

Interview with William Blumenthal, General Counsel, Federal Trade Commission

Editor's Note: Bill Blumenthal became General Counsel of the Federal Trade Commission in March 2005. He was formerly in private practice at King & Spalding in Washington, DC, focusing principally on antitrust aspects of mergers, acquisitions, and joint ventures. Throughout his distinguished career, Mr. Blumenthal has held a number of leadership positions in the ABA Section of Antitrust Law, was the principal author of the ABA monograph *Horizontal Mergers: Law and Policy*, and project leader for the ABA guide, *The Merger Review Process*, as well as authoring a variety of articles published in the *Antitrust Law Journal*, *California Law Review*, *George Washington Law Review*, and other publications. In addition, prior to joining the FTC, Mr. Blumenthal was very active in international antitrust, serving on OECD, International Chamber of Commerce, and International Competition Network committees, and as International Officer of the ABA Section of Antitrust Law.

In this interview, Mr. Blumenthal provides his perspective on the role of the Office of General Counsel (OGC) and the sometimes surprising workings of the Commission. He comments on the participation of the OGC in agency litigation and, in particular, its role in appellate advocacy through amicus briefs. Mr. Blumenthal has continued to be very active in international antitrust developments while at the FTC and provides his views on recent developments in Chinese and Indian merger law. Mr. Blumenthal also comments on current topics at the FTC, including mergers, gun-jumping, and the upcoming FTC report on single-firm conduct. The views Mr. Blumenthal expresses in this interview are his own and not necessarily those of the FTC or any of its individual members.

The interview was conducted on November 30, 2007, by Lisl Dunlop for The Antitrust Source.



William Blumenthal

ANTITRUST SOURCE: Thank you for participating in this interview. We're very eager to chat with you about your role as General Counsel and some of the recent developments at the Federal Trade Commission. Our readers are going to be very interested in the insights that you have to offer.

Before we get on to the Office of General Counsel, one of the areas that you suggested might be well less understood by practitioners is where the Commission fits in the overall scheme of governance. How does all this work from an insider's perspective?

BILL BLUMENTHAL: Let me begin with one of the most common areas of confusion: What branch of government is the FTC part of? Are we placed within the executive branch, the congressional branch, the judicial branch, or none of the above? The answer is the executive branch, but that fact is often misunderstood because people are not sure what to make of a so-called "independent agency." In fact, under Title 5 of the U.S. Code, we are an "independent establishment" within the executive branch.¹ The President has appointment power, but not the removal power that applies to a Cabinet agency—you may remember the *Humphrey's Executor* case² from your constitutional law courses.

The way that the institution functions in practice is partly a creature of the Federal Trade Commission Act, and people know about that statute. But people generally are not familiar with

¹ 5 U.S.C § 104.

² *Humphrey's Executor v. United States*, 295 U.S. 602 (1935).

the Reorganization Act of 1949, and that is at least as important day to day. My guess is until I mentioned it here, you probably weren't familiar with it, either.

ANTITRUST SOURCE: We'll agree with that.

BILL BLUMENTHAL: I'm embarrassed to say that I actually hadn't been either until I came into this job, notwithstanding twenty-five years of practice largely before this agency. Congress in 1949 passed an Act that gave President Truman the power to reorganize the executive branch, with an eye towards enhancing efficiency. That Act then gave rise to a series of reorganization plans during the 1950s and 1960s that defined the ways the agency functions. Under the Reorganization Plan of 1950, the executive and administrative functions of the Commission, by which I mean the "Gang of Five," are transferred to and vested in the Chairman. The Commission is essentially a board that has fundamental authority with respect to policy and budget, but the day-to-day execution of the policy that the Commission has set is delegated to the staff under the control of the Chairman. That structure, in turn, influences a lot of things in terms of how we function day to day.

It turns out that very early on, the Chairman's office is quite integrally involved with many of the early investigations.

ANTITRUST SOURCE: Can you give some examples of how that impacts the functioning of the Commission?

BILL BLUMENTHAL: Sure. It's a practical matter. The staff tends to meet most frequently with the Chairman and takes direction from the Chairman. That applies not just to the current Chairman, but it's inherent in the structure of the institution itself. Among the surprises I had coming into this job, I had had a misconception as to when things got up to the Commission level. When I was on the outside, I had been under the impression that the investigations were initiated and directed essentially by staff and that it was only very, very late in the process that something went up the line. It turns out that that's not the case. It turns out that very early on, the Chairman's office is quite integrally involved with many of the early investigations. And as soon as compulsory process is to be issued, the matter will go to the full Commission at least for purposes of the compulsory process determination. From that point until later in the investigation, the process reverts back to the staff under the control of the Chairman's office.

ANTITRUST SOURCE: Let's focus in a bit more on the role of the General Counsel and the General Counsel's Office (OGC). What's the focus of your position and the general functions of the OGC in the overall mission of the Federal Trade Commission?

BILL BLUMENTHAL: Let me give you the definition in the regulations and then try to give a little bit more of a real-world answer. Under the regulations, the General Counsel is the agency's "chief law officer."³ The regulations give the office broad responsibilities in the sense of rendering necessary legal services, representing the agency in courts, and rendering advice on law and policy. And the regulations then give somewhat more focused responsibilities in terms of ethics, legislation, and disclosure of confidential information.

As a practical matter, for those people who are accustomed to dealing with clients and particularly accustomed to dealing with clients in service industries, we're probably best analogized to

³ 16 C.F.R. § 0.11.

the law department in a service business. In a sense what this agency does is provide investigation and enforcement services in the competition and consumer protection fields. OGC is like a law department that advises the service providers on issues of law that they get into. To some degree, those issues relate to the particulars of the mission—the various statutes, the competition and consumer protection acts that get enforced. But more fundamentally, OGC is spending a lot of its time dealing with all of the other legal issues that the agency encounters. As you know, there's an extensive body of law beyond competition and consumer protection law that deals with what one might term "the law of government." It's as if we run into another new acronym each day. It's like in any other business or governmental organization—a full range of legal questions: labor and employment, unions, ethics, procurement, torts, basically everything you learned in law school.

ANTITRUST SOURCE: Have you expanded your knowledge of other areas of the law in this job?

BILL BLUMENTHAL: Stunningly. The percentage of time that I spent on the things that I used to do for a living before I came into this job may be in the single digits; it's certainly in no more than the low double digits. I spend more of my time on labor and employment matters than I do on merger matters.

ANTITRUST SOURCE: Well, we don't have any questions about labor and employment law—you're probably relieved about that. Sticking with the OGC, could you give us a bit of an overview of how the OGC works with the other parts of the Commission: the Commissioners themselves, the Bureaus of Competition and Economics, Bureau of Consumer Protection, etc.?

BILL BLUMENTHAL: OGC has three or four main units. We have a litigation shop, a legal counsel shop, a policy shop, and then there is separately some energy responsibility. Within one of the shops that I described, we also handle things like the Freedom of Information Act (FOIA) and e-discovery.

On the litigation side, we tend to handle appellate matters. We coordinate on a dotted-line basis with the bureaus when they are considering whether to initiate litigation; and if things start getting rocky, we will sometimes provide an assist. But fundamentally, the bureaus are the ones that handle litigation at the trial court level or during administrative proceedings. OGC then steps in at the appellate stage.

The litigation shop will also be involved with the agency's litigation that is not in furtherance of the competition or consumer protection mission, as such, but that the agency gets involved in as an organization. For example, if there's labor litigation or tort litigation, we won't necessarily handle that directly. Often those will be handled by the Justice Department because we're an agency of the United States, and the Justice Department usually handles litigation where another government agency does not specifically have litigation authority. But the OGC litigation shop will work with our counsel at the Justice Department. It may be in a U.S. attorney's office as opposed to main Justice, but we'll work with the Justice Department on those matters.

On the legal counsel side, we routinely will get questions on all sorts of issues: ethics questions; questions relating to procurement law if we want to hire an expert; questions relating to tort issues; real estate questions; tax questions. There are lots of Administrative Procedure Act questions, questions about jurisdiction, questions about the Sunshine Act. I don't know if you're familiar with the Paperwork Reduction Act, but we have a lot of questions on that. All of those are typ-

ically handled by the legal counsel side of the shop.

ANTITRUST SOURCE: You mentioned that you have a policy department. There is an Office of Policy Planning at the Commission as well. Is that a separate office?

BILL BLUMENTHAL: It is. The Commission has three shops that might be regarded as discrete policy shops. One of them is within the Bureau of Competition. One of them is a free-standing Office of Policy Planning that reports directly to the Chairman. And then within the Office of General Counsel is the unit known as the Office of Policy Studies. The three policy shops have slightly different functions. They operate with slightly different types of policy analysis. We try to coordinate the activity among them. But, yes, OGC's is a different unit.

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ANTITRUST SOURCE: Do you have different areas of policy competence that you would cover within the OGC versus the Bureau of Competition or the Office of Policy Planning?

BILL BLUMENTHAL: I don't know that it so much a different area of competence as it is a different "manufacturing process." You know how certain factories are designed for long production runs and certain factories are designed for short production runs? And sometimes you have factories that do highly routinized things and others that do highly customized things? The different units focus on different types of policy work. The one in the Office of General Counsel tends to do much longer-run, intensive policy analyses—detailed things that will take an extended period of time, often measured in years, and will typically yield extensive and lengthy reports.

By contrast, the Office of Policy Planning handles a range of things, but its most common deliverables are relatively short pieces of a competition advocacy variety. I think it's fair to say that's where the bulk of the agency's competition advocacy work rests. OPP does some other, longer things as well, such as our net neutrality report. But if you look, for example, at the agency's work in dealing with state legislatures and other governmental units on competition advocacy in businesses like wine and real estate, OPP has been responsible for most of those.

ANTITRUST SOURCE: You took office as General Counsel in March 2005, so you've been at the Commission for nearly three years. We talked earlier about some of the things that surprised you about the job involving the inner workings of the Commission. Have there been any others?

BILL BLUMENTHAL: Oh, sure. The two biggest surprises are going to sound as if they're somewhat in tension, which I suppose they are.

The first is the amount of unscheduled time. It's a lot larger than I ever would have expected. There is one job in the agency for which the schedule is fully booked—more than full-time scheduled—and that's the Chairman's job. Virtually everybody else has pockets of unscheduled time, and to me those pockets were surprisingly large. Several hours a day are fairly free and usually available on quick turnaround to meet with colleagues or people on the outside. Coming in to the job, I had an expectation that my days would be fully scheduled from 9:00 until 5:00 or 6:00, and that's just not the case.

At the same time—and this is the part that is going to sound like it's in tension—you would be stunned by the cascade of different matters that come over the waterfall. The number of issues that we have to deal with is larger than I ever would have imagined—whether to open or close an investigation, to bring an enforcement action, to issue a report or hold it for more work. To some

extent the volume is because OGC is one of the few offices that deals with both the competition and consumer protection side. The cascade isn't quite so severe in either BC or BCP.

ANTITRUST SOURCE: Have there been any major changes in the organization? Or have you tried to change things since you've been in the role?

BILL BLUMENTHAL: Not within the Office of General Counsel. I found it in very good shape and I've tried to do what I can not to ruin it.

Probably the most significant organizational change in my time here was not within the OGC. It was the creation of the separate Office of International Affairs. Previously the international functions had been found in three separate places. The Bureau of Competition and the Bureau of Consumer Protection each had an international office. And partly as a historical artifact, within the Office of General Counsel, there was a unit that handled technical assistance work. Those three units were pulled out of their respective offices or bureaus and moved into a new consolidated office. That happened about a year ago.

ANTITRUST SOURCE: And yet you personally seem to stay very involved in international affairs?

BILL BLUMENTHAL: Sure. That involvement is not inherent in the General Counsel job. But it just happens that a number of the people who have inhabited this office had international background before coming into the office and found that an area of continuing interest and activity.

ANTITRUST SOURCE: When you were appointed to the FTC, the announcement noted that you were on the OECD and the International Chamber of Commerce Competition Committees, as well as the U.S. Chamber of Commerce Antitrust Council, and that you also had a role as a private practitioner in the ICN. What bodies are you currently sitting on?

BILL BLUMENTHAL: None officially. One of the first things I did, simply for ethics reasons, was to step down from all of the formal relationships that I had with private sector organizations. I'm still in touch with many of those fairly often. I still have a lot of friends in them. But I limit my international activity to what I can pursue wearing a governmental hat.

ANTITRUST SOURCE: What are the areas that are of most interest to you in the development of international antitrust at the moment?

BILL BLUMENTHAL: They tend to be more country-specific than policy-specific. When I came into the post I had an interest in certain large jurisdictions that were likely to be enacting competition laws or had recently enacted them and were going to begin implementing them. That has been my primary focus. Much of that time has been given over to China, and recently I've been doing a little bit of work involving India.

ANTITRUST SOURCE: I see that you've taken a lot of trips to China and given a number of speeches about Chinese antitrust law. How is antitrust developing there? They've got merger control. What about other aspects of regulation?

BILL BLUMENTHAL: Well, the merger control is only just beginning. And it has begun largely as a

foreign acquisition regulation, as opposed to the competition regulations themselves. At this point the new competition law that was enacted in late August has not yet become effective, but there is competition review occurring under the foreign acquisition regulations.

In terms of how it's going, my office has been quite pleased with the transparency of the process that the Chinese government followed. I think that the new competition law is quite mainstream in its text. It has a lot of the types of provisions that people would regard as quite familiar. A few things that came in late in the process are more industrial-policy-like in nature. We're not entirely sure how that is going to work out once implementation really begins.

ANTITRUST SOURCE: Can you elaborate on those industrial-policy aspects of the new competition law?

BILL BLUMENTHAL: There are particular provisions that deal with state-owned enterprises and protected sectors; there are some provisions that deal with macroeconomic objectives; and there are some provisions that deal with coordinating activity undertaken by industry associations. Those are not standard types of provisions in a competition law. You don't see them in most other jurisdictions. How those are really going to work out, how they are going to be reconciled with the more traditional competition objectives is something we're watching with great interest.

ANTITRUST SOURCE: The ABA Antitrust and International Sections recently commented on India's proposed merger notification regime. One concern was that it could potentially apply to a broad range of transactions with a very limited nexus to India. Have you had any dealings with the Indian government about the new merger control law there? And if so, what's going on with it?

BILL BLUMENTHAL: The Chairman in her Fall Forum speech indicated that I had gone over to India, and I think that's also reported in an article in *The Deal* that recently appeared about the Indian law.⁴

India's competition law was enacted in late 2002, but it was caught up in a number of legal challenges within India. There was an effort undertaken earlier this year by the Indian Congress to enact some amendments that would deal with the constitutional problems under the original version of the law. While those revisions were being made, some other changes were put in place. One in particular dealt with merger notification. The earlier version of the law had contemplated that the merger notification regime would be voluntary. The details of the provisions in the merger notification system were designed for a voluntary scheme and would be perfectly appropriate for voluntary scheme. Very late in the process, people recognized that many other jurisdictions, including the U.S. and the EC, had a mandatory regime, not a voluntary regime.

So a shift was made in the text simply to provide that what theretofore had been a voluntary system would now be mandatory, with a couple of other accommodating changes made. But the system was not completely redesigned in a way that you typically might if you are shifting from a voluntary to a mandatory merger control regime. That has led to a number of anomalies based on the text itself. I think this was just an unintended glitch, and we're hoping the anomalies are going to get addressed as the process of drafting regulations proceeds. My sense is that the Indian gov-

⁴ Cecile Kohrs Lindell, *U.S. Wary of India Merger Law*, THE DEAL.COM (Nov. 29, 2007), available at <http://www.thedeal.com/servlet/ContentServer?pagename=TheDeal/TDDArticle/TDStandardArticle&bn=NULL&c=TDAArticle&cid=1195666641081> (by subscription only).

ernment is alert to the concern. I think they were alert to the concern before the ABA or the IBA sent their comments. Pretty much everybody is speaking with consistent concerns and is offering a similar menu of what needs to be addressed.

ANTITRUST SOURCE: Apart from the merger notification regime issues, are there other areas within the Indian antitrust law that you've been involved in?

BILL BLUMENTHAL: Only on the periphery. Because implementation of the law was suspended for a number of years pending resolution of the constitutional challenges, people haven't been proceeding actively with any of the sorts of implementation work that one otherwise would have seen. With the amendments to the law having lifted the constitutional cloud, I think we're expecting that other aspects are going to begin to move forward. But up until now I haven't been centrally involved in those.

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ANTITRUST SOURCE: In 2004 you wrote in the *Antitrust Law Journal* about the challenge of sovereignty to convergence in the area of substantive antitrust law development.⁵ And at that time, you noted that, if anything, the trend was away from material convergence on substantive antitrust law and that new and discordant guidelines were being issued in a variety of jurisdictions. Three years on, has your view of this changed, and do you see more or greater convergence in substantive of antitrust?

BILL BLUMENTHAL: The answer is both. It seems to me that there are two things going on. The first is that you have more regimes that are enacting laws or developing new initiatives under the laws that they have, so you have a broadening of activity, and that increases the risk of discordant views and inconsistent enforcement. At the same time, those who have had a system in place for some period of years, at least the major regimes, are working harder than ever to try to smooth out the inconsistencies. I think everybody is mindful of the complications for the international business community of having different and inconsistent rules. So you have tendencies pulling in both directions.

ANTITRUST SOURCE: With maybe the newer regimes pulling against, but the more established regimes pulling towards convergence?

BILL BLUMENTHAL: That's correct. One hopes that at some point new regimes will have been fully spoken for, and at that point you'll have a tendency only in the direction of greater convergence.

ANTITRUST SOURCE: How do you see the role of guidelines figuring in this process? Do you think it's a helpful or unhelpful trend? Have we reached the point of having too many guidelines?

BILL BLUMENTHAL: Well, another article I wrote in the 2000 *Antitrust Law Journal* talks about guidelines.⁶ One of my observations there is that people favorably remember the good guidelines, but tend to forget that there have been an awful lot of guidelines that were ignored and sometimes were counterproductive.

⁵ William Blumenthal, *The Challenge of Sovereignty and the Mechanisms of Convergence*, 72 ANTITRUST L.J. 267 (2004).

⁶ William Blumenthal, *Clear Agency Guidelines: Lessons from 1982*, 68 ANTITRUST L.J. 5 (2000).

I'm a fan of guidance. I think it's important for agencies to be reasonably transparent in letting the public know where they stand. But having the moniker of "guidelines" on a document tends to elevate the significance of the document, and using that name can sometimes lead to complications if the document is not of the right type.

ANTITRUST SOURCE: What would be an example of a document not of the right type?

BILL BLUMENTHAL: Well, I'm not going to name a particular document, and I would refer people back to that 2000 article. The proposition is that if guidelines are going to be effective, they need to be reasonably specific. They need to be reasonably well articulated, enough to let people know whether the conduct is or is not proper under the guidelines, and that often means that discretion is going to be somewhat limited. They need to be reasonably well specified. Oftentimes in policy statements that isn't done.

One of the risks of new guidelines in the field [of non-horizontal mergers] is that we would tend perhaps to overdignify the level of concern.

ANTITRUST SOURCE: The European Commission has just come out with a new set of non-horizontal merger guidelines. The last set of guidelines in the U.S. on the subject of non-horizontal mergers date from 1984, and there has been some vertical merger enforcement activity at the agencies through the late 1990s. Do you think the U.S. should be introducing new non-horizontal merger guidelines?

BILL BLUMENTHAL: I don't see any need to. There haven't been that many non-horizontal cases, and the ones that the agencies have brought have been addressed in analyses to aid public comment or competitive impact statements. The cases have been addressed in speeches. And I think the public has a reasonably good sense as to what theories are currently regarded as valid. One of the risks of new guidelines in the field is that we would tend perhaps to overdignify the level of concern. If you're dealing with a handful of cases, issuing guidelines might suggest that the concern is greater than it is.

ANTITRUST SOURCE: While we're talking about mergers, let's talk a little about the involvement of the OGC in merger review. One specific role that I think the OGC has is in the second request appeals process. How is that working? Have many parties availed of themselves of it over the last couple of years?

BILL BLUMENTHAL: I've read of that process. Candidly, I have not seen a single appeal. I think that there have been four of them in the lifetime of the mechanism. There have been none in my time.

ANTITRUST SOURCE: Another issue that comes up in the context of merger review is clearance between the FTC and the Antitrust Division. The Antitrust Modernization Commission report earlier this year made a recommendation that a formal clearance process be instituted and suggested some incentives to get things moving in terms of timing. Have you witnessed any major clearance battles during your time at the OGC? And do you think a formal clearance system is required?

BILL BLUMENTHAL: The answer, I guess, would be yes and no. Have I seen any major clearance battles? Sure. But they are extremely rare. In my time here there have been maybe ten. But also in my time here there have been probably 6,000 filings, so we're dealing with a problem that arises about 0.2 percent of the time.

Before coming on board here, my practice was very heavily on the merger side of things. And like a lot of other merger practitioners, I've had the experience once or twice of having a long delay for clearance. And if you've been through it, it tends to impress itself on your memory. But from the inside, seeing the overall pattern of activity, it does strike me that it is a rare event. And I would be reluctant to start designing systems to deal with things that are one-off.

ANTITRUST SOURCE: What kind of clearance delays have you seen?

BILL BLUMENTHAL: In terms of having the review assigned to one agency or the other, how much delay? Well, if you assume that clearance ordinarily would have come on day 8 or 10 or 15, it could be delayed to day 28 or 29 or 30. Obviously people don't like that. We don't like it internally, either. But as I say, it doesn't happen very often.

Now in terms of how one might deal with that, while I didn't often relish the prospect of dealing with both agencies simultaneously back when I was a practitioner, it's not an unknown technique. It's not one that I advocate, and I don't offer that as a justification or as remedy. But again, I think people need to step back and ask themselves how severe the problem is and whether efforts to fix the problem potentially might make things worse.

ANTITRUST SOURCE: This year was a very active year in merger enforcement, with the FTC seeking preliminary injunctions in three cases, but none of them was successful. Is there any single principle or lesson to be derived from this experience?

BILL BLUMENTHAL: Well, let's take the matters one at a time. In one of the three, there is an injunction that's in place right now. And one of the others is on appeal. Two of the three remain both in active litigation in the courts and in administrative litigation, so I'm going to be quite guarded in what I say.

I'm not sure that there is a single particular lesson to be taken from the three, since each of the three has its own fact pattern, has its own situation. *Equitable Dominion* is the case where the lower court initially dismissed on state action grounds, but the Third Circuit granted an injunction pending appeal based on the emergency appeal we brought. So that deal is in suspense at the moment, pending resolution of our arguments to the Third Circuit.

The *Western-Giant* case was quite fact-bound.

ANTITRUST SOURCE: Is that why no appeal has been made from it?

BILL BLUMENTHAL: That was one of the significant factors, a combination of its being fact-bound and the sense that there was no central issue of law that was new to the case.

In the case of *Whole Foods*, we've filed our appeal, and it's clear from our papers that we believe the district court misapplied the 13(b) standard. We'll see what the court of appeals thinks about that.

ANTITRUST SOURCE: In other cases like *Arch Coal*, you discontinued administrative proceedings after losing a preliminary injunction action. Is there any kind of policy on what to do in this situation and what criteria come into play in making the decision?

BILL BLUMENTHAL: *Arch Coal* was before my time—at least the activity in the district court was

before my time—and the decision not to proceed was being taken just as I was walking in the door. There is a multi-factored policy statement that the Commission published in the mid-1990s.⁷ It's on the Web, and it describes the same sort of factors I was alluding to a moment ago in connection with the thought process on such cases.

ANTITRUST SOURCE: Private equity continues to be a major source of merger activity and an area where the Commission seems to be taking a more active role these days, for example the *Kinder Morgan/Carlyle* settlement earlier this year. Can we expect to see greater attention paid to private equity deals and partial ownership issues?

BILL BLUMENTHAL: We haven't heard a lot about private equity in the last five or six months, but earlier this year there was a bit of a public kerfuffle about the role of private equity under the antitrust laws. It was largely in reaction to *Kinder Morgan*, and it struck me as a misplaced concern. There really is nothing new about private equity. If you look at the long list of merger cases over the last twenty years, you'll recognize many private equity names. Now, we didn't call it "private equity" fifteen years ago; typically we called them "buy-out funds." But if you go down the list, you'll see an awful lot of familiar names in matters under either Section 7 or Section 7A—Hicks Muse, KKR, Blackstone, MacAndrews & Forbes, Reliance Group, Hearst Trust, Trump, Milnot, Castle Harlan. From my perspective, while there was another case this year involving privately held companies, the ownership raised nothing new under the antitrust laws. But it happened to coincide with a new-found broader interest in the press in private equity, and it was seized on at least partly for that reason. From our perspective whether the ownership is through a public company or not is generally immaterial.

ANTITRUST SOURCE: Let's turn to gun-jumping. You've written a number of times on pre-closing coordination, and in November 2005 you gave a now-famous speech, "The Rhetoric of Gun-Jumping," which has been very useful in thinking about this area.⁸ Although you gave the usual disclaimer that your views did not necessarily represent the position of the FTC, I think you sought in that speech to dispel over-conservative counseling. What prompted the speech? Is this an area in which you have a personal interest, or was there some kind of Commission view that there needed to be some guidance in the area?

BILL BLUMENTHAL: It was more a personal sense that there was an overhang from some old statements that probably did not reflect Commission policy even at the time they were made, but that I kept running into as a merger practitioner. It seemed to me that there had been quite a bit of misunderstanding as to what was and was not permissible. And that was leading to confusion and more significantly to some inefficiencies. I thought that one well-placed speech probably would be able to clean that up.

⁷ Fed. Trade Comm'n, Commission Policy Statement Regarding Administrative Merger Litigation Following the Denial of a Preliminary Injunction (Jun. 21, 1995), *republished at* 60 Fed. Reg. 39,741 (Aug. 3, 1995), *available at* http://frwebgate.access.gpo.gov/cgi-bin/getpage.cgi?dbname=1995_register&position=all&page=39741.

⁸ William Blumenthal, The Rhetoric of Gun-Jumping, Remarks Before the Association of Corporate Counsel, Annual Antitrust Seminar of Greater New York Chapter: Key Developments in Antitrust for Corporate Counsel (Nov. 10, 2005), *available at* <http://www.ftc.gov/speeches/blumenthal/20051110gunjumping.pdf>.

ANTITRUST SOURCE: Do you think it has?

BILL BLUMENTHAL: I think so.

ANTITRUST SOURCE: Has there been any attempt to assess whether there has been any change in conduct since then? I suppose it's hard from the inside to work that out.

BILL BLUMENTHAL: I have what you might call anecdotes from the outside. But I don't think there is any systematic sense as to what changes have been made.

ANTITRUST SOURCE: Turning to non-merger antitrust, the FTC and DOJ held joint hearings on single firm conduct through the end of last year and the first half of this year. Has there been any outcome of those hearings? Do you have any views on what impact they might have on Section 2 enforcement?

[I]t's fair to say that the consensus identified no significant problems in the administration of Section 2 in the United States today. The one concern that speakers identified is the area of bundled discounts, following LePage's and now PeaceHealth.

BILL BLUMENTHAL: That project is within the policy shop in the General Counsel's office, so I've been following it very closely. As to the bottom-line message that I take away from the hearings, it's fair to say that the consensus identified no significant problems in the administration of Section 2 in the United States today. The one concern that speakers identified is the area of bundled discounts, following *LePage's* and now *PeaceHealth*. The speakers did express quite a bit of concern about the tendencies outside of the U.S. in enforcement against dominant firm conduct.

There's a lot of material that came out of those hearings, and we're working with DOJ in writing it up. That process is taking more time than we would have liked. I won't say it's taking more time than we expected, because this will be a large report. We're fairly far along in some of the drafting. But I don't see it as a 2007 delivery.

ANTITRUST SOURCE: Although the *Schering* case is now relatively old news, we understand that pharmaceutical patent settlements are still a hot topic at the Commission. What is the current thinking, and are there any cases you can talk about at this time?

BILL BLUMENTHAL: There's activity on a number of fronts. The issue is a subject of active legislative proposals. The issue is also before us in number of active investigations. It's fair to say that the Commission remains quite concerned about the adverse competitive effect of at least some pharmaceutical settlements that we're seeing. We're optimistic that sooner or later, the matter will come before the Supreme Court. And we're hoping that when it does, the Court will adopt a view along the lines we have urged.

ANTITRUST SOURCE: Turning to consumer protection, about 90 percent of the OGC's caseload seems to be in this area. What are the key enforcement areas or areas that are the most challenging from your perspective in consumer protection?

BILL BLUMENTHAL: Let me distinguish the litigated cases from the enforcement generally, because a lot of the enforcement is resolved not through litigation but through consent orders. The matters that actually go to litigation often involve something that is more akin to simple fraud, whereas the overall mix is much broader. We're seeing matters relating to data security, identity theft, spam, spyware, Internet types of abuses. For a long time there have been cases involving mortgage lend-

ing, truth-in-lending questions, fair credit reporting questions, and debt collection issues. There have been an awful lot of cases involving health-related claims that border on fraud. We have a number of do-not-call cases. We have the usual mix of business opportunity and franchise cases.

ANTITRUST SOURCE: The FTC has filed amicus briefs in many of the key Supreme Court cases of the last couple of years—*Leegin*, *Billings*, *Weyerhaeuser*, *Independent Ink*, *Dagher*, *Volvo*. How do you decide which ones you want to get involved in?

BILL BLUMENTHAL: All of those were while I've been here, although the Solicitor General makes the filing and we simply were participating in the process and signing on to what the SG did in most those cases.

To the extent there is a Supreme Court amicus situation involving antitrust or consumer protection, we will almost always have involvement where the Court asks for the government's views. Again, that request is directed to the SG, and we would be one of a number of agencies providing input into the SG's office. In the absence of a Court request for the government's views, the usual pattern is not to submit an amicus brief, and it would be quite exceptional for the SG to initiate an amicus brief in the absence of an invitation from the court. We're speaking here of the cert stage.

Below the Supreme Court, when we're dealing with amicus briefs in the court of appeals, those can be filed by the Commission under its own authority. We do so on occasion, but we are quite guarded. We typically would not appear before a court of appeals unless there was a quite compelling reason to do so. We find that especially in competition cases, parties tend to be well-represented, and the arguments tend to be adequately developed by the parties themselves. And we're generally better off keeping our powder dry, in case the matter ultimately comes before the Supreme Court.

ANTITRUST SOURCE: Of the cases you've gotten involved in through amicus briefs, which have been the most notable ones for you personally?

BILL BLUMENTHAL: Well, I have been involved in all of the ones you named, but the one that probably matters most to me personally was *Dagher*. As somebody who used to spend a lot of time practicing in the merger and joint venture area, I was quite concerned about the potential of the lower court decision to damage joint venture law. I thought cleaning that up was important.

ANTITRUST SOURCE: Final question: what have been the best things about the job so far and what do you hope to get done in your remaining time there?

BILL BLUMENTHAL: The best thing is not having to keep time sheets. I like the people as well. As for the limited time I have remaining here, the most important things probably would include seeing the Section 2 report to completion and continuing to work with some of the major emerging regimes outside the United States. ●