



# THE COMMITTEE ON ENERGY AND COMMERCE

## MEMORANDUM

February 26, 2014

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

From: Majority Committee Staff

Re: Hearing on “The FTC at 100: Views from the Academic Experts”

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### I. Summary

The Subcommittee on Commerce, Manufacturing, and Trade will hold a hearing entitled “The FTC at 100: Views from the Academic Experts” on Friday, February 28, 2014, at 9:30 a.m. in 2123 Rayburn House Office Building. Witnesses are by invitation only.

The second in a series focusing on the Federal Trade Commission (FTC) at its centennial, this hearing will follow a December 3, 2013, hearing at which the four sitting commissioners testified.<sup>1</sup> A panel of academic experts will discuss the Commission and its resources, mission, authorities, and performance as these have evolved over the last century, as well as how they should evolve to ensure the FTC becomes a modern, efficient bureaucracy responsive to existing and emerging needs.

### II. Witnesses

*Howard Beales*, Professor, The George Washington University School of Business;

*Daniel Crane*, Associate Dean for Faculty and Research and the Frederick Paul Furth, Sr. Professor of Law, University of Michigan School of Law;

*Geoffrey Manne*, Founder and Executive Director, International Center for Law & Economics;

*Christopher Yoo*, John H. Chestnut Professor of Law, Communication, and Computer & Information Science, Director, Center for Technology, Innovation & Competition, University of Pennsylvania Law School;

*Robert Lande*, Venable Professor of Law, University of Baltimore School of Law; and

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<sup>1</sup> Chairwoman Edith Ramirez, along with Commissioners Julie Brill, Maureen Ohlhausen, and Joshua Wright, testified before the Commerce, Manufacturing, and Trade Subcommittee on December 3, 2014. President Obama nominated Ms. Terrell McSweeney to fill the third Democratic seat in June 2013; after re-nomination this January, Ms. McSweeney awaits Senate confirmation; Committee memo, joint Commission testimony, and video of the Commissioners’ oral remarks can be found here: <http://energycommerce.house.gov/hearing/ftc-100-where-do-we-go-here>.

*Paul Ohm*, Associate Professor, University of Colorado Law School.

### **III. Background**

#### ***The Commission***

The FTC is an independent agency with broad jurisdiction across most sectors of the economy. The Federal Trade Commission Act of 1914 (15 U.S.C. § 41) created the Commission to enforce competition law. In 1938, its powers were expanded to include consumer protection. The Commission has three bureaus: the Bureau of Competition; the Bureau of Consumer Protection; and the Bureau of Economics. In addition to its headquarters, the FTC operates regional offices in Atlanta, Chicago, Cleveland, Dallas, Los Angeles, New York, San Francisco, and Seattle.

#### ***Bureau of Competition***

The FTC's original mission was to prevent anti-competitive business practices associated with the trusts that were prevalent a century ago. Through the Bureau of Competition, the FTC's antitrust arm, the Commission 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 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 Hart-Scott-Rodino (HSR) amendments of 1976 and 2001 require merging companies of a certain size,<sup>2</sup> prior to a merger, to notify both the FTC and the Antitrust Division of the Department of Justice (DOJ), with which the FTC shares antitrust enforcement authority. Either DOJ or FTC then will investigate the proposed merger and determine whether the merger is likely to restrict competition or be otherwise 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, an option not available to the DOJ. This different avenue, some observers maintain, has resulted in a lighter burden of proof for the Commission, and thus the potential for disparate treatment for companies undergoing FTC merger review as compared to subjects undergoing DOJ antitrust review.

In addition to the pre-merger review authority the FTC shares with the DOJ, it 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." The Bureau also performs an important advocacy function that promotes competition in the marketplace, often submitting 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.<sup>3</sup>

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<sup>2</sup> This threshold is adjusted annually by the FTC. For 2013 the threshold begins at a combined value of \$70.9 million.

<sup>3</sup> For a complete list of filings see [http://www.ftc.gov/opp/advocacy\\_date.shtm](http://www.ftc.gov/opp/advocacy_date.shtm).

### ***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 disclosures to privacy.<sup>4</sup> Among the most familiar of these laws is the Do-Not-Call Act.

Generally, the Commission can only enforce the provisions of Section 5 against persons, partnerships, or corporations, excluding banks, savings and loan institutions, thrifts, Federal credit unions, and common carriers. The initial step in its enforcement powers is an injunction to stop unlawful behavior. If a person violates an injunction or a rule or order, the Commission may seek civil penalties up to \$16,000 per violation (indexed to inflation and except as otherwise limited by law).

### ***Shared Enforcement with the Consumer Financial Protection Board (CFPB)***

Under the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, the Commission now shares its consumer protection jurisdiction with the CFPB where related to financial products or services. The FTC retains authority to enforce the Truth in Lending Act, the Consumer Leasing Act, the Equal Credit Opportunity Act, the Electronic Fund Transfer Act, the Fair Debt Collection Practices Act, Gramm-Leach-Bliley Act, and the Fair Credit Reporting Act (including the Fair and Accurate Credit Transactions Act), for entities within its jurisdiction. However, the FTC no longer enjoys the authority to promulgate implementing rules—an authority now vested in the CFPB. Regardless of the lack of this rulemaking authority, the Commission has authority to enforce any CFPB rules applicable to entities within the FTC's jurisdiction.

### ***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 by Congress, the FTC may only promulgate rules using more demanding procedures prescribed by the Magnuson-Moss Warranty Act–Federal Trade Commission Improvement Act of 1974. Congress imposed these additional rulemaking steps—famously 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.<sup>5</sup>

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

<sup>5</sup> H.R. Rep. No. 93-1107, at 45 (1974).

In addition to enforcement authority, the FTC possesses investigative authority, which flows primarily from Sections 6, 9, and 20 of the FTC Act.<sup>6</sup> 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 matter under investigation” when it investigates alleged unfair methods of competition or other antitrust violations.<sup>7</sup> The Bureau of Consumer Protection has authority under Section 20 of the FTC Act to issue a civil investigative demand, which may compel oral testimony, the production of documents, answers to questions, or the filing of written reports.

Both Bureaus possess the authority under Section 6(b) to require annual or special reports 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.<sup>8</sup> 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: HSR pre-merger filing fees and Do-Not-Call Registry fees paid by telemarketing entities. The HSR filing fee for premerger notification in 2013 ranges from \$45,000 for the smallest transactions subject to review to \$280,000 for the largest transactions.<sup>9</sup> Since 2000, the FTC has grown from an agency of 985 FTEs and an appropriation of \$125,000,000 to an agency of 1176 FTEs and an appropriation of \$311,000,000.<sup>10</sup> The Commission requested \$311,563,000 in 2013 and \$301,000,000 in 2014<sup>11</sup> while Congress funded the agency at \$311,000,000<sup>12</sup> and \$298,000,000, respectively.<sup>13</sup>

## **IV. Questions for Consideration**

- How efficiently does the Commission use its resources? What are the best uses of Commission resources?
- What changes to the Commission’s authorities, if any, are needed?

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<sup>6</sup> “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/brfovrvw.shtm>

<sup>7</sup> Id.

<sup>8</sup> Id.

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

<sup>10</sup> See <http://www.ftc.gov/about-ftc/bureaus-offices/office-executive-director/financial-management-office/ftc-full-time> and <http://www.ftc.gov/ftc/oed/fmo/appropriationhistory.shtm>.

<sup>11</sup> Federal Trade Commission Fiscal Year 2014 Congressional Budget Justification, p.2, available at [http://www.ftc.gov/ftc/oed/fmo/2014\\_CBJ.pdf](http://www.ftc.gov/ftc/oed/fmo/2014_CBJ.pdf)

<sup>12</sup> As a result of sequester the Commission’s budget for FY2013 totaled \$296 million. See Testimony of the Honorable Edith Ramirez, p. 4, <http://docs.house.gov/meetings/IF/IF17/20131203/101545/HHRG-113-IF17-Wstate-RamirezE-20131203.pdf>.

<sup>13</sup> Consolidated Appropriates Act of 2014, P.L. 113-76, p. 207, available at <http://www.gpo.gov/fdsys/pkg/BILLS-113hr3547enr/pdf/BILLS-113hr3547enr.pdf>.

- How has the Commission's use of the Bureau of Economics changed over time?
- Is there a practical difference between antitrust merger review at the FTC and DOJ?
- Should the FTC develop a policy statement relating to its authority to prevent unfair methods of competition as it has in the case of other authorities?

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