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The Federal Trade Commission's Path Ahead

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Given my extensive experience as a leader at the Federal Trade Commission (FTC), I have developed views about how the Commission should carry out its work. In the months ahead, I hope to realize my vision by continuing the agency's good work to protect competition while advancing principles that the FTC overlooked or undervalued under the Obama Administration.

First, a word on my antitrust philosophy: I believe in the power of markets—when free of restraints and unnecessary regulations—to provide the best outcomes for consumers. Antitrust enforcers guard the competitive process. We intervene when firms injure competition, and we advocate for consumers when governments consider anticompetitive legislation. But equally important is knowing when *not* to intervene.

As you know, competitive markets tend toward static efficiency, as firms experience market pressures to price near a measure of their costs. But even periods of monopolistic pricing can be consistent with—if not indispensable to—dynamically efficient markets. That is especially so when dominance reflects a firm's superior innovation. The continuing rise of technology-driven industries makes that consideration more fundamental than ever. The Arrow-Schumpeter debate remains live and nuanced.¹

Importantly, competition enforcers should not intervene simply because they dislike certain market outcomes.² Antitrust is about protecting the process, not guaranteeing a particular result at a particular time. We trust that markets in which firms must endure competitive pressures will produce favorable outcomes in terms of price, output, quality, and innovation in the

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¹ See, e.g., Marina Lao, *Ideology Matters in the Antitrust Debate*, 79 ANTITRUST L.J. 649, 659–60 (2014).

² For a larger elaboration on the views I express in this paragraph, see Maureen K. Ohlhausen, *What Are We Talking About When We Talk About Antitrust?* (Sept. 22, 2016), <https://www.ftc.gov/public-statements/2016/09/what-are-we-talking-about-when-we-talk-about-antitrust>.

long run. But if prices seem excessive or output stagnant at a point in time, we do not use antitrust enforcement to require firms to charge less or to produce more. In short, antitrust is not regulation. As the Supreme Court observed in *National Society of Professional Engineers*, “competition is the best method of allocating resources in a free market,” and even “occasional exceptions to the presumed consequences of competition” are not grounds for antitrust enforcement.³

My record shows that I favor meritorious intervention. But, I believe, it is critical to wield our competition laws with regard for the limits of our knowledge, the risk of getting it wrong, and the relative costs to society of over-enforcement and under-enforcement. Those considerations inform my lodestar of “regulatory humility,” which I will follow in the months ahead.⁴ Impressionistic assessments of harm should not drive major interventions in the market. Rather, empiricism should control. Moreover, a rigorous application of economic theory is crucial for understanding the likely effects of business conduct and for informing enforcement decisions.

Although I will discuss how the agency can improve its work, I first want to acknowledge what the Commission already does right. Under my leadership, we will continue aggressively to challenge anticompetitive mergers and exclusionary conduct, building on the agency’s hard-won achievements. Those include wins at the Supreme Court in pay-for-delay cases and state-action immunity.⁵ They also include appellate-court victories in the health-care-merger space in *Advocate-North Shore*⁶ and *Pinnacle-Hershey*⁷ in 2016.

Rather than discuss every recent Commission action with which I agree, however, I highlight two points that might be of more immediate interest at this time of change. First, empiricism will be a touchstone of my leadership of the FTC. Second, there are some specific changes that I would like to enact during my time as chairman of the agency.

I. EMPIRICISM

It is sometimes said that one should never let a few facts get in the way of a good story. Policymaking is not immune to that phenomenon. Antitrust enforcers usually do not consciously disregard facts, of course. Instead, there is a natural human tendency to view the world through a lens informed by one’s priors.

³ Nat’l Soc’y of Prof’s Eng’rs v. United States, 435 U.S. 679, 695 (1978).

⁴ Maureen K. Ohlhausen, *Regulatory Humility in Practice*, Remarks Before the Am. Enterprise Inst. (Apr. 1, 2015), <https://www.ftc.gov/public-statements/2015/04/regulatory-humility-practice-remarks-ftc-commissioner-maureen-k-ohlhausen>.

⁵ N.C. State Bd. of Dental Exam’rs v. FTC, 135 S. Ct. 1101 (2015); FTC v. Actavis, Inc., 133 S. Ct. 2223 (2013); see also FTC v. Phoebe Putney Health Sys., Inc., 133 S. Ct. 1003 (2013).

⁶ FTC v. Advocate Health Care Network, 841 F.3d 460 (7th Cir. 2016).

⁷ FTC v. Penn State Hershey Med. Ctr., 838 F.3d 327 (3d Cir. 2016).

In an area as complicated as competition policy, where empirical knowledge is hard won and seldom obvious, theory rightly plays a role. The problem, in my view, is that people's embrace of a theory can become difficult to dislodge. This is unsurprising. A clever theory provides useful organizing principles for understanding business conduct and predicting its consequences. And, correctly employed, such theory is crucial to effective antitrust enforcement. Problems arise, however, when a theory's predictions do not mesh with actual market outcomes, leading policymakers to act against consumers' interests. I will analyze three examples.

A. Patent Holdup in the Standard-Setting Space

First, an influential theory that, in my mind, has produced some problematic intervention decisions is patent holdup. The idea is that, once a firm invests sunk capital in a project that implicates another's property rights, the owner can credibly demand more compensation after the fact than it could have demanded before.⁸ In high-transaction-cost environments where the parties could not have bargained *ex ante*, a property rule that necessarily grants the owner an injunction might facilitate patent holdup. The end result could be suboptimal investment.

Opportunism is ubiquitous, of course, and guarding against it is the principal economic justification for the law of contracts. Importantly, though, such opportunism exists on both sides of a sequential bargain. Each party's performance leaves it vulnerable to the other. Thus, those concerned about patent holdup should also worry about patent holdout.⁹

Patent-holdup theory drove the FTC's recent interventions in the standard-setting arena.¹⁰ A recurring concern is that the owner of a standard-essential technology obtains holdup power when a standard-setting organization (SSO) adopts its technology. To guard against that risk, SSOs require participants to agree to license their standard-essential patents (SEPs) on reasonable and nondiscriminatory (RAND) terms. In cases like *Robert Bosch*¹¹ and *Google-MMI*,¹² we have seen section 5 claims premised—at least in part—on the idea

⁸ See, e.g., Mark A. Lemley & Carl Shapiro, *Patent Holdup and Royalty Stacking*, 85 TEX. L. REV. 1991 (2007).

⁹ See, e.g., Colleen V. Chien, *Holding Up and Holding Out*, 21 MICH. TELECOMM. & TECH. L. REV. 1 (2014); see also J. Gregory Sidak, *Holdup, Royalty Stacking, and the Presumption of Injunctive Relief for Patent Infringement: A Reply to Lemley and Shapiro*, 92 MINN. L. REV. 714 (2008).

¹⁰ See, e.g., Federal Trade Commission's Complaint for Equitable Relief, *FTC v. Qualcomm Inc.*, No. 5:17-cv-00220 (N.D. Cal. Jan. 17, 2017), 2017 WL 242848.

¹¹ *In re Robert Bosch GmbH*, FTC File No. 121-0081, Statement of Commissioner Ohlhausen (Nov. 26, 2012), <https://www.ftc.gov/public-statements/2012/11/dissenting-statement-commissioner-maureen-ohlhausen-matter-robert-bosch>.

¹² *In re Motorola Mobility LLC & Google Inc.*, Dissenting Statement of Commissioner Maureen K. Ohlhausen (Jan. 3, 2013), <https://www.ftc.gov/public-statements/2013/01/statement-commissioner-maureen-ohlhausen-o>.

that alleged breaches of RAND-licensing promises necessarily cause patent holdup. Theory is all well and good, but what I did not see in those cases was evidence that an SEP owner's pursuit of an injunction actually caused patent holdup. It was merely theorized. Worse, those interventions did not consider patent holdout, which is an equally plausible risk.

B. Claims of Inadequate Competition in the U.S. Economy

Actions based merely on theoretical suppositions are obviously problematic. Not much better are calls for action built on a faulty empirical foundation. My second example involves recurrent claims in 2016 that the American economy lacked adequate competition. The Council of Economic Advisers, the *Economist*, the *New York Times*, and others observed industry census data; noted that concentration across certain industries like retail, transportation, finance, and utilities had risen; and saw that firms' returns on invested capital had increased.¹³ From this information, they inferred that monopoly power was rising, and they called for stricter antitrust enforcement.

In a speech and article last year, I explained that those conclusions were empirically unsound.¹⁴ Proponents of more antitrust intervention committed basic errors that industrial-organization economists have warned about for decades. Specifically, using a cross-sectional, inter-industry analysis, they saw a correlation between structure and profits and then inferred a causal relationship between the two. But such a structure-conduct-performance approach has long been discredited.

I will not repeat the specifics of my article, beyond a brief summary. Industry classifications identified by the Census Bureau are not antitrust markets. Even if they were, shifting trends in concentration might not reflect lost competition. And it is error to tie rising concentration and profits to increased economic power.

Some markets have diminishing long-run average-cost curves, while others produce dominant firms or oligopolies due to superior efficiency or innovation. Those critical nuances—and many others—went overlooked. I also observed the pointlessness of the inquiry. It is obvious that competition is imperfect. And it might be impossible to identify a sound barometer of optimal levels of competition. What enforcers can—and should—do is look for unjustified restraints. We must work to undo harms to competition in all

¹³ See Council of Economic Advisers Issue Brief, *Benefits of Competition and Indicators of Market Power*, Apr. 2016, https://www.whitehouse.gov/sites/default/files/page/files/20160414_cea_competition_issue_brief.pdf; *Too Much of a Good Thing*, *ECONOMIST*, Mar. 26, 2016; *The Problem With Profits*, *ECONOMIST*, Mar. 26, 2016; Paul Krugman, *Robber Baron Recessions*, *N.Y. TIMES*, Apr. 18, 2016, at A21.

¹⁴ Maureen K. Ohlhausen, *Does the U.S. Economy Lack Competition?*, 1 *CRITERION J. ON INNOVATION* 47 (2016).

of their forms. But, in pursuing those efforts, we must always do so with a sound factual basis.

C. Claims That Divestitures Fail to Protect Competition

Finally, in following an evidence-based approach to antitrust enforcement, we should guard against uncritically accepting a single piece of empirical work. A good example involves the reaction to John Kwoka's late 2014 book, *Mergers, Merger Control, and Remedies*.¹⁵ There, Professor Kwoka reviewed retrospective studies covering 49 transactions—mostly mergers. Combining the data in those studies, he concluded that “many challenged mergers are subject to remedies that fail to prevent post-merger price increases.”¹⁶ In his view, the FTC and Department of Justice (DOJ) had been overly permissive.¹⁷

I applaud Professor Kwoka for his timely empirical work. But that should be the beginning of the discussion rather than the end. For example, subsequent analysis by two of the FTC's leading economists concluded that his analysis suffers from methodological errors and that the evidence he considered “cannot support” his “broad conclusions.”¹⁸

Yet, before the FTC economists released their draft paper two months ago, Kwoka's claims were largely accepted as definitive. They featured prominently in arguments that the agencies need to be more aggressive in challenging mergers. In that regard, I suspect that those favorably disposed toward his conclusions were all too quick to embrace them. But there is a teaching moment in this example for all of us—not to be too hasty in confirming one's priors without a fuller record.

Of course, retrospective studies are tremendously important. Regardless of whether they point to a job well done, evidence-based assessments of FTC practice are high on my priority list. That is why I am pleased to announce that the FTC has released its remedies study.¹⁹

The report builds on the FTC's 1999 divestiture study to provide the latest insights into the efficacy of the Commission's remedies. FTC staff reviewed all of its remedial orders between 2006 and 2012—89 orders in all—variously using a case-study method, questionnaires, and data.²⁰

¹⁵ JOHN KWOKA, *MERGERS, MERGER CONTROL, AND REMEDIES: A RETROSPECTIVE ANALYSIS OF U.S. POLICY* (MIT Press 2014).

¹⁶ *Id.* at 159–60.

¹⁷ *Id.* at 119.

¹⁸ Michael Vita & F. David Osinski, John Kwoka's *Mergers, Merger Control, and Remedies*: A Critical Review (Dec. 21, 2016), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2888485.

¹⁹ FED. TRADE COMM'N, *THE FTC'S MERGER REMEDIES 2006-2012: A REPORT OF THE BUREAU OF COMPETITION AND ECONOMICS* (2017), <https://www.ftc.gov/reports/ftcs-merger-remedies-2006-2012-report-bureaus-competition-economics>.

²⁰ *Id.* at 1.

The conclusions are simultaneously heartening—because they suggest that the FTC’s remedies work well in most cases—and useful because they identify imperfections that the Commission and its staff are already addressing. Although I cannot review the study in detail here, three findings from the case study warrant emphasis.

First, every divestiture of an ongoing business successfully maintained competition at the pre-merger level or returned it to that point.²¹ Second, although only a few vertical mergers featured in the study, it is worth noting that all remedies in those matters succeeded.²² Third, it was not a perfect success story. The study reveals that divestitures of limited-asset packages were less successful. They nevertheless restored or maintained competition in roughly 70 percent of cases.²³ That information is valuable. FTC staff has already learned from those findings and will review proposed divestitures of partial-asset packages even more closely going forward.

Overall, the case study revealed that over 80 percent of the FTC’s remedies succeeded.²⁴ In my view, that is an impressive success rate. We can have an interesting discussion, though, about whether it is impressive enough and, indeed, what percentage would mark the ideal level of success. For instance, it is not clear that having remedies that work in 100 percent of cases is the appropriate goal. That might reflect overly strict enforcement, especially since no one can guarantee the 100-percent success of a business in the future.

Whatever the answers, I see tremendous value in asking hard questions about our practices, rooting our policies in evidence, and never settling for good enough. Expect to see more of the same under my stewardship.

II. NEW DIRECTIONS

In short, my philosophy of regulatory humility, my belief in the power of competitive markets, and a devotion to empiricism inform my view of antitrust. An important question, however, is how my views translate into specific policy goals for the FTC. I would like to see the Commission pursue some new directions.

A. Abuse of the Government Process

Arguably the most destructive restrictions on competition flow from the government. Put simply, government regulation is the barrier to entry that may never fall.

²¹ *Id.*

²² *Id.* at 2.

²³ *Id.* at 1–2.

²⁴ *Id.* at 2.

Although antitrust obviously polices private-firm conduct, a blind spot emerges regarding the state. To be clear, I believe in federalism. But that does not leave us powerless to advance consumers' interests in our federal system. We can work to define and confine the anticompetitive effects that flow from state action. That was one lesson of *Phoebe Putney*²⁵ and *North Carolina Dental*,²⁶ which force states wishing to limit competition to clearly articulate that goal and to actively supervise its application by market participants.

From one perspective, federal antitrust enforcement can make governments politically accountable for state-imposed restrictions on competition. I hasten to add, however, that FTC action regarding state-action immunity need not be adversarial. For example, *North Carolina Dental* gave FTC staff a welcome opportunity to work with state and local governments on how they might reduce barriers to more robust competition.

One of my particular concerns is the tremendous growth of occupational licensing, which has created barriers for low-income and middle-income Americans seeking new job opportunities. To that end, I would like to create an occupational-licensing task force to work with the states and other stakeholders to identify and reduce unnecessary barriers to entrepreneurship and innovation.

B. A "SMARTER" Part 3 and Disgorgement

Another area of interest is the FTC's unique asset in enforcing our antitrust laws: Part 3.²⁷ Through administrative litigation, the Commission can bring its expertise to bear on cutting-edge questions of competition law.

Earlier this year, I published a detailed study of Part 3 in the *Journal of Competition Law & Economics*.²⁸ There, I found claims of due-process deficiencies to be misplaced and explained why the FTC should make better use of Part 3. After all, the Commission has taken 7 cases to the Supreme Court over the last 30 years, has won 6 of them, and has taken most of them there through Part 3.²⁹

The problem is that the Obama-era Commission got its priorities on Part 3 backward. Time and again, it elected to forgo administrative litigation in conduct matters in favor of federal court, which is where the money is. In

²⁵ *Phoebe Putney*, 133 S. Ct. at 1007.

²⁶ *N.C. State Bd. of Dental Exam'rs*, 135 S. Ct. at 1110.

²⁷ 17 C.F.R. pt. 3.

²⁸ Maureen K. Ohlhausen, *Administrative Litigation at the FTC: Effective Tool for Developing the Law or Rubber Stamp?*, 12 J. COMPETITION L. & ECON. 623 (2016).

²⁹ *Id.* at 624 (citing cases).

two pay-for-delay cases—*AbbVie*³⁰ and *Endo*³¹—the FTC sued in federal court (over my dissent), seeking disgorgement. Both cases struggled in the lower courts, which I see as a lost opportunity to develop the law.

The FTC has neglected its Part 3 authority in some appropriate conduct cases. Conversely, it has fought to preserve administrative litigation where it is not well suited. As you know, Congress has considered the SMARTER Act,³² which would subject the FTC and DOJ to the same standard in seeking preliminary injunctions, and bar the FTC from challenging unconsummated mergers in Part 3. I support that legislation. A merging company's prospects should not depend on which agency reviews its Hart-Scott-Rodino (HSR) filing.

For these reasons—and please excuse the pun—I favor “SMARTER” use of Part 3.³³ Disgorgement appears to be the magnet drawing the FTC to federal court in conduct cases. Hence, I would like to see the FTC under the new Administration explore adopting new guidance on disgorgement, akin to the one passed with unanimous, bipartisan support in 2003 and withdrawn over my dissent in 2012.³⁴

CONCLUSION

In this essay, I have discussed the basic principles that inform my perspective on antitrust law and outlined certain policy priorities for me going forward. I specifically mentioned grounding action in a strong empirical basis, challenging abuses of the government process, and better use of Part 3. But, as I articulated at the Heritage Foundation recently, I have other goals, too.³⁵ Those include the promotion of economic liberty, trimming the costs that the FTC imposes on business without hindering the Commission's enforcement abilities, and protecting U.S. firms' intellectual-property rights. I will continue to pursue those aims energetically.

³⁰ Press Release, FTC, FTC Sues Pharmaceutical Companies for Illegally Blocking Consumer Access to Lower-Cost Versions of the Blockbuster Drug AndroGel (Sept. 8, 2014), <https://www.ftc.gov/news-events/press-releases/2014/09/ftc-sues-pharmaceutical-companies-illegally-blocking-consumer>.

³¹ *In re Endo Pharm., Inc.*, File No. 141-0004, Dissenting Statement of Commissioner Maureen K. Ohlhausen (Mar. 31, 2016), https://www.ftc.gov/system/files/documents/public_statements/942513/160331endostatement.pdf.

³² Standard Merger and Acquisition Reviews Through Equal Rules Act of 2015, H.R. 2745, 114th Cong. (2015).

³³ Maureen K. Ohlhausen, *A SMARTER Section 5*, Remarks Before the U.S. Chamber of Commerce, at 3–11 (Sept. 25, 2015), <https://www.ftc.gov/public-statements/2015/09/smarter-section-5>.

³⁴ Maureen K. Ohlhausen, *Dollars, Doctrine, and Damage Control: How Disgorgement Affects the FTC's Antitrust Mission*, Remarks at Dechert LLP, New York (Apr. 20, 2016), <https://www.ftc.gov/public-statements/2016/04/dollars-doctrine-damage-control-how-disgorgement-affects-ftcs-antitrust>.

³⁵ Maureen K. Ohlhausen, *Antitrust Policy for a New Administration*, Remarks Before the Heritage Foundation (Jan. 24, 2017), <https://www.ftc.gov/public-statements/2017/01/antitrust-policy-new-administration>.