



THE COMMITTEE ON ENERGY AND COMMERCE

MEMORANDUM

November 26, 2013

To: Members of the Subcommittee on Commerce, Manufacturing, and Trade

From: Majority Committee Staff

Re: Hearing on "The FTC at 100: Where Do We Go From Here?"

I. Summary

The Subcommittee on Commerce, Manufacturing, and Trade will hold a hearing entitled "The FTC at 100: Where Do We Go From Here?" on Tuesday, December 3, 2013, at 10:00 a.m. in 2123 Rayburn House Office Building. Witnesses are by invitation only.

II. Purpose

The Federal Trade Commission (FTC) will mark its 100 year anniversary in 2014. The occasion provides Congress with an opportunity to re-examine the agency's mission, budget, performance, and authorities in light of today's environment.

III. Witnesses

The Honorable Edith Ramirez, Chairwoman, Federal Trade Commission
The Honorable Julie Brill, Commissioner, Federal Trade Commission
The Honorable Maureen Ohlhausen, Commissioner, Federal Trade Commission
The Honorable Joshua Wright, Commissioner, Federal Trade Commission

IV. Background

Commissioners

Edith Ramirez: Sworn into office as a commissioner in April 2010 and designated Chairwoman in March 2013. Prior to joining the Commission, Chairwoman Ramirez was a partner at the law firm Quinn Emanuel Urquhart & Sullivan, LLP in Los Angeles.

Julie Brill: Sworn into office in April 2010. Previously, Commissioner Brill was the Senior Deputy Attorney General and Chief of Consumer Protection and Antitrust for the North Carolina Department of Justice. Prior to that, she served as Assistant Attorney General for Consumer Protection and Antitrust for the State of Vermont for more than two decades.

Maureen Ohlhausen: Sworn into office in April 2012. Commissioner Ohlhausen previously served for 11 years at the Commission and held the position of Director of Policy Planning under Chairman Kovacic. She was most recently a partner at Wilkinson Barker Knauer.

Joshua Wright: Sworn into office in January 2013. Commissioner Wright was a professor of law at George Mason University School of Law focusing on antitrust and competition law. He holds a Ph.D. in economics and served at the FTC as its scholar-in-residence at the Bureau of Competition from 2007-2008.

The fifth commissioner position is vacant. President Obama has nominated Ms. Terrell McSweeney to fill the position. She is currently awaiting Senate confirmation.

The Commission

The FTC is an independent agency with broad jurisdiction across most sectors of the economy. The FTC was originally established in 1914 by the Federal Trade Commission Act (15 U.S.C. § 41) to enforce competition law. In 1938, its powers were expanded to strengthen its consumer protection role. The Commission has three bureaus: the Bureau of Competition (BC); the Bureau of Consumer Protection (BCP); and the Bureau of Economics.

The Commission has regional offices in Atlanta, Chicago, Cleveland, Dallas, Los Angeles, New York, San Francisco, and Seattle.

Bureau of Competition (BC)

The FTC's original mission was to prevent anti-competitive business practices associated with the trusts that were prevalent a century ago. The Bureau of Competition is the FTC's antitrust arm that enforces the Clayton Act, the FTC Act, and other competition-related statutes (a complete list is available at <http://www.ftc.gov/ogc/stat2.shtm>), to ensure the markets remain free and competitive. In general, the Commission will challenge business practices that are likely to reduce consumer choices, raise prices, limit competition, or provide inferior service.

The Commission's antitrust authority was modified by the Hart-Scott-Rodino (HSR) Antitrust Amendments of 1976, and further amended in 2001. Under the HSR amendments, companies involved in a merger or acquisition of a certain size,¹ unless exempt, must notify both the FTC and the Antitrust Division of the Department of Justice (DOJ) prior to a merger. Either DOJ or FTC will then investigate the proposed merger and determine whether the merger is likely to restrict competition or otherwise be anti-competitive. If the agency conducting the review believes the merger will harm competition, it can go to court to enjoin it. The FTC also has authority to seek a preliminary injunction in court and then consider the merger in an administrative proceeding.

¹ This threshold is adjusted annually by the FTC. For 2013 the threshold begins at a combined value of \$70.9 million.

Because of the FTC's option to address mergers administratively—an option not open to the DOJ—and because some courts have interpreted the FTC Act as allowing the FTC to obtain a preliminary injunction on an easier showing than DOJ would face, some observers have raised concerns that there is now the potential for disparate treatment depending on which antitrust authority conducts a merger review.²

In addition to the pre-merger review authority the FTC shares with the DOJ, it also has enforcement authority under Section 5 of the FTC Act (15 U.S.C. § 45) to prevent “unfair methods of competition in or affecting commerce.” Some Commissioners recently have proposed a policy statement to clarify how the Commission will exercise this far-reaching authority, as it has done in other contexts.

The Bureau also performs an important advocacy function that promotes competition in the marketplace. The Commission often submits advocacy filings to other Federal agencies, as well as State and local governments, to explain how the proposed regulations could impede competition and hurt consumers.³ For example, the FTC filed comments with the District of Columbia Taxicab Commission in June 2013 regarding proposed regulations affecting public vehicles for hire. The Commission determined the proposed regulations could stifle competition from popular applications-based car companies by imposing unnecessary technological barriers. Such regulations would hurt consumers by limiting available choices.

Bureau of Consumer Protection (BCP)

In 1938, Congress expanded the FTC's mission to include consumer protection. Specifically, Section 5 of the FTC Act authorizes the Commission to prohibit “unfair or deceptive acts or practices in or affecting commerce.” The BCP conducts investigations under this standard, educates consumers and businesses, and enforces more than 30 other statutes, as well as rules governing a wide range of requirements, from funeral home disclosure to privacy.⁴ Among the most familiar of these laws is the Do-Not-Call Act for consumers. By registering their home phone number on the Do-Not-Call list, consumers may stop unsolicited commercial telemarketing calls.

The BCP has seven divisions: Advertising Practices; Consumer and Business Education; Enforcement; Financial Practices; Marketing Practices; Planning and Information; and Privacy and Identity Protection.

The FTC has civil penalty authority to enforce against violations of a rule or order; however, if there is no existing rule or preexisting order regarding a particular act or practice, it may only seek injunctive relief. Once an injunction is in place, the Commission may seek civil

² Muris, Timothy, p.40, Testimony before the U.S. Senate Committee on Commerce, Science, and Transportation Subcommittee on Consumer Protection, Product Safety, and Insurance hearing on “The Role of the FTC in Protecting Consumers, Part II”, March 17, 2010, available at http://www.commerce.senate.gov/public/?a=Files.Serve&File_id=283c285e-53c8-4bf2-ad48-ee772b93d8c4

³ For a complete list of filings see http://www.ftc.gov/opp/advocacy_date.shtm.

⁴ A complete list is available at <http://www.ftc.gov/ogc/stat3.shtm>.

penalties up to \$16,000 per violation (indexed to inflation and except as otherwise limited by law).

The FTC generally has authority to prevent violations of Section 5 of the FTC Act against persons, partnerships, or corporations. However, that authority does not extend to banks, savings and loan institutions, thrifts, Federal credit unions, and common carriers.

While it has always shared antitrust authority with the Department of Justice, since the enactment of the Dodd-Frank Act in 2010, the Commission now also shares its consumer protection jurisdiction with the Consumer Financial Protection Board (CFPB) where related to financial products or services.

The FTC retains authority to enforce the Truth in Lending Act (TILA), the Consumer Leasing Act (CLA), the Equal Credit Opportunity Act (ECOA), the Electronic Fund Transfer Act (EFTA), the Fair Debt Collection Practices Act (FDCPA), Gramm-Leach-Bliley Act (GLB Act), and the Fair Credit Reporting Act (FCRA, including the Fair and Accurate Credit Transactions Act, or FACT Act), for entities within its jurisdiction. However, it does not have the authority to promulgate implementing rules--that authority belongs to the CFPB. Additionally, the Commission has authority to enforce any CFPB rules applicable to entities within the FTC's jurisdiction.

Similar to the concerns raised about inconsistent antitrust review standards, observers also have raised concerns about the potential for inconsistent consumer protection enforcement as the new agency develops its own enforcement policies rather than follow the history and guidance of the FTC related to unfair or deceptive acts or practices.

FTC Authorities

The FTC does not have general rulemaking authority under the typical notice-and-comment rules of the Administrative Procedure Act (APA). Unless granted ad-hoc APA rulemaking authority, the FTC may only promulgate rules using procedures prescribed by the Magnuson-Moss Warranty Act–Federal Trade Commission Improvement Act of 1974. Congress imposed these additional rulemaking steps—familiarily known as “Mag-Moss” procedures—because the “potentially pervasive and deep effect of rules defining what constitutes unfair or deceptive acts or practices” demanded greater procedural safeguards.⁵ However, when Congress defines the policy more explicitly through public laws such as the Do-Not-Call-Act or COPPA (Children’s Online Privacy Protection Act), it sometimes gives the FTC APA rulemaking authority to implement the law.

The FTC has investigative authority as well as enforcement authority. Its investigatory authority flows primarily from Sections 6, 9, and 20 of the FTC Act.⁶ The Bureau of Competition has subpoena power under Section 9 of the FTC Act to compel “attendance and testimony of witnesses and the production of all such documentary evidence relating to any

⁵ H.R. Rep. No. 93-1107, at 45 (1974).

⁶ “A Brief Overview of the Federal Trade Commission’s Investigative and Law Enforcement Authority”, Office of General Counsel, U.S. Federal Trade Commission, available at <http://ftc.gov/ogc/brfovrwv.shtm>

matter under investigation” when it investigates alleged unfair methods of competition or other antitrust violations.⁷ The Bureau of Consumer Protection has authority under Section 20 of the FTC Act to issue a civil investigative demand (CID). A CID may require oral testimony or the production of documents. However, a CID also can be used to compel answers to questions or require the recipient to file written reports.

The Commission also has authority under Section 6(b), available to both Bureaus, to require annual or special reports, or both, to obtain information from an entity subject to its jurisdiction. Such requests are not confined to law enforcement purposes and may be used in conjunction with broad economic studies.⁸ For example, the Commission recently announced a new study it will undertake on standard essential patents (SEPs) and the concerns regarding patent assertion entities (PAEs), or “patent trolls.”

Budget

The FTC was last authorized in 1996; that authorization expired in 1998. It is funded by a combination of fee collections and general appropriation. The FTC collects the fees from two sources: Hart-Scott-Rodino pre-merger filing fees and Do-Not-Call registry fees paid by telemarketing entities accessing the registry. The HSR filing fee for premerger notification in 2013 ranges from \$45,000 for the smallest of transactions subject to review to \$280,000 for the largest transactions.⁹

FY 2014 Budget Request Summary¹⁰
(\$ in thousands)

| Budget by Goal: | Fiscal Year 2013 | | Fiscal Year 2014 | | Change | |
|----------------------|------------------|-----------|------------------|-----------------------|--------|-----------|
| | FTE | Dollars | FTE | Dollars | FTE | Dollars |
| Protect Consumers | 638 | \$175,689 | 638 | \$170,230 | --- | -\$5,459 |
| Maintain Competition | 538 | \$135,874 | 538 | \$30,770 ¹ | --- | -\$5,104 |
| Total | 1,176 | \$311,563 | 1,176 | \$301,000 | --- | -\$10,563 |

⁷ Id.

⁸ Id.

⁹ Filing Fee Information February 11, 2013, Hart Scott-Rodino Premerger Notification Program, FTC, available at <http://ftc.gov/bc/hsr/filing2.shtm>

¹⁰ Federal Trade Commission Fiscal Year 2014 Congressional Budget Justification, p.2, available at http://www.ftc.gov/ftc/oed/fmo/2014_CBJ.pdf

| Budget by Funding Source: | FY 2013 | FY 2014 request | Change |
|----------------------------------|------------------|------------------------|------------------|
| Offsetting Collections | | | |
| HSR Filing Fees | \$108,000 | \$102,300 | -\$5,700 |
| Do Not Call Fees | \$21,000 | \$15,000 | -\$6,000 |
| Subtotal Offsetting Collections | \$129,000 | \$117,300 | -\$11,700 |
| General Fund | \$182,563 | \$183,700 | \$1,137 |
| Total | \$311,563 | \$301,000 | -\$10,563 |

Recent History of Appropriations for the FTC¹¹

| | | |
|------------------------------|-----------------------|---------------|
| 2000 | 985 | \$125,000,000 |
| 2001 | 1,007 | \$147,000,000 |
| 2002 | 1,054 | \$156,000,000 |
| 2003 | 1,051 | \$177,000,000 |
| 2004 | 1,057 | \$186,000,000 |
| 2005 | 1,019 | \$205,000,000 |
| 2006 | 1,007 | \$211,000,000 |
| 2007 | 1,061 | \$211,000,000 |
| 2008 | 1,094 | \$244,000,000 |
| 2009 | 1,107 | \$259,000,000 |
| 2010 | 1136 | \$292,000,000 |
| 2011 | 1160 | \$291,000,000 |
| 2012 | 1132 | \$312,000,000 |
| 2013 | 1176 | \$311,000,000 |
| * Includes reimbursable FTE. | | |

V. Questions for Consideration

- How can the Commission use its resources more efficiently?
- What are the best uses of Commission resources?
- What changes to the Commission's authority, if any, are needed?

Please contact Brian McCullough, Gib Mullan, or Shannon Taylor at ext. 5-2927 with any questions.

¹¹ Available at <http://www.ftc.gov/ftc/oed/fmo/fte2.shtm#Includes> and <http://www.ftc.gov/ftc/oed/fmo/appropriationhistory.shtm>