The Federal Trade Commission:

Restoring Congressional Oversight of the Second National Legislature

AN ANALYSIS OF PROPOSED LEGISLATION

by Berin Szóka & Geoffrey A. Manne

May 2016

Report 2.0

FTC: Technology & Reform Project

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Report 2.0 of the FTC: Technology & Reform Project

The "FTC: Technology & Reform Project" was convened by the International Center for Law & Economics and TechFreedom in 2013. It is not affiliated in any way with the FTC.

Executive Summary

Congressional reauthorization of the FTC is long overdue. It has been twenty-two years since Congress last gave the FTC a significant course-correction and even that one, codifying the heart of the FTC's 1980 Unfairness Policy Statement, has not had the effect Congress expected. Indeed, neither that policy statement nor the 1983 Deception Policy Statement, nor the 2015 Unfair Methods of Competition Enforcement Policy Statement, will, on their own, ensure that the FTC strikes the right balance between over- and under-enforcement of its uniquely broad mandate under Section 5 of the FTC Act.

These statements are not without value, and we support codifying the other key provisions of the Unfairness Policy Statement that were not codified in 1980, as well as codifying the Deception Policy Statement. In particular, we urge Congress or the FTC to clarify the

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meaning of "materiality," the key element of Deception, which the Commission has effectively nullified.

But a shoring up of substantive standards does not address the core problem: ultimately, that the FTC's *processes* have enabled it to operate with essentially unbounded discretion in developing the doctrine by which its three high level standards are applied in real-world cases.

Chiefly, the FTC has been able to circumvent judicial review through what it calls its "common law of consent decrees," and to effectively circumvent the rulemaking safeguards imposed by Congress in 1980 through a variety of forms of "soft law": guidance and recommendations that have, if indirectly and through amorphous forms of pressure, essentially regulatory effect.

At the same time, and contributing to the problem, the FTC has made insufficient use of its Bureau of Economics, which ought to be the agency's crown jewel: a dedicated, internal think tank of talented economists who can help steer the FTC's enforcement and policymaking functions. While BE has been well integrated into the Commission's antitrust decision-making, it has long resisted applying the lessons of law and economics to its consumer protection work.

The FTC is, in short, in need of a recalibration. In this paper we evaluate nine of the seventeen FTC reform bills proposed by members of the Commerce, Manufacturing and Trade Subcommittee, and suggest a number of our own, additional reforms for the agency.

Many of what we see as the most needed reforms go to the lack of economic analysis. Thus we offer detailed suggestions for how to operationalize a greater commitment to economic rigor in the agency's decision-making at all stages. Specifically, we propose expanding the proposed requirement for economic analysis of recommendations for "legislation or regulatory action" to include best practices (such as the FTC commonly recommends in reports), complaints and consent decrees. We also propose (and support bills proposing) other mechanisms aimed at injecting more rigor into the Commission's decisionmaking, particularly by limiting its use of various sources of informal or overly discretionary sources of authority.

The most underappreciated aspect of the FTC's processes is investigation, for it is here that the FTC wields incredible power to coerce companies into settling lawsuits rather than litigating them. Requiring that the staff satisfy a "preponderance of the evidence" standard for issuing consumer protection complaints would help, on the margin, to embolden some defendants not to settle. Other proposed limits on the aggressive use of remedies and on the allowable scope of the Commission's consent orders would help to accomplish the same thing. Changing this dynamic even slightly could produce a significant shift in the agency's model, by injecting more judicial review into the FTC's evolution of its doctrine.

Commissioners themselves could play a greater role in constraining the FTC's discretion, as well, keeping the FTC focused on advancing consumer welfare in everything it does. Together with the Bureau of Economics, these two internal sources of constraint could partly substitute for the relative lack of external constraint from the courts.

We are not wholly critical of the FTC. Indeed, we are broadly supportive of its mission. And we support several measures to *expand* the FTC's jurisdiction to cover telecom common carriers and to make it easier for the FTC to prosecute non-profits that engage in for-profit activities. We enthusiastically support expansion of the FTC's Bureau of Economics. And we recommend expansion of the Commission's competition advocacy work into a full-fledged Bureau, so that the Commission can advocate at all levels of government — federal, state and local — on behalf of consumers and against legislation and regulations that would hamper the innovation and experimentation that fuel our rapidly evolving economy.

But most of all, Congress should not take the FTC's current processes for granted. Ultimately, the FTC reports to Congress and it is Congress's responsibility to regularly and carefully scrutinize how the agency operates. The agency's vague standards, sweeping jurisdiction, and its demonstrated ability to circumvent both judicial review and statutory safeguards on policy making make regular reassessment of the Commission through biennial reauthorization crucial to its ability to serve the consumers it is tasked with protecting.

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> Considering that rules of the Commission may apply to any act or practice "affecting commerce", and that the only statutory restraint is that it be unfair, **the apparent power of the Commission with respect to commercial law is virtually as broad as the Congress itself. In fact, the Federal Trade Commission may be the second most powerful legislature in the country….** All 50 State legislatures and State Supreme Courts can agree that a particular act is fair and lawful, but the five-man appointed FTC can overrule them all. **The Congress has little control over the far-flung activities of this agency short of passing entirely new legislation**.[1]
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> *Sens. Barry Goldwater & Harrison Schmitt, 1980*

> **Within very broad limits, the agency determines what shall be legal. Indeed, the agency has been "lawless" in the sense that it has traditionally been beyond judicial control**.[2]
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> *Former FTC Chairman Tim Muris, 1981*

> **The FTC's investigatory power is very broad and is akin to an inquisitorial body.** On its own initiative, it can investigate a broad range of businesses without any indication of a predicate offense having occurred.[3]
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> *Prof. Chris Hoofnagle, 2016*

Introduction

Only by the skin of its teeth did the Federal Trade Commission survive its cataclysmic confrontation with Congress in 1980. Today, the Federal Trade Commission remains the closest thing to a second national legislature in America. Its jurisdiction covers nearly every company in America. It powers over unfair and deceptive acts and practices (UDAP) and unfair methods of competition (UMC) remain so inherently vague that the Commission retains unparalleled discretion to make policy decisions that are essentially legislative. The Commission increasingly wields these powers over high tech issues affecting not just the high tech *sector*, but, increasingly, every company in America. It has become the de facto

[1] S. Rep. No. 96-184, at 18 (1980), *available at* http://digitalcollections.library.cmu.edu/awweb/awarchive?type=file&item=417102.

[2] Timothy J. Muris, *Judicial Constraints*, in THE FEDERAL TRADE COMMISSION SINCE 1970: ECONOMIC REGULATION AND BUREAUCRATIC BEHAVIOR, 35, 49 (Kenneth W. Clarkson & Timothy J. Muris, eds., 1981).

[3] CHRIS JAY HOOFNAGLE, FEDERAL TRADE COMMISSION PRIVACY LAW & POLICY 102 (2016).

Federal *Technology* Commission — a moniker we coined,[4] but which Chairwoman Edith Ramirez has embraced.[5]

For all this power, either by design or by neglect, the FTC is also "a largely unconstrained agency."[6] "Although appearing effective, most means of controlling Commission actions are virtually useless, owing to lack of political support and information, lack of interest on the part of those ostensibly monitoring the FTC, or FTC maneuvering."[7] At the same time, "[t]he courts place almost no restraint upon what commercial practices the FTC can proscribe…."[8]

The vast majority of what the FTC does is uncontroversial — routine antitrust, fraud and advertising cases. Yet, as the FTC has dealt with cutting-edge legal issues, like privacy, data security and product design, it has raised deep concerns not merely about the specific cases brought by the FTC, but also that the agency is drifting away from the careful balance it struck in its 1980 Unfairness Policy Statement (UPS)[9] and its 1983 Deception Policy Statement (DPS).[10]

We applaud the Commerce, Manufacturing & Trade Subcommittee for taking up the issue of FTC reform, and for the seventeen bills submitted by members of both parties. Even if no legislation passes this Congress, active engagement by Congress in the operation of the Commission was crucial in the past to ensuring that the FTC does not stray from its mission of serving consumers. But active congressional oversight has been wanting for far too long.

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[4] Berin Szóka & Geoffrey Manne, *The Second Century of the Federal Trade Commission*, TECHDIRT (Sept. 26, 2013), *available at* https://www.techdirt.com/blog/innovation/articles/20130926/16542624670/second-century-federal-trade-commission.shtml; *see also Consumer Protection & Competition Regulation in a High-Tech World: Discussing the Future of the Federal Trade Commission*, Report 1.0 of the FTC: Technology & Reform Project, 3 (Dec. 2013), *available at* http://docs.techfreedom.org/FTC_Tech_Reform_Report.pdf.

[5] Kai Ryssdal, *The FTC is Dealing with More High Tech Issues*, MARKETPLACE (Mar. 7, 2016), *available at* http://www.marketplace.org/2016/03/07/tech/ftc-dealing-more-high-tech-issues.

[6] *Part I: The Institutional Setting*, in THE FEDERAL TRADE COMMISSION SINCE 1970, *supra* note 2 at 11.

[7] *Id*. at 11–12.

[8] Timothy J. Muris, *Judicial Constraints*, in *id*. 35, 43.

[9] *Letter from the FTC to the House Consumer Subcommittee, appended to* In re Int'l Harvester Co., 104 F.T.C. 949, 1073 (1984) ["Unfairness Policy Statement" or "UPS"], *available at* http://www.ftc.gov/ftc-policy-statement-on-unfairness.

[10] *Letter from the FTC to the Committee on Energy & Commerce, appended to* Cliffdale Assocs., Inc., 103 F.T.C. 110, 174 (1984) ["Deception Policy Statement" or "DPS"], *available at* http://www.ftc.gov/ftc-policy-statement-on-deception.

Not since 1996 has Congress reauthorized the FTC,[11] and not since 1994 has Congress actually substantially modified the FTC's standards or processes.[12]

The most significant thing Congress has done regarding the FTC since 1980 was the 1994 codification of the Unfairness Policy Statement's three-part balancing test in Section 5(n). But even that has proven relatively ineffective: The Commission pays lip service to this test, but there has been essentially none of analytical development promised by the Commission in the 1980 UPS:

> The present understanding of the unfairness standard is the result of an evolutionary process. The statute was deliberately framed in general terms since Congress recognized the impossibility of drafting a complete list of unfair trade practices that would not quickly become outdated or leave loopholes for easy evasion. The task of identifying unfair trade practices was therefore assigned to the Commission, **subject to judicial review, in the expectation that the underlying criteria would evolve and develop over time**.

The Commission no doubt believes that it has carefully weighed (1) substantial consumer injury with (2) countervailing benefit to consumers or to competition, and carefully assessed whether (3) consumers could "reasonably have avoided" the injury, as Congress required by enacting Section 5(n). But whatever weighing the Commission has done in its internal decision-making is far from apparent from the outside, and it has not been done by the courts in any meaningful way.[13] As former Chairman Tim Muris notes, "the Commission's authority remains extremely broad."[14]

The situation is little on better on Deception — at least, on the cutting edge of Deception cases, involving privacy policies, online help pages, and enforcement of other promises that differ fundamentally from traditional marketing claims. Just as the Commission has rendered the three-part Unfairness test essentially meaningless, it has essentially nullified the "materiality" requirement that it volunteered in the 1983 Deception Policy Statement. The Statement began by presuming, reasonably, that express *marketing* claims are always materi-

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[11] Federal Trade Commission Reauthorization Act of 1996, Pub. L. 104-216, 110 Stat. 3019 (Oct. 1, 1996), *available at* http://uscode.house.gov/statutes/pl/104/216.pdf.

[12] Federal Trade Commission Act Amendments of 1994, Pub. L. 103-312, 108 Stat. 1691 (Aug. 26, 1994) *available at* http://uscode.house.gov/statutes/pl/103/312.pdf.

[13] *See infra* at 39.

[14] Statement of Timothy J. Muris, Hearing on Financial Services and Products: The Role of the Fed. Trade Commission in Protecting Customers, before the Subcomm. on Consumer Protection, Product Safety, and Insurance of the S. Comm. on Commerce, Science, and Transportation, 111th Cong. 2 (2010), 28, *available at* http://lawprofessors.typepad.com/files/muris_senate_testimony_ftc_role_protecting_consumers_3-17-101.pdf.

al, but the Commission has extended that presumption (and other narrow presumptions of materiality in the DPS) to cover essentially *all* deception cases.[15]

Congress cannot fix these problems simply by telling the FTC to dust off its two bedrock policy statements and take them more seriously (as it essentially did in 1994 regarding Unfairness). Instead, Congress must fundamentally reassess the *process* that has allowed the FTC to avoid judicial scrutiny of how it wields its discretion.

The last time Congress significantly reassessed the FTC's *processes* was in May 1980, when it created procedural safeguards and evidentiary requirements for FTC rulemaking. These reforms were much needed, and remain fundamentally necessary (although we do, below, encourage the FTC to attempt a Section 5 rulemaking for the first time in decades in order to provide a real-world experience of how such rulemakings work and whether Congress might make changes at the margins to facilitate reliance on that tool).[16]

But these 1980 reforms failed to envision that the Commission would, eventually, find ways of exercising the vast discretion inherent in Unfairness and Deception through what it now proudly calls its "common law of consent decrees"[17] — company-specific, but cookie-cutter consent decrees that have little to do with the facts of each case (and always run for twenty years). These consent decrees are bolstered by the regular issuance of recommended best practices in reports and guides that function as quasi-regulations, imposed on entire industries not by rulemaking but by the administrative equivalent of a leering glare. Together, these new tactics have allowed the FTC to effectively circumvent not only the process re-

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[15] *See infra* at 21.

[16] *See infra* at 99.

[17] "Together, these enforcement efforts have established what some scholars call 'the common law of privacy' in the United States." Julie Brill, Commissioner, Fed. Trade Comm'n, *Remarks to the Mentor Group Forum for EU-US Legal-Economic Affairs Brussels, April 16, 2013*, 3 (Apr. 16, 2013), *available at* https://www.ftc.gov/sites/default/files/documents/public_statements/remarks-mentor-group-forum-eu-us-legal-economic-affairs-brussels-belgium/130416mentorgroup.pdf (citing Christopher Wolf, *Targeted Enforcement and Shared Lawmaking Authority As Catalysts for Data Protection in the United States* (2010), *available at* http://www.justice.gov.il/NR/rdonlyres/8D438C53-82C8- 4F25-99F8-E3039D40E4E4/26451/Consumer_WOLFDataProtectionandPrivacyCommissioners.pdf (FTC consent decrees have "created a 'common law of consent decrees,' producing a set of data protection rules for businesses to follow.")). FTC Chairman Edith Ramirez said roughly the same thing in a 2014 speech:

> I have expressed concern about recent proposals to formulate guidance to try to codify our unfair methods principles for the first time in the Commission's 100 year history. While I don't object to guidance in theory, I am less interested in prescribing our future enforcement actions than in describing our broad enforcement principles revealed in our recent precedent.

Quoted in Geoffrey Manne, *FTC Commissioner Joshua Wright gets his competition enforcement guidelines*, TRUTH ON THE MARKET (Aug. 13, 2015), *available at* https://truthonthemarket.com/2015/08/13/ftc-commissioner-joshua-wright-gets-his-competiton-enforcement-guidelines/ (*speech video available at* http://masonlec.org/media-center/299).

forms of May 1980 but also the substantive constraints volunteered by the FTC later that year in the Unfairness Policy Statement and, three years later, in the Deception Policy Statement.

Such process reforms are the focus of this paper. The seventeen bills currently before the Subcommittee would begin to address these problems — but only begin. In this paper we evaluate nine of the proposed bills in turn, offer specific recommendations, and also offer a slate of our own additional suggestions for reform.

Our most important point, though, is not any one of our proposed reforms, but this: The default assumption should not be that the FTC continues operating indefinitely without course corrections from Congress.

Justice Scalia put this point best in his 2014 decision, striking down the EPA's attempt to "rewrite clear statutory terms to suit its own sense of how the statute should operate," when he said: "We are not willing to stand on the dock and wave goodbye as EPA embarks on this multiyear voyage of discovery."[18] The point is more, not less, important when a statute like Section 5 has been "deliberately framed in general terms since Congress recognized the impossibility of drafting a complete list of unfair trade practices that would not quickly become outdated or leave loopholes for easy evasion": trusting the FTC to follow an "evolutionary process" *requires* regular, searching reassessments by Congress. This need is especially acute given that the "underlying criteria" have *not* "evolve[d] and develop[ed] over time" through the "judicial review" expected by both Congress and the FTC in 1980 — at least, not in any analytically meaningful way.

Reauthorization should happen at regular two-year intervals and it should never be a *pro forma* rubber-stamping of the FTC's processes. Each reauthorization should begin from the assumption that the FTC is a uniquely important and valuable agency — one that can do enormous good for consumers, but also one whose uniquely broad scope and broad discretion require constant supervision and regular course corrections. Regular tweaks to the FTC's processes should be expected and welcomed, not resisted.

The worst thing defenders of the FTC could do would be allowing the FTC to drift along towards the kind of confrontation with Congress that nearly destroyed the FTC in 1980.

The FTC's History: Past is Prologue

It is no exaggeration to say that the 1980 compromise over unfairness saved the FTC from going the way of the Civil Aeronautics Board, which Congress began phasing out in 1978 under the leadership of Alfred Kahn, President Carter's de-regulator-in-chief. President

[18] Util. Air Regulatory Grp. v. EPA, 134 S. Ct. 2427, 2446 (2014).

Carter signed the 1980 FTC Improvements Act even though he objected to some of its provisions because, as he noted, "the very existence of this agency is at stake."[19] Those reforms to the FTC's rulemaking process, enacted in May 1980, were only part of what saved the FTC from oblivion.

Driven largely by outrage over the FTC's attempt to regulate children's advertising, Congress had allowed the FTC's funding to lapse, briefly shuttering the FTC. As Howard Beales, then (in 2004) director of the FTC's Bureau of Consumer Protection, noted, "shutting down a single agency because of disputes over policy decisions is almost unprecedented."[20] In the mid-to-late 1970s, the FTC had interpreted "unfairness" expansively in an attempt to regulate everything from funeral home practices to labor practices and pollution. Beales and former FTC Chairman, Tim Muris, summarize the problem thusly:

> Using its unfairness authority under Section 5, but unbounded by meaningful standards, in the 1970s the Commission embarked on a vast enterprise to transform entire industries. Over a 15-month period, the Commission issued a rule a month, usually without a clear theory of why there was a law violation, with only a tenuous connection between the perceived problem and the recommended remedy, and with, at best, a shaky empirical foundation.[21]

When the FTC attempted to ban the advertising of sugared cereals to children, the Washington Post dubbed the FTC the "National Nanny."[22] This led directly to the 1980 FTC Improvements Act — the one Sens. Goldwater and Schmitt endorsed in the quotation that opens this paper.

In early 1980, by a vote of 272-127, Congress curtailed the FTC's Section 5 rulemaking powers under the 1975 Magnuson-Moss Act, imposing additional evidentiary and procedural safeguards.[23] But the FTC refused to narrow its doctrinal interpretation of unfairness until Congress briefly shuttered the FTC in the first modern government shutdown. In December, 1980, the FTC issued its Unfairness Policy Statement, promising to weigh (a) sub-

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[19] Jimmy Carter, *Federal Trade Commission Improvements Act of 1980 Statement on Signing H.R. 2313 into Law* (May 28, 1980), *available at* http://www.presidency.ucsb.edu/ws/?pid=44790.

[20] J. Howard Beales III, *Advertising to Kids and the FTC: A Regulatory Retrospective that Advises the Present*, 8 n.32 (2004), *available at* https://www.ftc.gov/sites/default/files/documents/public_statements/advertising-kids-and-ftc-regulatory-retrospective-advises-present/040802adstokids.pdf.

[21] J. Howard Beales III & Timothy J. Muris, *Striking the Proper Balance: Redress Under Section 13(B) of the FTC Act*, 79 ANTITRUST L. J. 1, 1 (2013), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2764456.

[22] Editorial, WASH. POST (Mar. 1, 1978), reprinted in MICHAEL PERTSCHUK, REVOLT AGAINST REGULATION, 69–70 (1982); *see also* Beales, *supra* note 20, at 8 n.37 ("Former FTC Chairman Pertschuk characterizes the Post editorial as a turning point in the Federal Trade Commission's fortunes.").

[23] Federal Trade Commission Act Improvements Act of 1980, Pub. L. 96-252, 94 Stat. 374 (May 28, 1980), *available at* http://uscode.house.gov/statutes/pl/96/252.pdf.

stantial injury against (b) countervailing benefit and (c) to focus only on practices consumers could not reasonably avoid. Last year, the FTC finally adopted a Policy Statement on Unfair Methods of Competition that parallels the two UDAP statements.[24]

In 1994, in Section 5(n), Congress codified the core requirements of the UPS, and further narrowed the FTC's ability to rely on its assertions of what constituted public policy. This was the last time Congress substantially modified the FTC Act — meaning that the Commission has operated since then without course-correction from Congress.[25] This is itself troubling, given that independent agencies are supposed to operate as creatures of Congress, not regulatory knights errant. But it is even more problematic given the extent of the FTC's renewed efforts to escape the bounds of even its minimal discretionary constraints.

The Inevitable Tendency Towards the Discretionary Model

To paraphrase Winston Churchill on democracy, the FTC offers the "worst form of consumer protection and competition regulation — except for all the others." Democracy, without constant vigilance and reform, will inevitably morph into the unaccountable exercise of power — what the Founders meant by the word "corruption" (literally, "decayed"). When Benjamin Franklin was asked, upon exiting the Constitutional Convention of 1787, "Well, Doctor, what have we got — a Republic or a Monarchy?," he famously remarked "A Republic, if you can keep it."[26]

The same can be said for the FTC: an "evolutionary process… subject to judicial review,"[27] *if we can keep it*. Any agency given so broad a charge as to prohibit "unfair methods of competition… and unfair or deceptive acts or practices…" will inevitably tend towards the exercise of maximum discretion.

This critique is of a dynamic inherent in the FTC itself, not of particular Chairmen, Commissioners, Bureau Directors or other staffers. The players change regularly, each leaving their mark on the agency, but the agency has institutional tendencies of its own, inherent in the nature of the agency.

The Commission itself most clearly identified the core of the FTC's institutional nature in the Unfairness Policy Statement, in a passage so critical it bears quoting in full:

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[24] Fed. Trade Comm'n, *Statement of Enforcement Principles Regarding "Unfair Methods of Competition" Under Section 5 of the FTC Act* (Aug. 13, 2015) ["UMC Policy Statement"], *available at* https://www.ftc.gov/system/files/documents/public_statements/735201/150813section5enforcement.pdf.

[25] The 1996 FTC reauthorization was purely *pro forma*.

[26] Benjamin Franklin, *quoted in* Respectfully Quoted: A Dictionary of Quotations, BARTLEBY.COM (last visited May 22, 2016), http://www.bartleby.com/73/1593.html

[27] UPS, *supra* note 9.

> The **present understanding of the unfairness standard is the result of an evolutionary process**. The **statute was deliberately framed in general terms** since Congress recognized the impossibility of drafting a complete list of unfair trade practices that would not quickly become outdated or leave loopholes for easy evasion. The task of identifying unfair trade practices was therefore assigned to the Commission, subject to judicial review, in **the expectation that the underlying criteria would evolve and develop over time**. As the Supreme Court observed as early as 1931, the ban on unfairness "belongs to that class of phrases which do not admit of precise definition, but the meaning and application of which must be arrived at by what this court elsewhere has called 'the **gradual process of judicial inclusion and exclusion**.'"[28]

In other words, Congress delegated vast discretion to the Commission from the very start because of the difficulties inherent in prescriptive regulation of competition and consumer protection. The Commission generally exercised that discretion primarily through case-by-case adjudication, but began issuing rules on its own authority in 1964,[29] setting it on the road that culminated in the cataclysm of 1980.

Indeed, given the essential nature of bureaucracies, it was probably only a matter of time before the FTC reached this point. It is no accident that it took just three years from 1975, when Congress affirmed the FTC's claims to "organic" rulemaking power (implicit in Section 5), until the FTC was being ridiculed as the "National Nanny." In short, the 1975 Magnuson-Moss Act created a monster, magnifying the effects of the FTC's inherent Section 5 discretion with the ability to conduct statutorily sanctioned rulemakings. If it had not been then-Chairman Michael Pertschuk who pushed the FTC too far, it probably would have, eventually, been some other chairman. The power was simply too great for any government agency to resist using without some feedback mechanism in the system telling it to stop.

In that sense, we believe the rise of the Internet played a role analogous to the 1975 Magnuson-Moss Act, spurring the FTC to greater activity where it had previously been more restrained.[30]

After 1980, the FTC ceased conducting new Section 5 rulemakings. Between 1980 and 2000, the FTC brought just sixteen unfairness cases, all of which fell into narrow categories of clearly "bad" conduct: "(1) theft and the facilitation thereof (clearly the leading category);

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[28] UPS, *supra* note 9.

[29] Statement of Basis and Purpose, Unfair or Deceptive Advertising and Labeling of Cigarettes in Relation to the Health Hazards of Smoking, 29 Fed. Reg. 8324, 8355 (1964).

[30] Of course, we also recognize that other societal forces were at work, such as the Naderite consumer protection movement of the 1970s, and the growing privacy protection movement of the 1990s and 2000s. But the analogy still offers some value.

(2) breaking or causing the breaking of other laws; (3) using insufficient care; (4) interfering with the exercise of consumer rights; and (5) advertising that promotes unsafe practices."[31] Just how easy these cases were conveys in turn just how *cautious* the Commission was in using its unfairness powers — not only because it was chastened by the experience of 1980 but also because of Congress's reaffirmation of the limits on unfairness in its 1994 codification of Section 5(n). In a 2000 speech, Commissioner Leary summarized the Commission's restrained, "gap-filling" approach to unfairness enforcement over the preceding two decades:

> The overall impression left by this body of law is hardly that policy has been created from whole cloth. Rather, the Commission has sought through its unfairness authority to challenge commercial conduct that under any definition would be considered wrong but which escaped or evaded prosecution by other means.[32]

Yet even then Commissioner Leary noted his concerns about the burgeoning unfairness enforcement innovation in two of the Commission's then-recent cases: *Touch Tone* (1999)[33] and ReverseAuction (2000). Tellingly, his concern was over the Commission's failure to properly assess the substantiality of the amorphous privacy injuries alleged in those cases. Still, he concluded on a note of optimism:

> The extent of the disagreement should not be exaggerated, however. The majority [in *Reverse Auction*] did not suggest that all privacy infractions are sufficiently serious to be unfair and the minority did not suggest that none of them are. The boundaries of unfairness, as applied to Internet privacy violations, remain an open question.
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> The Commission has so far used its unfairness authority in relatively few cases that involve the Internet. These cases, however, suggest that future application of unfairness will be entirely consistent with recent history. Internet technology is new, but we have addressed new technology before. I believe that the Commission will do what it can to prevent the Internet from becoming a lawless frontier, but it will also continue to avoid excesses of paternalism.
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> The lessons of the past continue to be relevant because the basic patterns of dishonest behavior continue to be the same. Human beings evolve much more slowly than their artifacts.[34]

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[31] Stephen Calkins, *FTC Unfairness: An Essay*, 46 WAYNE L. REV. 1935, 1962 (2000).

[32] Thomas B. Leary, Former Commissioner of the Fed. Trade Comm'n, *Unfairness and the Internet*, II (Apr. 13, 2000), *available at* http://www.ftc.gov/public-statements/2000/04/unfairness-and-internet.

[33] *Id.* at II-C ("The unfairness count in Touch Tone also raised interesting questions about whether an invasion of privacy by itself meets the statutory requirement that unfairness cause "substantial injury." Unlike most unfairness prosecutions, there was no concrete monetary harm or obvious and immediate safety or health risks. The defendants' revenue came, not from defrauding consumers, but from the purchasers of the information who received exactly what they had requested.").

[34] *Id.*, at III-IV.

The Commission began bringing cases in 2000 alleging that companies employed unreasonable data security practices. While these early cases alleged that the practices were "unfair *and* deceptive," they were, in fact, pure deception cases.[35] In 2005, the FTC filed its first pure unfairness data security action, against BJ's Warehouse. Unlike past defendants, BJ's had, apparently, made no promise regarding data security upon which the FTC could have hung a deception action.[36] Since 2009, we believe the Commission has become considerably more aggressive in its prosecution of unfairness cases, not just about data security, but about privacy and other high tech issues like product design.

Yet it would be hard to pinpoint a single moment when the FTC's approach changed, or to draw a clear line between Republican data security cases and Democratic ones. And this is precisely a function of the first of the two crucial attributes of the modern FTC with which we are concerned: Legal doctrine continues to evolve even in the absence of judicial decisions, its evolution just becomes less transparent and more amorphous. As Commissioner Leary remarked in a footnote that now seems prescient:

> Because this case was settled, I cannot be sure that the other Commissioners agreed with this rationale.[37]

Indeed, this is the crucial difference between the FTC's pseudo common law and *real* common law. There is an observable directedness to the evolution of the real common law, which rests on a sort of ongoing conversation among the courts and the economic actors that appear before them. The FTC's ersatz common law, however, has little of this directedness or openness, and the conversations that do occur are more like whispered tête-à-têtes in the corner that someone else occasionally overhears.

But the second point is actually the more important, although the two are related: In this institutional structure, how often individual Commissioners dissent and how much rigor they demand matters far, far less than the structure of the agency itself. There is only so much an individual can do to divert the path of an already-steaming ship.

This leads back to the point made above: that we should expect regulatory agencies, over time, to expand their discretion as much as the constraints upon the agency allow. In this, regulatory agencies resemble gases, which, when unconstrained, do not occupy a fixed volume (defined by a clear statutory scheme, as in the Rulemaking Model) but rather expand to

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[35] See, e.g., FTC v. Rennert, Complaint, FTC File No. 992 3245, http://www.ftc.gov/os/2000/07/iogcomp.htm (2000); In re Eli Lilly, Complaint, File No. 012 3214, http://www.ftc.gov/os/2002/05/elililycmp.htm (2002).

[36] Complaint, In the Matter of BJ's Wholesale Club, Inc., a corporation, Fed. Trade Comm'n Docket No. C-4148, *available at* http://www.ftc.gov/enforcement/cases-proceedings/042-3160/bjs-wholesale-club-inc-matter.

[37] Leary, *Unfairness and the Internet*, *supra* note 32, n.50.

fill whatever space they occupy. What ultimately determines the size, volume and shape of a gas is its container. So, too, with regulatory agencies: what ultimately determines an agency's scale, scope, and agenda are the external constraints that operate upon it.

The FTC has evolved the way it has because, most fundamentally, Section 5 offers little in the way of prescriptive, statutory constraints, and because the FTC's processes have enabled it to operate case-by-case with relatively little meaningful, ongoing oversight from the courts.

We distinguish this from two other models of regulation: (1) the **Rulemaking Model**, in which the agency's discretion is constrained chiefly by the language of its organic statute, procedural rulemaking requirements and the courts; and (2) the **Evolutionary Model**, in which the agency applies a vague standard case by case, but is constrained in doing so by its ongoing interaction with the courts.[38] By contrast, we call the FTC's current approach the **Discretionary Model**, in which the agency also applies a vague standard case-by-case, but in which it operates without meaningful judicial oversight, such that doctrine evolves at the Commission's discretion and with little of the transparency provided by published judicial opinions. (Dialogue between majority and minority Commissioners seldom approaches the analysis of judicial opinions.)

We believe there is an inherent tendency of agencies that begin with an Evolutionary Model — which is very much the design of the FTC — to slide towards the Discretionary Model, simply because all agencies tend to maximize their own discretion, and because the freedom afforded by the lack of statutory constraints on substance or the agency's case-by-case process enable these agencies to further evade judicial constraints. The only way to check this process, without, of course, simply circumscribing its discretion by substantive statute (i.e., amending section 5(a)(2)), is regular assessment and course-correction by Congress — not with the aim of its own micromanagement of the agency, but rather with the aim of invigorating the ability of the courts to exert their essential role in steering doctrine.

This is not to be taken as an admission of defeat or a condemnation of the Commission. There is no reason to think that the FTC was in every way ideally constituted from the start (or in 1980 or in 1994), that its model could perform exactly as intended and perfectly in the public interest no matter what changed around it. Rather, limited, thoughtful oversight by

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[38] We derive the term "evolutionary" from the Unfairness Policy Statement itself, *supra* note 9:

> *The present understanding of the unfairness standard is the result of an evolutionary process*. The statute was deliberately framed in general terms since Congress recognized the impossibility of drafting a complete list of unfair trade practices that would not quickly become outdated or leave loopholes for easy evasion. The task of identifying unfair trade practices was therefore assigned to the Commission, subject to judicial review, in the expectation that the underlying criteria would evolve and develop over time.

Congress is simply in the nature of the beast. As Justice Holmes said (of the importance of free speech):

> That, at any rate, is the theory of our Constitution. It is an experiment, as all life is an experiment. Every year, if not every day, we have to wager our salvation upon some prophecy based upon imperfect knowledge.[39]

That, in a nutshell, is why regular reauthorization is critical for agencies like the FTC. As President Carter said, "[w]e need vigorous congressional oversight of regulatory agencies." This is more true for the FTC — with its vast discretion, immense investigative power, and all-encompassing scope — than any other agency. As we wrote in the precursor to this report:

> Thus, while the Congress of 1914 intended to create an agency better suited than itself to establish a flexible but predictable and consistent body of law governing commercial conduct, the modern trend of administrative law has relaxed the requirement that an agency's output be predictable or consistent.
>
> The FTC has embraced this flexibility as few other agencies have. Particularly in its efforts to keep pace with changing technology, the FTC has embraced its role as an administrative agency, and frequently sought to untether itself from ordinary principles of jurisprudence (let alone judicial review).[40]

The Doctrinal Pyramid

One of the chief reasons the FTC has come to operate the way it does is that the vocabulary around its operations is deeply confused, particularly around the word "guidance" and the term "common law." In an (admittedly first-cut) effort to introduce some concreteness, we view the various levels of "guidance" as steps in a Doctrinal Pyramid that looks something like the following, from highest to lowest degrees of authority:

1. **The Statute**: Section 5 (and other, issue-specific statutes)
2. **Litigated Cases**: Only these are technically binding on courts, thus they rank near the top of the pyramid, even though they are synthesized in, or cited by, the guidance summarized below. There are precious few of these on Unfairness or the key emerging issues of Deception
3. **Litigated Preliminary Injunctions**: Less meaningful than full adjudications of Section 5, these are, unfortunately, largely the only judicial opinions on Section 5.
4. **High-Level Policy Statements**: Unfairness, Deception, Unfair Methods of Competition

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[39] Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J. dissenting).

[40] *Consumer Protection & Competition Regulation in a High-Tech World, supra*, note 4.

5. **Lower-Level Policy Statements**: The now-rescinded Disgorgement Policy Statement, the (not-yet existent) Materiality Statement we propose, *etc.*
6. **Guidelines**: Akin to the several DOJ/FTC Antitrust Guidelines, synthesizing past approaches to enforcement into discernible principles to guide future enforcement and compliance
7. **Consent Decrees**: Not binding upon the Commission and hinging (indirectly) upon the very low bar of whether the Commission has "reason to believe" a violation occurred, these provide little guidance as to how the FTC really understands Section 5
8. **Closing Letters**: Issued by the staff, these letters at times provide some limited guidance as to what the staff believe is *not* illegal
9. **Reports & Recommendations**: In their current form, the FTC's reports do little more than offer the majority's views of what companies should do to comply with Section 5, but carefully avoid any real legal analysis
10. **Industry Guides**: Issue-specific discussions issued by staff (*e.g.*, photo copier data security)
11. **Public Pronouncements**: Blog posts, press releases, congressional testimony, FAQs, etc.

In essence, under today's Discretionary Model, the FTC puts great weight on the base of the pyramid, while doing little to develop the top. Under the Evolutionary Model, the full Commission would develop doctrine primarily through litigation, and do everything it possibly could to provide guidance at higher levels of the pyramid, such as by debating, refining and voting upon new Policy Statements on each of the component elements of Unfairness and Deception and Guidelines akin to the Horizontal Merger Guidelines. Instead, the FTC staff issues Guides and other forms of casual guidance. Yet not all "guidance" is of equal value. Indeed, much of the "guidance" issued by the FTC serves not to constrain its discretion, but rather to expand it by increasing the agency's ability to coerce private parties into settlements — which begins the cycle anew.

Our Proposed Reforms

Seventeen bills have been introduced in the House Energy & Commerce Committee's Subcommittee on Commerce, Manufacturing and Trade aimed at reforming the agency for the modern, technological age and improving FTC process and subject-matter scope in order to better protect consumers. Most of these will, we hope, be consolidated into a single FTC Reauthorization Act of 2016, passed in both chambers, and signed by the President.

With the hope of aiding this process, we describe and assess nine of these proposed bills, focusing in particular on whether and how well each proposal addresses the fundamental issues that define the problems of today's FTC. In broad strokes, the proposed bills address the following areas:

- Substantive standards
- Enforcement and guidance
- Remedies

- Other process issues
- Jurisdictional issues
- Other issues

Our analysis addresses the bills within the context of these broad categories, and adds our own suggestions (and one additional category: Competition Advocacy) for both minor amendments and additional legislation in each category.

Despite our concerns, we remain broadly supportive of the FTC's mission and we generally support expanding the agency's jurisdiction, to the extent that doing so effectively addresses substantial, identifiable consumer harms or reduces the scope of authority for sector-specific agencies. Although the process reforms proposed in these bills are, we believe, relatively minor, targeted adjustments, taken together they would do much to make the FTC more effective in its core mission of maximizing consumer welfare. But these proposed reforms are only a beginning.

Even if all of these reforms were enacted immediately, they would not fundamentally, or even substantially, change the core functioning of the FTC — and the core problem at the FTC today: its largely unconstrained discretion.

The FTC loudly proclaims the advantages of its *ex post* approach of relying on case-by-case enforcement of UDAP and UMC standards rather than rigid *ex ante* rulemaking, especially over cutting-edge issues of consumer protection. And there is much to commend this sort of approach relative to the prescriptive regulatory paradigm that characterizes many other agencies — again, the Evolutionary Model. But under the FTC's *Discretionary* Model, the Commission uses its "common law of consent decrees" (more than a hundred high-tech cases settled without adjudication, and with essentially zero litigated cases to guide these settlements) and a mix of other forms of soft law (increasingly prescriptive reports based on workshops tailored to produce predetermined outcomes, and various other public pronouncements), to "regulate" — or, more accurately, to try to steer — the evolution of technology.

The required balancing of tradeoffs inherent in unfairness and deception have little meaning if the courts do not review, follow or enforce them; if the Bureau of Economics has little role in the evaluation of these inherently economic considerations embodied in the enforcement decision-making of the Bureau of Consumer Protection or in its workshops; and if other Commissioners are able only to quibble on the margins about the decisions made by the FTC Chairman. Simply codifying these standards, as Congress codified the heart of the Unfairness Policy Statement in Section 45(n) back in 1994, and as the proposed CLEAR Act would finish doing, will not solve the problem: The FTC has routinely circumvented the rigorous analysis demanded by these standards, and the same processes would enable it to continue doing so.

To address these concerns, we also propose here a number of further process reforms that we believe would begin to correct these problems and ensure that the Commission's process really does serve the consumers the agency was tasked with protecting.

Our aim is not to hamstring the Commission, but to ensure that it wields its mighty powers with greater analytical rigor — something that should inure significantly to the benefit of consumers. Ideally, the impetus for such rigor would be provided by the courts, through careful weighing of the FTC's implementation of substantive standards in at least a small-but-significant percentage of cases. Those decisions would, in turn, shape the FTC's exercise of its discretion in the vast majority of cases that will — and should, in such an environment — inevitably settle out of court. The Bureau of Economics and the other Commissioners would also have far larger roles in ensuring that the FTC takes its standards seriously. But reaching these outcomes requires adjustment to the Commission's *processes*, not merely further codification of the standards the agency already purports to follow.

We believe that our reforms should attract wide bipartisan support, if properly understood, and that they would put the FTC on sound footing for its second century — one that will increasingly see the FTC assert itself as the Federal Technology Commission.

FTC Act Statutory Standards

Unfairness

The Statement on Unfairness Reinforcement & Emphasis (SURE) Act

Rep. Markwayne Mullin's (R-OK) bill (H.R. 5115)[41] further codifies promises the FTC made in its 1980 Unfairness Policy Statement — thus picking up where Congress left off in 1994, the last time Congress reauthorized the FTC in Section 5(n):

> The Commission shall have no authority … to declare unlawful an act or practice on the grounds that such act or practice is unfair unless the act or practice [i] causes or is likely to cause substantial injury to consumers [ii] which is not reasonably avoidable by consumers themselves and [iii] not outweighed by countervailing benefits to consumers or to competition. In determining whether an act or practice is unfair, the Commission may consider established public policies as evidence to be considered with all other evidence. Such public policy considerations may not serve as a primary basis for such determination.[42]

[41] The Statement on Unfairness Reinforcement and Emphasis Act, H.R. 5115,114th Cong. (2016) [hereinafter SURE Act] *available at* https://www.congress.gov/bill/114th-congress/house-bill/5115/text.

[42] 15 U.S.C. § 45(n).

This effectively codified the core of the Unfairness Policy Statement, while barring the FTC from relying on public policy determinations alone.[43] The bill would add several additional clauses to Section 5(n), drawn from the Unfairness Policy Statement. Most importantly:

1. It would exclude "trivial or merely speculative" harm from the definition of "substantial" injury.[44]
2. It would enhance the Act's "countervailing benefits" language to require consideration of the "net effects" of conduct, including dynamic, indirect consequences (like effects on innovation).[45]
3. It would prohibit the Commission from "second-guess[ing] the wisdom of particular consumer decisions," and encourage it to ensure "the free exercise of consumer decisionmaking."[46]

These provisions in particular (along with the others included in the bill, to be sure) would codify core aspects of the economic trade-off embodied in the UPS. They would enhance the Commission's administrative efficiency and direct its resources where consumers are most benefited. They would ensure that the FTC's weighing of costs and benefits is as comprehensive as possible, avoiding the systematic focus on concrete, short-term costs to the exclusion of larger, longer-term benefits. And they would help to preserve the inherent benefits of consumer choice, and avoid the intrinsic costs of agency paternalism.

Codification of these provisions would benefit consumers. And because H.R. 5115's language hews almost verbatim to the Unfairness Policy Statement, it should be uncontroversial. Effectively, it simply makes binding those parts of the UPS that Congress did not codify back in 1994.

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[43] The Unfairness Policy Statement had said:

> Sometimes public policy will independently support a Commission action. This occurs when the policy is so clear that it will entirely determine the question of consumer injury, so there is little need for separate analysis by the Commission….
>
> To the extent that the Commission relies heavily on public policy to support a finding of unfairness, the policy should be clear and well-established. In other words, the policy should be declared or embodied in formal sources such as statutes, judicial decisions, or the Constitution as interpreted by the courts, rather than being ascertained from the general sense of the national values. The policy should likewise be one that is widely shared, and not the isolated decision of a single state or a single court. If these two tests are not met the policy cannot be considered as an "established" public policy for purposes of the S&H criterion. The Commission would then act only on the basis of convincing independent evidence that the practice was distorting the operation of the market and thereby causing unjustified consumer injury.

UPS, *supra* note 9.

[44] SURE Act, *supra* note 41.

[45] *Id.*

[46] *Id.*

VALUE OF THE BILL: Codifying the Unfairness Policy Statement Would Reaffirm its Value, Encouraging Dissents and Litigation

Codifying a policy statement, even if verbatim and only in part, does essentially four things:

1. Legally, it makes the policy binding upon the Commission, since Policy Statements, technically, are not. On the margin this should deter the FTC from bringing more-tenuous cases that may not benefit consumers but that it might otherwise have brought.
2. Practically, it confers greater weight on the codified text in the Commission's deliberations, empowering dissenting Commissioners to point to the fact that Congress has chosen to codify certain language and requiring the majority to respond.
3. Legally, it somewhat reduces the deference the courts will give the FTC when it applies the statute (under *Chevron*) relative to the stronger deference given to agencies applying their own policy statements (under *Auer*).[47]
4. Perhaps most importantly, it gives defendants a stronger leg to stand on in court, thus increasing, on the margin, the number that will actually litigate rather than settle. That, in turn, benefits everyone by increasing the stock of judicial analysis of doctrine.

In all four respects, the FTC would greatly benefit from the H.R. 5115's further codification of the Unfairness Policy Statement. As a string of dissenting statements by former Commissioner Wright make lays bare, the FTC is not consistently taking the Unfairness Policy Statement seriously.[48] At most, it pays lip service even to the three core elements of unfairness set forth in Section 5(n) — and even less regard to those aspects of the UPS not codified in Section 5(n).[49]

Indeed, it is difficult to imagine any principled objection to codifying a document that the FTC already claims to observe carefully. And if the agency plans to bring unfairness cases that are *not* covered by the four corners of the Unfairness Policy Statement (yet somehow within Section 5(n)), that should be a matter of grave concern to Congress.

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[47] Note that not everyone agrees that *Chevron* deference is weaker than *Auer* deference. *See* Sasha Volokh, *Auer and Chevron*, THE VOLOKH CONSPIRACY (Mar. 22, 2013), *available at* http://volokh.com/2013/03/22/auer-and-chevron/.

[48] *See, e.g.*, Dissenting Statement of Commissioner Joshua D. Wright, In the Matter of Apple, Inc., FTC File No. 1123108 (Jan. 15, 2014), *available at* https://www.ftc.gov/sites/default/files/documents/cases/140115applestatementwright_0.pdf. *See also* Berin Szóka, *Josh Wright's Unfinished Legacy: Reforming FTC Consumer Protection Enforcement*, TRUTH ON THE MARKET (Aug. 26, 2015), https://truthonthemarket.com/2015/08/26/josh-wrights-unfinished-legacy/.

[49] UPS, *supra* note 9.

RECOMMENDATION: Require a Preponderance of the Evidence Standard for Unfairness Complaints

As valuable as codification of the substantive standards of the Unfairness Policy Statement would be, mere codification, or even tweaking, is unlikely to change much about the FTC's apparent evasion of its obligation to adhere to those standards. Rather, unless the *process* of enforcement by which the FTC has evaded the limits of the Statement is adjusted, the Commission will remain free to avoid the rigor it contemplates.

Indeed, it is far from clear that even the 1994 codification of the heart the Unfairness Policy Statement has been effective in actually changing the FTC's approach to enforcement. It is certainly possible that, but for Section 5(n), the Commission would have taken an even more aggressive approach to unfairness, and done even less to analyze its component elements in enforcement actions.

The process reforms we propose below are intended either (a) to increase the likelihood that the FTC will actually litigate unfairness cases, thus gaining judicial development of the doctrine, (b) that the Commissioners themselves will better develop doctrine through debate, or (c) that FTC staff, particularly through the involvement of the Bureau of Economics, will do so. Some combination of these (and, doubtless, other) reforms is essential to giving effect to Section 5(n) in its current form, to say nothing of expanding 5(n).

But the reform that would make the biggest difference within 5(n) itself would be to amend the existing Section 5(n) as follows:

> The Commission may not issue a complaint under this section unless the Commission demonstrates by a **preponderance of objective evidence** that an act or practice causes or is likely to cause substantial injury to consumers which is not reasonably avoidable by consumers themselves and not outweighed by countervailing benefits to consumers or to competition.

The preponderance of the evidence standard is certainly a higher standard than the FTC currently faces for bringing complaints, but only because that standard is so absurdly low under Section 5(b): "reason to believe that [a violation may have occurred]" and that "it shall appear to the Commission that [an enforcement action] would be to the interest of the public."[50] The "preponderance of the evidence" standard is the same standard used in civil cases, simply requiring that civil plaintiffs provide evidence that that their argument is "more likely than not" to get judgement against defendants. This standard is substantially less stringent than the "beyond a reasonable doubt" standard used in criminal cases, or the "clear and convincing" standard used in habeas petitions, so it should be suitable for the FTC's unfairness work.

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[50] 15 U.S.C. § 45(b).

Why should the FTC have a higher burden (than it does today) at this intermediate stage in its enforcement process, when it brings a complaint? The FTC has significant pre-complaint powers of investigation at its disposal; it will have had considerable opportunity to perform discovery *before* bringing its complaint. Unlike private plaintiffs, who must first survive a *Twombly/Iqbal* motion to dismiss before they can compel discovery, typically at their own expense, the FTC can do so (through its civil investigative demand power) — and impose all of its costs on potential defendants — *before* ever alleging wrongdoing.

As we discuss in more detail below,[51] in order to justify the massive expense of this pre-complaint discovery process, it is not enough that it enables the Commission to engage in fishing expeditions to "uncover" possible violations of the law. Rather, if it is to be justified, and if its use by the Commission is to be kept consistent with its consumer-welfare mission, it must tend to lead to enforcement only when complaints can be justified by the weight of the evidence uncovered. A heightened burden is more likely to ensure this fealty to the consumer interest and to reduce the inefficient imposition of discovery costs on the wrong enforcement targets.

It is also important to note that, although we disagree strongly with their claims,[52] several FTC Commissioners and commentators have asserted that the set of consent orders entered into by the Commission with various enforcement targets constitute a *de facto* common law: "Technically, consent orders legally function as contracts rather than as binding precedent. Yet, in practice, the orders function much more broadly…."[53] In making these claims, proponents, including the Commission's current Chairwoman,[54] assert that "the trajectory and

[51] *See infra* at 31.

[52] *See, e.g.*, Berin Szóka, *Indictments Do Not a Common Law Make: A Critical Look at the FTC's Consumer Protection "Case Law,"* (2014 TPRC Conference Paper, Jul. 15, 2014), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2418572; Geoffrey A. Manne & Ben Sperry, *FTC Process and the Misguided Notion of an FTC "Common Law" of Data Security*, *available at* http://masonlec.org/site/rte_uploads/files/manne%20%26%20sperry%20-%20ftc%20common%20law%20conference%20paper.pdf.

[53] Daniel J. Solove & Woodrow Hartzog, *The FTC and the New Common Law of Privacy*, 114 COLUM. L. REV. 583, 607 (2014).

[54] *Address by FTC Chairwoman Edith Ramirez,* at 6, at the Competition Law Center at George Washington University School of Law (Aug. 13, 2015), *available at* https://www.ftc.gov/system/files/documents/public_statements/735411/150813section5speech.pdf ("As I have emphasized, I favor a common law approach to the development of Section 5 doctrine."). The previous chairwoman held the same view. *See* Commissioner Julie Brill, *Privacy, Consumer Protection, and Competition*, speech given at 12th Annual Loyola Antitrust Colloquium (Apr. 27, 2012), *available at* http://www.ftc.gov/sites/default/files/documents/public_statements/privacy-consumer-protection-andcompetition/120427loyolasymposium.pdf ("Yet our privacy cases are also more generally informative about data collection and use practices that are acceptable, and those that cross the line, under Section 5 of the Federal Trade Commission Act creating what some have referred to as a common law of privacy in this country.").

development [of FTC enforcement] has followed a predictable set of patterns… [that amount to] the functional equivalent of common law."[55]

For these claims to be true or worthy, it would seem necessary, *at a minimum,* that the Commission's consumer protection complaints, which are virtually always coupled with consent orders upon their release (because *there is no statutory standard for settling FTC enforcement actions*), be tied to substantive standards that go beyond the mere exercise of three commissioners' discretion. And yet the FTC and the courts have consistently argued that the FTC Act's "reason to believe" standard for issuance of complaints requires nothing more than this minimal exercise of discretion. As former Commissioner Tom Rosch put it,

> [t]he "reason to believe" standard, however, is not a summary judgment standard: it is a standard that simply asks whether there is a reason to believe that litigation may lead to a finding of liability. That is a low threshold…. [T]he "reason to believe" standard is amorphous and can have an "I know it when I see it" feel."[56]

This creates a real problem for the claims that the Commission's consent orders have any kind of precedential power:

> In theory, the questions of whether to bring an enforcement action and whether a violation occurred are distinct; but in practice, when enforcement actions end in settlements (and when the two are often filed simultaneously), the two questions collapse into one. The FTC Act does not impose any additional requirement on the FTC to negotiate a settlement…. Thus, at best, the FTC's decisions are roughly analogous not to court decisions on the merits, but to court decisions on motions to dismiss…. Or, perhaps even more precisely, the FTC's decisions are analogous to reviews of warrants in criminal cases, as Commissioner Rosch has argued. It would be a strange criminal common law, indeed, that confused ultimate standards of guilt with the far lower standard of whether the police could properly open an investigation, yet this is essentially what the FTC's "common law" of settlements does.[57]

The incentives, discussed in more detail below,[58] that impel nearly every FTC consumer protection enforcement target to settle with the agency ensure that the only practical inflec-

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[55] Solove & Hartzog, *supra* note 53, at 608.

[56] J. Thomas Rosch, Commissioner, Fed. Trade Comm'n, *Remarks at the American Bar Association Annual Meeting*, 3–4 (Aug. 5, 2010), *available at* https://www.ftc.gov/sites/default/files/documents/public_statements/so-i-serve-both-prosecutor-and-judge-whats-big-deal/100805abaspeech.pdf.

[57] Berin Szóka, *Indictments Do Not a Common Law Make: A Critical Look at the FTC's Consumer Protection "Case Law"* 7-8, available at http://masonlec.org/site/rte_uploads/files/Szoka%20for%20GMU%20FTC%20Workshop%20-%20May%202014.pdf.

[58] See *infra* at 31.

tion point at which the entire enforcement process is subject to any kind of "review," is when the Commissioners vote to authorize the issuance of a formal complaint and, simultaneously, approve an already-negotiated settlement. That such a determination may be based solely on the effectively unreviewable[59] discretion of the Commission that the complaint — not the consent order — meets the current, low threshold is troubling.

As former FTC Chairman Tim Muris observed, "Within very broad limits, the agency determines what shall be legal. Indeed, the agency has been 'lawless' in the sense that it has traditionally been beyond judicial control."[60] If meaningful judicial review is ever to be brought to bear on the final agency decisions embodied in consent orders, it is crucial that the complaints that give rise to those settlements be subject to a more meaningful standard that imposes some evidentiary and logical burden on the Commission beyond the mere exercise of its discretion. While a preponderance of the evidence standard would hardly impose an insurmountable burden on the agency, it would at least impose a standard that is more than purely discretionary, and thus reviewable by courts and subject to recognizable standards upon which such review could proceed. Most importantly, enacting such a standard should, on the margin, embolden defendants to resist settling cases, thus producing more judicial decisions, which could in turn constrain the FTC's discretion.

None of our proposed reforms to the FTC's investigation process[61] would in any way undermine the FTC's ability to gather information prior to issuing a complaint. The FTC would still be able to contact parties and investigate them through its 6(b) powers and use civil investigative demands if necessary to compel disclosure. But it is necessary to heighten the FTC's standard for finally bringing a complaint since it can do significant investigation beforehand. It is not unreasonable to think they should have enough evidence to determine a violation of the law by a preponderance of the evidence by the point of complaint, especially since this is where most enforcement actions end in settlement.

Deception & Materiality

No Bill Proposed

The FTC's 1983 Deception Policy Statement forms one of the two pillars of its consumer protection work. As with Unfairness, the purpose of the Deception power is to protect consumers from injury. But unlike Unfairness, Deception does not require the FTC to prove injury. Instead, the FTC need prove only materiality — as an evidentiary proxy for injury:

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[59] *See* FTC v. Standard Oil Co. of Cal., 449 U.S. 232 (1980).

[60] Muris, *supra* note 8, at 49.

[61] *See infra* at 31.

> [T]he representation, omission, or practice must be a "material" one. The basic question is whether the act or practice is likely to affect the consumer's conduct or decision with regard to a product or service. If so, the practice is material, and consumer injury is likely, because consumers are likely to have chosen differently but for the deception. **In many instances, materiality, and hence injury, can be presumed from the nature of the practice. In other instances, evidence of materiality may be necessary**. Thus, the Commission will find deception if there is a representation, omission or practice that is likely to mislead the consumer acting reasonably in the circumstances, to the consumer's detriment….[62]
>
> A finding of materiality is also a finding that injury is likely to exist because of the representation, omission, sales practice, or marketing technique. Injury to consumers can take many forms. **Injury exists if consumers would have chosen differently but for the deception**. **If different choices are likely, the claim is material, and injury is likely as well. Thus, injury and materiality are different names for the same concept**.[63]

Materiality is the *point* of the Deception Policy Statement. It is a shortcut by which the FTC can protect consumers from injury (*i.e.*, not getting the benefit of the bargain promised them) without having to establish injury (that failing to get this benefit actually harms them). A finding of materiality allows the FTC to presume injury because, in the traditional marketing context, a deceptive claim that is "material" enough to alter consumer behavior (which is the *point* of marketing, after all) may reasonably be presumed to do so in ways that a truthful claim wouldn't (or else why bother making the misleading claim?).

Unfortunately, the FTC has effectively broken the logic of the materiality "shortcut" by extending a *second* set of presumptions: most notably, that all express statements are material. This presumption may make sense in the context of traditional marketing claims, but it breaks down with things like privacy policies and other non-marketing claims (like online help pages) — situations where deceptive statements certainly *may* alter consumer behavior, but in which such an effect can't be presumed (because the company making the claim is not doing so in order to convince consumers to purchase the product).[64]

The FTC has justified this presumption-on-top-of-a-presumption by pointing to this passage of the DPS (shown with the critical footnotes):

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[62] *DPS supra* note 10.

[63] *Id.* at 6 (emphasis added).

[64] Of course, even in the marketing context this presumption is one of administrative economy, not descriptive reality. While there is surely a correlation between statements intended to change consumer behavior and actual changes in consumer behavior, a causal assumption is not warranted. *See generally* Geoffrey A. Manne & E. Marcellus Williamson, *Hot Docs vs. Cold Economics: The Use and Misuse of Business Documents in Antitrust Enforcement and Adjudication*, 47 ARIZ, L. REV. 609 (2005).

> The Commission considers certain categories of information presumptively material.[47] First, the Commission presumes that express claims are material.[48] As the Supreme Court stated recently [in *Central Hudson Gas & Electric Co. v. PSC*], "[i]n the absence of factors that would distort the decision to advertise, we may assume that the willingness of a business to promote its products reflects a belief that consumers are interested in the advertising."
>
> [47] The Commission will always consider relevant and competent evidence offered to rebut presumptions of materiality.
>
> [48] Because this presumption is absent for some implied claims, the Commission will take special caution to ensure materiality exists in such cases.[65]

In effect, the first two sentences have come to swallow the rest of the paragraph, including the logic of the Supreme Court's decision in *Central Hudson,* the single most important case of all time regarding the regulation of commercial speech.[66] In particular, the FTC ignores the "absence of factors that would distort the decision to advertise."[67]

When the Deception Policy Statement talked about "express claims," it was obviously contemplating *marketing* claims, where the presumption of materiality makes sense: if a company buys an ad, anything it says in the ad is intended to convince the viewer to buy the product. The intention to advertise the product is simply the flipside of materiality — a way of inferring what reasonable buyers would think from what profit-maximizing sellers obviously intended. But this logic breaks down once we move beyond advertising claims.

We have written at length about this problem in the context of the FTC's 2015 settlement with Nomi, the maker of a technology that allowed stores to track users' movement on their premises, as well as a shopper's repeat visits, in order to deliver a better in-store shopping experience, placement of products, etc.[68]

The FTC's complaint focused on a claim made in the privacy policy on Nomi's website that consumers could opt out on the website or at "any retailer using Nomi's technology." Nomi failed to provide an in-store mechanism for allowing consumers to opt out of the tracking program, but it did provide one on the website — right where the allegedly deceptive claim was made. That Nomi did not, in fact, offer an in-store opt-out mechanism in violation of its express promise to do so is clear. Whether, taken in context, that failure was *material*, however, is not clear.

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[65] *Id.* at 5.

[66] Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of NY, 447 U.S. 557 (1980).

[67] *Id.* at 567–68.

[68] *See* Geoffrey A. Manne, R. Ben Sperry & Berin Szóka, *In the Matter of Nomi Technologies, Inc.: The Dark Side of the FTC's Latest Feel-Good Case* (ICLE Antitrust & Consumer Protection Research Program White Paper 2015-1), *available at* http://laweconcenter.org/images/articles/icle-nomi_white_paper.pdf.

For the FTC majority, even though the website portion of the promise was fulfilled, Nomi's failure to comply with the in-store portion amounted to an actionable deception. But the majority dodged the key question: whether the evidence that Nomi accurately promised a website opt-out, and that consumers could (and did) opt-out using the website, rebuts the presumption that the inaccurate, in-store opt-out portion of the statement was material, and sufficient to render the statement *as a whole* deceptive.

In other words, the majority assumed that Nomi's express claim, in the context of a privacy policy rather than a marketing statement, affected consumers' behavior. But given the very different purposes of a privacy policy and a marketing statement (and the immediate availability of the website opt-out in the very place that the claim was made), that presumption seems inappropriate. The majority did not discuss the reasonableness of the presumption given the different contexts, which *should* have been the primary issue. Instead it simply relied on a literal reading of the DPS, neglecting to consider whether its underlying logic merited a different approach.

The Commission failed to demonstrate that, *as a whole*, Nomi's failure to provide in-store opt out was deceptive, in clear contravention of the Deception Policy Statement's requirement that all statements be evaluated in context:

> [T]he Commission will evaluate the entire advertisement, transaction, or course of dealing in determining how reasonable consumers are likely to respond. Thus, in advertising the Commission will examine "the entire mosaic, rather than each tile separately."[69]

Moreover, despite the promise in the DPS that the Commission would "always consider relevant and competent evidence offered to rebut presumptions of materiality," the FTC failed to do so in *Nomi*. As Commissioner Wright noted in his dissent:

> [T]he Commission failed to discharge its commitment to duly consider relevant and competent evidence that squarely rebuts the presumption that Nomi's failure to implement an additional, retail-level opt out was material to consumers. In other words, the Commission neglects to take into account evidence demonstrating consumers would not "have chosen differently" but for the allegedly deceptive representation.
>
> Nomi represented that consumers could opt out on its website as well as in the store where the Listen service was being utilized. Nomi did offer a fully functional and operational global opt out from the Listen service on its website. Thus, the only remaining potential issue is whether Nomi's failure to offer the represented in-store opt out renders the statement in its privacy policy deceptive. The evi-

[69] *DPS supra* note 10, at 4 n.31 (quoting Fed. Trade Comm'n v. Sterling Drug, 317 F.2d 669, 674 (2d Cir. 1963)).

> dence strongly implies that specific representation was not material and therefore not deceptive. Nomi's "tracking" of users was widely publicized in a story that appeared on the front page of The New York Times, a publication with a daily reach of nearly 1.9 million readers. Most likely due to this publicity, Nomi's website received 3,840 unique visitors during the relevant timeframe and received 146 opt outs — an opt-out rate of 3.8% of site visitors. This opt-out rate is significantly higher than the opt-out rate for other online activities. This high rate, relative to website visitors, likely reflects the ease of a mechanism that was immediately and quickly available to consumers at the time they may have been reading the privacy policy.
>
> The Commission's reliance upon a presumption of materiality as to the additional representation of the availability of an in-store opt out is dubious in light of evidence of the opt-out rate for the webpage mechanism. Actual evidence of consumer behavior indicates that consumers that were interested in opting out of the Listen service took their first opportunity to do so. To presume the materiality of a representation in a privacy policy concerning the availability of an additional, in-store opt-out mechanism requires one to accept the proposition that the privacy-sensitive consumer would be more likely to bypass the easier and immediate route (the online opt out) in favor of waiting until she had the opportunity to opt out in a physical location. Here, we can easily dispense with shortcut presumptions meant to aid the analysis of consumer harm rather than substitute for it. The data allow us to know with an acceptable level of precision how many consumers — 3.8% of them — reached the privacy policy, read it, and made the decision to opt out when presented with that immediate choice. The Commission's complaint instead adopts an approach that places legal form over substance, is inconsistent with the available data, and defies common sense.[70]

The First Circuit's recent opinion in *Fanning v. FTC* compounds the FTC's error. First, it holds (we believe erroneously) that the DPS's presumptions aren't limited to the marketing milieu:

> There is no requirement that a misrepresentation be contained in an advertisement. The FTC Act prohibits 'deceptive acts or practices,' and we have upheld the Commission when it imposed liability based on misstatements not contained in advertisements.[71]

In addition, the *Fanning* decision would allow the FTC to go even a step further. Citing the language from the Deception Policy Statement that "claims pertaining to a central charac-

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[70] Dissenting Statement of Commissioner Joshua D. Wright, In the Matter of Nomi Technologies, Inc., at 3-4 (Apr. 23, 2015) (emphasis added), *available at* https://www.ftc.gov/system/files/documents/public_statements/638371/150423nomiwrightstatement.pdf.

[71] Fanning v. Fed. Trade Comm'n, No. 15-1520, slip op. at 13 (May 9, 2016), *available at* https://www.ftc.gov/system/files/documents/cases/051816jerkopinion.pdf (citing *Sunshine Art Studios, Inc. v. FTC*, 481 F.2d 1171, 1173-74 (1st Cir. 1973) (finding FTC Act violation based on company's practice of sending customers excess merchandise and using "a fictitious collection agency to coerce payment")).

teristic of the product about 'which reasonable consumers would be concerned,'" are material, the First Circuit shifted the burden of proof to Fanning to prove that its promises were *not* material.

Of course, the DPS strongly suggests that this "central characteristic" language is also applicable only in the marketing context — in the context, that is, of claims made about a product's "central characteristics" in the service of *selling* that product — and that it is fact-dependent:

> Depending on the facts, information pertaining to the central characteristics of the product or service will be presumed material. Information has been found material where it concerns the purpose, safety, efficacy, or cost, of the product or service. Information is also likely to be material if it concerns durability, performance, warranties or quality.[72]

Much like *Nomi*, the effect of the First Circuit's decision could be far-reaching. If the FTC may simply assert that claims relate to the central characteristic of a product, receive a presumption of materiality on that basis, and then shift the burden the defendant to adduce evidence to the contrary, it may *never* need to offer any evidence of its own on materiality. Combined this with the reluctance of the FTC to actually consider evidence rebutting the presumption (as illustrated in *Nomi*), we could see cases where the FTC presumes materiality on the basis of mere allegation and ignores all evidence to the contrary offered in rebuttal, despite its promise to "always consider relevant and competent evidence offered to rebut presumptions of materiality.[73] This would lead to an outcome that the drafters of the Deception Policy Statement plainly did not intend: that effectively every erroneous or inaccurate word ever publicly disseminated by companies may be presumed to injure consumers and constitute an actionable violation of Section 5.

In short, if the courts will defer to the FTC even as it reads the materiality requirement out of the Deception Policy Statement, this is not a vindication of the FTC's reading; it is merely a reminder of the vastness of the deference paid to agencies in interpreting ambiguous statutes. And it should be a reminder to Congress that only through legislation can Congress ultimately reassert itself — if only to keep the FTC on the path the agency itself laid out decades ago.

RECOMMENDATION: Codify the 1983 Deception Policy Statement

Congress should codify the Deception Policy Statement in a new Section 5(o), just as it codified the core part of the Unfairness Policy Statement in 1994, and just as the SURE Act would codify the rest of the UPS today. Fully codifying both statements (all *three* statements,

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[72] *DPS supra* note 10, at 5.

[73] *Id.* at n.47.

including the UMC Enforcement Policy Statement) is a good idea if only because the FTC is somewhat more likely to take them seriously if they are statutory mandates. But, as we have emphasized, codification alone will not do much to change the institutional structures and processes that are at the heart of the statements' relative ineffectiveness in guiding the FTC's discretion.

In codifying the DPS, Congress should be mindful of the problems we discuss above. It should also modify the DPS' operative language to mitigate the interpretative problems arising from its inevitable ambiguity. Without specifying precise language here, a few guidelines for drafting such language come readily to mind:

1. Defer to the DPS drafters: they could never have meant for the exceptions (presumptions) to subsume the rule (the materiality requirement), and the codified language should endeavor to reflect this.
2. Acknowledge that there are differences between marketing language and language used in other contexts, including, importantly, today's ubiquitous privacy policies and website terms of use — settings that weren't contemplated by the DPS drafters.
3. Clarify what evidentiary burden is required to demonstrate materiality in contexts where it shouldn't simply be inferred, and, after *Fanning*, clarify whether, and when, the burden should shift from the FTC to defendants.

RECOMMENDATION: Clarify that Legally Required Statements Cannot Be Presumptively Material

Particularly given the increasing importance of privacy policies in the FTC's deception enforcement practice, it is also important to clarify whether legally mandated language should be presumed material. We believe that the DPS' exception for "factors that would distort the decision to advertise" includes a legal mandate to say something, which unequivocally "distorts" the decision to proffer such language. Thus, in most cases, privacy policies — required by California law[74] — ought not be treated as presumptively material. This would not preclude the FTC from proving that they *are* material, of course. It would simply require the Commission to *establish* their materiality in each particular case — which, again, was the point of the Deception Policy Statement in the first place.

RECOMMENDATION: Delegate Reconsideration of Other Materiality Presumptions

Unfortunately, it will be difficult for Congress to address the other aspects of the FTC's interpretation of materiality by statute, because each is highly fact-specific. But, ultimately, ensuring that the FTC's implementation of the Deception Policy Statement's requirement of

[74] *See* CAL. BUS. & PROF. § 22575, *available at* http://www.leginfo.ca.gov/cgi-bin/displaycode?section=bpc&group=22001-23000&file=22575-22579.

a rigorous assessment of trade-offs doesn't require specification of outcomes; it requires some institutional rejiggering ensure that the Bureau of Consumer Protection is motivated to do so by some combination of the courts, the commissioners, and the Bureau of Economics.

Instead of trying to address these issues directly, Congress could, for example, direct the FTC to produce a Policy Statement on Materiality in which the Commission attempts to clarify these issues on its own. Thus, for example, the Commission could describe factors for determining whether and when an online help center should be considered a form of marketing that merits the presumption. Or, as we have previously proposed, Congress could delegate this and other key doctrinal questions to a Modernization Commission focused on high-tech consumer protection issues like privacy and data security, parallel to the Antitrust Modernization Commission.[75]

RECOMMENDATION: Require Preponderance of the Evidence in Deception Cases

Above, we explain that among our top three priorities for additional reforms — indeed, for reforms overall — is adding a "preponderance of the evidence" standard for unfairness cases by expanding upon Section 5(n).[76] We urge Congress to include the same standard in a new Section 5(o) for non-fraud deception cases. Again, this standard should be easy for the FTC to satisfy.

Unfair Methods of Competition

No Bill Proposed

The Commission's unanimous adoption last year of a "Statement of Enforcement Principles Regarding 'Unfair Methods of Competition'" was a watershed moment for the agency.[77] The adoption of the Statement marked the first time in the Commission's 100-year history

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[75] Comments of TechFreedom & International Center for Law and Economics, In the Matter of Big Data and Consumer Privacy in the Internet Economy, Docket No. 140514424–4424–01, at 4 (Aug. 5, 2014), available at http://www.laweconcenter.org/images/articles/tf-icle_ntia_big_data_comments.pdf ("A Privacy Law Modernization Commission could do what Commerce on its own cannot, and what the FTC could probably do but has refused to do: carefully study where new legislation is needed and how best to write it. It can also do what no Executive or independent agency can: establish a consensus among a diverse array of experts that can be presented to Congress as, not merely yet another in a series of failed proposals, but one that has a unique degree of analytical rigor behind it and bipartisan endorsement. If any significant reform is ever going to be enacted by Congress, it is most likely to come as the result of such a commission's recommendations.").

[76] *See supra* note 18.

[77] Fed. Trade Comm'n, Statement of Enforcement Principles Regarding "Unfair Methods of Competition" Under Section 5 of the FTC Act (Aug. 13, 2015), *available at* https://www.ftc.gov/system/files/documents/public_statements/735201/150813section5enforcement.pdf.

that the FTC issued enforcement guidelines for cases brought under the Unfair Methods of Competition ("UMC") provisions of Section 5 of the FTC Act.[78]

Enforcement principles for UMC actions were in desperate need of clarification at the time of the Statement's adoption. Without any UMC standards, the FTC had been essentially completely free to leverage its costly adjudication process into settlements (or short-term victories), and to leave businesses in the dark as to what sorts of conduct might trigger enforcement. Through a series of un-adjudicated settlements, UMC unfairness doctrine (such as it is) has remained largely within the province of FTC discretion and without judicial oversight. As a result, and either by design or by accident, UMC never developed a body of law encompassing well-defined goals or principles like antitrust's consumer-welfare standard. Several important cases had seemingly sought to take advantage of the absence of meaningful judicial constraints on UMC enforcement actions to bring standard antitrust cases under the provision.[79] And more than one recent Commissioner had explicitly extolled the virtue of the unfettered (and unprincipled) enforcement of antitrust cases the provision afforded the agency.[80] The new Statement makes it official FTC policy to reject this harmful dynamic.

The UMC Statement is deceptively simple in its framing:

> In deciding whether to challenge an act or practice as an unfair method of competition in violation of Section 5 on a standalone basis, the Commission adheres to the following principles:
>
> - the Commission will be guided by the public policy underlying the antitrust laws, namely, the promotion of consumer welfare;
> - the act or practice will be evaluated under a framework similar to the rule of reason, that is, an act or practice challenged by the Commission must cause, or be likely to cause, harm to competition or the competitive process, taking into account any associated cognizable efficiencies and business justifications; and

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[78] It should be noted that the Statement represents a landmark victory for Commissioner Joshua Wright, who has been a tireless advocate for defining the scope of the Commission's UMC authority since before his appointment to the FTC in 2013. *See, e.g.*, Joshua D. Wright, *Abandoning Antitrust's Chicago Obsession: The Case for Evidence-Based Antitrust*, 78 ANTITRUST L. J. 241 (2012).

[79] For a succinct evaluation of these cases (including, e.g., *Intel* and *N-Data*), see Geoffrey A. Manne & Berin Szóka, *Section 5 of the FTC Act and monopolization cases: A brief primer*, TRUTH ON THE MARKET (Nov. 26, 2012), https://truthonthemarket.com/2012/11/26/section-5-of-the-ftc-act-and-monopolization-cases-a-brief-primer/.

[80] *See, e.g.*, Statement of Chairman Leibowitz and Commissioner Rosch, In the Matter of Intel Corp., Docket No. 9341, 1, *available at* https://www.ftc.gov/system/files/documents/public_statements/568601/091216intelchairstatement.pdf ("[I]t is more important than ever that the Commission actively consider whether it may be appropriate to exercise its full Congressional authority under Section 5.").

- the Commission is less likely to challenge an act or practice as an unfair method of competition on a standalone basis if enforcement of the Sherman or Clayton Act is sufficient to address the competitive harm arising from the act or practice.[81]

Most importantly, the Statement espouses a preference for enforcement under the antitrust laws over UMC when both might apply, and brings the weight of consumer-welfare-oriented antitrust law and economics to bear on such cases.

RECOMMENDATION: Codify the Statement of Enforcement Principles Regarding "Unfair Methods of Competition" Under a New Section 5(p) of the FTC Act

As beneficial as the Statement is, it necessarily reflects compromise. In particular, the third prong is expressed merely as a *preference* for antitrust enforcement rather than an obligation. And, of course, such statements are not binding on the Commission, no matter how strongly worded they may be, and no matter how much "soft law" may be brought to bear on the Commissioners charged with following it.

For these reasons, Congress should codify the most important aspects of the Statement — much as it did with the Unfairness Policy Statement's consumer-injury unfairness test — by adding the following language in a new Section 5(p):

> The Commission ***shall not*** challenge an act or practice as an unfair method of competition on a standalone basis if the alleged competitive harm arising from the act or practice is subject to enforcement under the Sherman or Clayton Act.
>
> An act or practice challenged by the Commission as an unfair method of competition must cause, or be likely to cause, harm to competition or the competitive process, taking into account any associated cognizable efficiencies and business justifications.

This language is taken directly from the UMC Statement, with the small tweak highlighted above *requiring* application of the antitrust laws instead of UMC in appropriate cases, rather than merely expressing a preference for doing so.

Such language would harmonize enforcement of all anticompetitive practices under the antitrust laws' consumer-welfare standard, while still permitting the few cases not amenable to Sherman or Clayton Act jurisdiction (*e.g.*, invitations to collude) to be brought by the Commission. Importantly, language such as this, which would make enforcement under the antitrust laws *obligatory* where both UMC and antitrust could apply, would transform the Statement's expression of agency preference into an enforceable statutory requirement.

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[81] Statement of UMC Enforcement Principles, *supra* note 77.

Enforcement & Guidance

The FTC is commonly labeled a "law enforcement agency," but in reality it is an administrative agency that regulates primarily through enforcement rather than rulemaking:

> As an administrative agency, the FTC's primary form of regulation involves administrative application of a set of general principles — a "law enforcement" style function that, practically speaking, operates as administrative regulation….[82]

This administrative enforcement model puts significant emphasis on the agency's investigative power, and it is the investigatory aspect of its enforcement process that has become the agency's most powerful — and least overseen — tool. As one commentator notes, "[t]he FTC possesses what are probably the broadest investigatory powers of any federal regulatory agency."[83]

The Commission's investigatory process is also the heart of the mechanism by which the agency largely bypasses judicial oversight:

> [Not even] the courts have… been a significant factor in deterring FTC investigation. Indeed, the bulk of court cases appear to affirm the agency's authority to obtain information pursuant to the Federal Trade Commission Act. Thus, any constraints placed upon the FTC's ability to obtain information must lie elsewhere.[84]

By overly compelling companies to settle enforcement actions when they are little more than investigations, the investigative process inevitably leads, on the margin, to less-well-targeted investigations, increased discovery burdens on (even blameless) potential defendants, inefficiently large compliance expenditures throughout the economy, under-experimentation and innovation by firms, doctrinally questionable consent orders, and a relative scarcity of judicial review of Commission enforcement decisions.

More than any other aspect of the FTC Act or the FTC's operations, it is here that reinvigorated congressional oversight is needed. Even Chris Hoofnagle, who has long advocated that the FTC be far more aggressive on privacy and data security, warns, in his new treatise on privacy regulation at the agency, that

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[82] *Consumer Protection & Competition Regulation in a High-Tech World: Discussing the Future of the Federal Trade Commission*, *supra* note 4, at 12.

[83] Stephanie W. Kanwit, 1 Federal Trade Commission § 13:1 at 13-1 (West 2003).

[84] Darren Bush, *The Incentive and Ability of the Federal Trade Commission to Investigate Real Estate Markets: An Exercise in Political Economy*, 20-21, *available at* http://www.antitrustinstitute.org/files/517c.pdf.

> the FTC's investigatory power is very broad and is akin to an inquisitorial body. On its own initiative, it can investigate a broad range of businesses without any indication of a predicate offense having occurred.[85]

In competition cases, the entire Commission must vote to authorize CIDs in each matter and also vote to close investigations once compulsory process is issued. But in the consumer protection context, the Commission issues standing orders — "omnibus resolutions" (ORs) — authorizing extremely broad, industry-wide investigations that authorize the subsequent issuance of CIDs with the consent of only a single Commissioner. For instance, there is a standing Commission order authorizing staff to investigate telemarketing fraud cases.[86] Thus, if staff wants to issue a CID to investigate a specific telemarketer or any of a wide range of companies that may be supporting telemarketers, it need seek approval for the CID from only a single Commissioner. These requests are frequent (to the best of our knowledge amounting to many dozens *per week*), and routinely granted.

The staff's ability to rely upon Omnibus Resolutions in this manner bypasses an important aspect of how the FTC's enforcement approach is structured on paper. The FTC Operating Manual draws a clear line between initial phase investigations (initiated and run by the staff at their own discretion for up to 100 hours in consumer protection cases) and full investigations. The decision to upgrade an investigation can be made by the Bureau Director on delegated authority, but at least this creates some potential for involvement of other Commissioners. It also requires written analysis by the staff[87] — something other Commissioners could ask to see. But most relevant to the immediate discussion is the Commission's policy that

> Compulsory procedures are not ordinarily utilized in the initial phase of investigations; therefore, facts and data which cannot be obtained from existing sources must be developed through the use of voluntary procedures.[88]

Relying on ORs, however, the staff may make use of compulsory process even when it would not otherwise be appropriate to do so.

At the same time, the Commission may (if it so chooses) bring its Section 5 cases (those relatively few that don't settle) in its own administrative tribunal, whose decisions are appealed to the Commission itself. Only after the Commission's review (or denial of review) may a

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[85] HOOFNAGLE, FEDERAL TRADE COMMISSION PRIVACY LAW & POLICY, *supra* note 3, at 102.

[86] Resolution No. 0123145, "Resolution Directing the Use of Compulsory Process in a Nonpublic Investigation of Telemarketers, Sellers, Suppliers, and Others" Technically the Telemarketing Resolution expired in April 2016. But it authorizes continuing investigation subject to already-issued CIDs as long as necessary. Although no further CIDs will be issued, the investigation continues.

[87] Federal Trade Commission, *Operating Manual*, 3.5.1.2 [hereinafter Operating Manual].

[88] *Id.* at 3.2.3.2.

party bring its case before an Article III court. Needless to say, this adds an extremely costly layer of administrative process to enforcement, as former Commissioner Wright explains:

> [T]he key to understanding the threat of Section 5 is the interaction between its lack of boundaries and the FTC's administrative process advantages.... Consider the following empirical observation that demonstrates at the very least that the institutional framework that has evolved around the application of Section 5 cases in administrative adjudication is quite different than that faced by Article III judges in federal court in the United States. The FTC has voted out a number of complaints in administrative adjudication that have been tried by administrative law judges ("ALJs") in the past nearly twenty years. In each of those cases, after the administrative decision was appealed to the Commission, the Commission ruled in favor of FTC staff. In other words, **in 100 percent of cases where the ALJ ruled in favor of the FTC, the Commission affirmed; and in 100 percent of the cases in which the ALJ ruled against the FTC, the Commission reversed**. By way of contrast, when the antitrust decisions of federal district court judges are appealed to the federal courts of appeal, plaintiffs do not come anywhere close to a 100 percent success rate. Indeed, the win rate is much closer to 50 percent.[89]

The net effect of these procedural circumstances is stark. Wright continues:

> The combination of institutional and procedural advantages with the vague nature of the Commission's Section 5 authority gives the agency the ability, in some cases, to elicit a settlement even though the conduct in question very likely may not [violate any law or regulation]. This is because firms typically prefer to settle a Section 5 claim rather than going through lengthy and costly administrative litigation in which they are both shooting at a moving target and have the chips stacked against them. Significantly, such settlements also perpetuate the uncertainty that exists as a result of the ambiguity associated with the Commission's [Section 5] authority by **encouraging a process by which the contours of Section 5 are drawn without any meaningful adversarial proceeding or substantive analysis of the Commission's authority**.[90]

Further, the Commission currently enjoys a nearly insurmountable presumption that its omnibus resolutions are proper — a fact that places subjects of investigations at a severe disadvantage when trying to challenge the Commission's often intrusive investigative process.

Whether issued under an Omnibus Resolution or otherwise, the Commission's CIDs allow the agency to impose enormous costs on potential defendants before even a single Commis-

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[89] Joshua Wright, *Recalibrating Section 5: A Response to the CPI Symposium*, CPI ANTITRUST CHRONICLE (Nov. 2013 (2)), at 4 (emphasis added), *available at* https://www.ftc.gov/sites/default/files/documents/public_statements/recalibrating-section-5-response-cpi-symposium/1311section5.pdf.

[90] *Id.* at 5 (emphasis added).

sioner — let alone the entire Commission or a court of law — determines that there is even a "reason to believe" that the party being investigated has violated any law.

The direct costs of compliance with these extremely broad CIDs can be enormous. Unlike discovery requests in private litigation, reimbursement of costs associated with CID compliance is not available, even if a defendant prevails. Among other things, CID recipients will be required to incur the expense of performing electronic and offline searches for copious amounts of information (which may require the hiring of outside vendors), interviewing employees, the business costs of lost employee and management time, and attorneys' fees. Moreover, there may be several CIDs issued to a single company. And, sometimes of greatest importance, in many cases publicly traded companies will be required to disclose receipt of a CID in its SEC filings. This can have significant immediate effects on a company's share price and do lasting damage to its reputation among consumers.

The experience of Wyndham Hotels is illustrative. The company became the first to challenge an FTC data security enforcement action following more than twelve years of FTC data security settlements. Even before it finally had recourse to an Article III court, Wyndham had already incurred enormous costs, as we noted in our amicus brief in support of Wyndham's 2013 motion to dismiss:

> Burdensome as settlements can be, *not* settling can be even costlier. Wyndham, for example, has already received 47 document requests in this case and spent $5 million responding to these requests. The FTC's compulsory investigative discovery process and administrative litigation both consume the most valuable resource of any firm: the time and attention of management and key personnel.[91]

And it is difficult for CID recipients to challenge a CID on the basis of cost. As the Commission notes in a ruling denying one such request:

> WAM [West Asset Management] has not satisfied its burden of demonstrating compliance with the CID would be unduly burdensome…. WAM has not cited, and the Commission is unaware of, any cases to support WAM's minimize-disruption standard. "Thus courts have refused to modify investigative subpoenas unless compliance threatens to unduly disrupt or seriously hinder normal operations of a business." As in *Texaco* the breadth of the CID is a reflection of the comprehensiveness of the inquiry being undertaken and the magnitude of WAM's business operations.[92]

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[91] Amici Curiae Brief Of TechFreedom, International Center for Law and Economics & Consumer Protection Scholars, Fed. Trade Comm'n v. Wyndham Worldwide Corp., No. 2:13-cv-01887 (3d Cir. 2013) at 13.

[92] Request for Review of Denial of Petition to Limit Civil Investigative Demand, File No. 0723006 (Jul. 2, 2008), *available at* https://www.ftc.gov/sites/default/files/documents/petitions-quash/west-asset-management-inc./080702westasset.pdf (citing Fed. Trade Comm'n v. Texaco, Inc., 555 F.2d 862, 882 (D.C. Cir. 1977)).

High costs, as long as they don't threaten a company's viability, will be insufficient to quash or even minimize the scope of a CID. But even expenses that don't threaten viability can be extremely large and extremely burdensome. And, of course, broader costs (*e.g.*, on stock price and market reputation) are extremely difficult to measure and unaccounted for in the FTC's assessment of a CID's burden.

It should be noted that, unlike complaints (before adjudication) and consent orders, CIDs are directly reviewed by courts at times. For better or worse, however, courts are prone to give the Commission an extreme degree of deference when reviewing CIDs. "The standard for judging relevancy in an investigatory proceeding is more relaxed than in an adjudicatory one… The requested material, therefore, need only be relevant to the investigation — the boundary of which may be defined quite generally."[93] Thus, the Commission has "'extreme breadth' in conducting … investigations."[94]

But high *direct* costs aren't even the most troubling part. The indirect, societal cost of overly broad CIDs is the increased propensity of companies to settle to avoid them. For reasons we also discuss elsewhere, an excessive tendency toward settlements imposes costs throughout the economy. Among other things:

- It reduces the salutary influence of judicial review of agency enforcement actions;
- It reduces the stock of judicial decisions from which companies, courts and the FTC would otherwise receive essential guidance regarding appropriate enforcement theories and the propriety of ambiguous conduct;
- It induces companies that haven't violated the statute to be saddled with remedies nonetheless, and thereby induces other, similarly-situated companies to incur inefficient costs to avoid the same fate;
- It incentivizes the FTC to impose remedies via consent order that a court might not sustain; and
- It may induce companies that would be found by a court not to have violated the statute to admit liability.

These largely hidden, underappreciated effects are, collectively, enormously distorting. And they feedback into the process, reinforcing the institutional dynamics that lead to such outcomes in the first place. In short, the FTC's discovery process greatly magnifies its already vast discretion to make substantive decisions about the evolution of Section 5 doctrine (or quasi-doctrine).

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[93] Invention Submission, 965 F.2d at 1090 (emphasis in original, internal citations omitted) (citing Fed. Trade Comm'n v. Carter, 636 F.2d 781, 787-88 (D.C. Cir. 1980), and *Texaco*, 555 F.2d at 874 & n.26).

[94] *Re: LabMD, Inc.'s Petition to Limit or Quash the Civil Investigative Demand; and Michael J. Daugherty's Petition to Limit or Quash the Civil Investigative Demand (*Apr. 20, 2012), 5, *available at* https://www.ftc.gov/sites/default/files/documents/petitions-quash/labmd-inc./102-3099-lab-md-letter-ruling-04202012.pdf.

At the same time, there is reason to believe that the rate of CID issuance, and the scope of CIDs issued, are (far) greater than optimal.

In order to issue a CID pursuant to an OR, staff need not present the authorizing Commissioner with a theory of the case or anything approaching "probable cause" for the CID; rather, the OR effectively takes care of that (although without anything like the specificity required of, say, a subpoena), and staff need only assert that the CID is in furtherance of an OR. The other Commissioners do not have an opportunity to vote on the issuance of the CID and would not likely even know about the investigation. Even if dissenting staff members attempt to notify Commissioners,[95] it may be difficult, at this early stage, for Commissioners to recognize the doctrinal or practical significance of the cases the staff is attempting to bring, and thus to provide any meaningful check upon the discretion of the staff to use the discovery process to coerce settlements.

Thus, because of omnibus resolutions, a great number of investigations — encompassing a great number of costly CIDs — are not presented to the other Commissioners to determine whether the investigation is an appropriate use of the agency's resources or whether the legal basis for the case is sound. In many cases, the other Commissioners may not even see the case until a settlement has been negotiated as a *fait accompli*.

The bar for issuing CIDs pursuant to an omnibus resolution is extremely low. Nominally the CID request must fall within the agency's authority and be relevant to the investigation that authorizes it. But the FTC has enormous discretion in determining whether a specific compulsory demand is relevant to an investigation, and it need not have "a justifiable belief that wrongdoing has actually occurred."[96]

For example, the Commission's telemarketing resolution authorized compulsory process

> [t]o determine whether unnamed telemarketers, sellers, or others assisting them have engaged in or are engaging in: (1) unfair or deceptive acts or practices in or affecting commerce in violation of Section 5 of the Federal Trade Commission Act; and/or (2) deceptive or abusive telemarketing acts or practices in violation of the Commission's Telemarketing Sales Rule, including but not limited to the provision of substantial assistance or support — such as mailing lists, scripts, merchant accounts, and other information, products, or services — to telemarketers engaged in unlawful practices. The investigation is also to determine

[95] Operating Manual § 3.5.1.1 ("Dissenting staff recommendations regarding compulsory process, compliance, consent agreements, proposed trade regulation rules or proposed industrywide investigations should be submitted to the Commission by the originating offices, upon the request of the staff member.").

[96] United States v. Morton Salt Co., 338 U.S. 632, 642 (1950).

> whether Commission action to obtain redress for injury to consumers or others would be in the public interest.[97]

Pursuant to this OR, the Commission issued a CID to Western Union. Western Union challenged the CID on the grounds that it was unrelated to the OR (among other things). The FTC, in denying the motion to quash, claimed that "[t]he resolution… includes investigations of telemarketers or sellers as well as entities such as Western Union who may be providing substantial assistance or support to telemarketers or sellers." While the OR does mention "assistance or support," it doesn't specify any companies by name and doesn't specify that payment processors provide the sort of support it contemplates. In fact, it is fairly clear from even the impressively broad characterization of these in the OR — "mailing lists, scripts, merchant accounts, and other information, products, or services" — that the ancillary processing of payment transactions by legitimate companies was not really contemplated.

Nevertheless, the standard of review for the relevance of CIDs — in the rare instance that they are challenged at all — is extremely generous to the agency. As the Commission notes in its *Western Union* decision:

> In the context of an administrative CID, "relevance" is defined broadly and with deference to an administrative agency's determination. An administrative agency is to be accorded "extreme breadth" in conducting an investigation. As the D.C. Circuit has stated, the standard for judging relevance in an administrative investigation is "more relaxed" than in an adjudicatory proceeding. As a result, the agency is entitled to the documents unless the CID recipient can show that the agency's determination is "obviously wrong" or the documents are "plainly irrelevant" to the investigation's purpose. We find that Western Union has not met this burden.[98]

Finally, administrative challenges to CIDs are public proceedings, which itself presents a substantial bar to their review. Companies subject to investigations by the FTC are, not surprisingly, reluctant to reveal the existence of such an investigation publicly. While the immense breadth and vagueness of the ORs authorizing compulsory process in an investigation, the ease with which CIDs are issued, and the lack of a "belief of wrongdoing" requirement certainly mean that no wrongdoing *should* be inferred from the existence of an investigation or a CID, unfortunately public perception may not track these nuances. In the

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[97] *Resolution Directing Use of Compulsory Process in a Nonpublic Investigation of Telemarketers, Sellers, Suppliers, or Others*, File No. 0123145 (Apr. 11, 2011), quoted in *In the Matter of December 12, 2012 Civil Investigative Demand Issue to the Western Union Company*, File No. 012 3145 (Mar. 4, 2013), *available at* https://www.ftc.gov/sites/default/files/documents/petitions-quash/unnamed-telemarketers-others/130404westernunionpetition.pdf (Citations omitted).

[98] *In the Matter of December 12, 2012 Civil Investigative Demand Issue to the Western Union Company* at 8. (Citing cases).

case of some publicly traded companies, the mere issuance of a CID may require disclosure.[99] But for other publicly traded companies and for all private companies such disclosure is not required. This means that, for these companies, there is an added deterrent to challenging a CID because doing so will cause it to be disclosed publicly when it otherwise would not be.

The combination of an exceedingly deferential standard of review, the need to exhaust administrative process before the very agency that issued the OR and CID *before* gaining access to an independent Article III tribunal, the risk of reputational harms, and the massive compliance costs combine to ensure that very few CIDs are ever challenged. This only reinforces FTC staff's incentives to issue CIDs, and to do so with an increasingly tenuous relationship to the Commission-approved resolution authorizing them.

The absence of effective oversight on this process creates a further problem. FTC staff have the power to issue Voluntary Access Letters requesting the same documents as a CID without *any* Commissioner involvement — or even (at least on paper) the possibility that a dissenting staff member can notify a Commissioner of her objections.[100] While these requests are nominally voluntary, the omnipresent threat of compelled discovery means that recipients virtually always comply with these requests, although they do often initiate a discussion between staff and recipients that may result in a narrowing of the requests' scope. Voluntary Access Letters are subject to even less scrutiny than CIDs, and there is virtually no way for any of the FTC's oversight bodies (Congress, the courts, the public, the executive branch, etc.) to monitor their use.

Investigations and Reporting on Investigations

The Clarifying Legality & Enforcement Action Reasoning (CLEAR) Act

While identifying the problems with the Commission's investigation and CID process is fairly straightforward, identifying solutions is not so straightforward. A critical first step, however, would be imposing greater transparency requirements on the Commission's investigation practices.

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[99] *See, e.g.*, Deborah S. Birnbach, *Do You Have to Disclose a Government Investigation?*, HARVARD LAW SCHOOL FORUM ON CORPORATE GOVERNANCE AND FINANCIAL REGULATION (May 21, 2016), https://corpgov.law.harvard.edu/2016/04/09/do-you-have-to-disclose-a-government-investigation/.

[100] Again, Operating Manual Section 3.3.5.1.1 requires that "[d]issenting staff recommendations… be submitted to the Commission by the originating offices, upon the request of the staff member," but does not include voluntary assistance letters in the list of covered subjects, only "compulsory process."

Rep. Brett Guthrie's (R-KY) proposed CLEAR Act (H.R. 5109)[101] would require the FTC to report annually to Congress on the status of its investigations, including the legal analysis supporting the FTC's decision to close some investigations without action. This requirement would not require the Commission to identify its targets, thus preserving the anonymity of the firms in question.

VALUE OF THE BILL: Better Reporting of FTC Enforcement Trends

The FTC used to provide somewhat clearer data on the number of enforcement actions it took every year, classifying each by product and "type of matter."[102] The FTC's recent "Annual Highlights" reports do not include even this level of data on its enforcement actions. [103] But neither includes the basic data required by the CLEAR Act on the number of investigations commenced, closed, settled or litigated. Without hard data on this, it is difficult to assess how the FTC's enforcement approach works, the relationship between the agency's investigations and enforcement actions, and how these has changed over time. While the bill does not specifically mention consent decrees among the items that must be reported to Congress, it does require that the report include "the disposition of such investigations, if such investigations have concluded and resulted in official agency action," which would include consent decrees.

RECOMMENDATION: Add Discovery Tools to the Required Reporting

The bill omits, however, one of the most important aspects of the FTC's operations, which is very easily quantifiable: the FTC's use of its various discovery tools. The FTC should, in addition, have to produce aggregate statistics on its use of discovery tools, excluding the specific identity of the target, but including, for example:

- The source of the investigation (*e.g.*, Omnibus Resolution, consumer complaint, etc.);
- The volume of discovery requested;
- The volume of discovery produced;
- The time elapsed between the initiation of the investigation and the request(s);
- The time elapsed between the request(s) and production;
- Estimated cost of compliance (as volunteered by the target);

[101] The Clarifying Legality and Enforcement Action Reasoning Act, H.R. 5109, 114th Cong. (2016) [hereinafter CLEAR Act] *available at* https://www.congress.gov/bill/114th-congress/house-bill/5109/text.

[102] *See. e.g.,* 1995 Annual Report at 49, https://www.ftc.gov/sites/default/files/documents/reports_annual/annual-report-1995/ar1995_0.pdf.

[103] Fed. Trade Comm'n, FTC Annual Reports, https://www.ftc.gov/policy/reports/policy-reports/ftc-annual-reports.

- The specific tool(s) used to authorize the investigation and production request(s) (*e.g.*, Omnibus Resolution, CID, Voluntary Access Letter, etc.);
- Who approved the investigation and production request(s) (*e.g.*, a single Commissioner, the full Commission, the Bureau Director, the staff itself, etc.);
- The approximate size (number of employees) and annual revenues of the target business (to measure effects on small businesses); and
- The general nature of the issue(s) connected to the investigation and production request(s).

This reporting could be largely automated from the FTC database used to log investigations, discovery requests and resulting production of documents. And, of course, the FTC should have such a flexible and usable database if it does not already. Once created, it should be relatively easy to make the data public, as it will require little more than obscuring the identity of the target, putting the size of the company in ranges, and ensuring that the metadata identifying the relevant issues is sufficiently high level (e.g., "data security" rather than "PED skimming").

VALUE OF THE BILL: What is *Not* Prohibited Is a Crucial Form of Guidance

Clarity as to what the law does *not* prohibit may be a more important hallmark of the Evolutionary Model (the *true* common law), than is specificity as to what the law does prohibit.

The FTC used to issue closing letters regularly but stopped providing meaningful guidance at least since the start of this Administration. The FTC Operating Manual already requires staff to produce a memo justifying closure of any investigation that has gone beyond the initial stage, thus requiring the approval of the Bureau Directors to expand into a full investigation, that "summarize[s] the results of the investigation, discuss[es] the methodology used in the investigation, and explain[s] the rationale for the closing."[104]

In other words, the staff already, in theory, does the analysis that would be required by the bill (at least for cases that merit being continued beyond the 100 hours allowed for initial phase consumer protection investigations);[105] they simply do not share it. Thus, at most, the bill would require (i) greater rigor in the memoranda that staff already writes, (ii) that some version of memoranda be included in the annual report, edited to obscure the company's identity, and (iii) that *some* analysis be written for initial phase cases that may be closed without any internal memoranda. And this last requirement should not be difficult for the staff to satisfy, since cases that did not merit full investigations ought to raise simpler legal issues.

[104] Operating Manual § 3.2.4.1.1 (consumer protection) & § 3.2.4.1.2 (competition)

[105] Operating Manual § 3.2.2.1.

For example, in 2007, the FTC issued a no-action letter closing its investigation into Dollar Tree Stores that offers a fair amount of background on the issue: "PED skimming," the tampering with of payment card PIN entry devices (PEDs) used at checkout that allowed hackers to steal customers' card information and thus make fraudulent purchases.[106] The FTC explained its decision to close the Dollar Tree Stores investigation at length, listing the factors considered by the FTC:

> the extent to which the risk at issue was reasonable foreseeable at the time of the compromise; the nature and magnitude of the risk relative to other risks; the benefits relative to the costs of protecting against the risk; Dollar Tree's overall data security practices, the duration and scope of the compromise; the level of consumer injury; and Dollar Tree's prompt response to the incident.[107]

The letter went on to note:

> We continue to emphasize that data security is an ongoing process, and that as risks, technologies, and circumstances change over time, companies must adjust their information security programs accordingly. The staff notes that, in recent months, the risk of PED skimming at retain locations has been increasingly identified by security experts and discussed in a variety of public and business contexts. We also understand that some businesses have now taken steps to improve physical security to deter PED skimming, such as locking or otherwise securing PERs in checkout lanes; installing security cameras or other monitoring devices; performing regular PED inspections to detect tampering, theft, or other misuse; and/or replacing older PEDs with newer tamper-resistant and tamper-evident models. We hope and expect that all businesses using PEDs in their stores will consider implementing these and/or other reasonable and appropriate safeguards to secure their systems.[108]

The FTC has issued only one closing letter in standard data security cases since its 2007 letter in *Dollar Tree Stores* — and, apparently, about the same issue. In 2011, the FTC issued a letter closing its investigation of the Michaels art supply store chain.[109] The letter offers essentially no information about the investigation or analysis of the issues involved — in marked contrast to the *Dollar Tree Stores* letter. But based on press reports from 2011, the issue appears to have been the same as in *Dollar Tree Stores*: "crooks [had] tampered with PIN

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[106] Letter from Joel Winston, Associate Director of Fed. Trade Comm'n to Michael E. Burke, Esq., Counsel to Dollar Tree Stores, Inc. (June 5, 2001) *available at* http://www.ftc.gov/sites/default/files/documents/closing_letters/dollar-tree-stores-inc./070605doltree.pdf.

[107] *Id.* at 2.

[108] *Id.*

[109] Letter from Maneesha Mithal, Associate Director of Fed. Trade Comm'n to Lisa J. Sotto, Counsel to Michael's Stores, Inc. (June 5, 2001) *available at* http://www.ftc.gov/sites/default/files/documents/closing_letters/michaels-stores-inc./120706michaelsstorescltr.pdf.

pads in the Michaels checkout lanes, allowing them to capture customers' debit card and PIN numbers."[110]

Once again, the FTC has become increasingly unwilling to constrain its own discretion, even in the issuance of closing letters that do not bar the FTC from taking future enforcement actions. This underscores not only the value of the CLEAR Act, but also of the challenge in getting the FTC to take seriously the bill's requirement that annual reports include, "for each such investigation that was closed with no official agency action, a description sufficient to indicate the legal analysis supporting the Commission's decision not to continue such investigation, and the industry sectors of the entities subject to each such investigation."[111]

RECOMMENDATION: Require the Bureau of Economics to Be Involved

Wherever possible, Congress should specify that the Bureau of Economics be involved in the making of important decisions, and in the production of important guidance materials. Absent that instruction, the FTC, especially the Bureau of Consumer Protection, will likely resist fully involving the Bureau of Economics in its processes. The simplest way to make this change is as follows:

> For each such investigation that was closed with no official agency action, a description sufficient to indicate the legal ***and economic*** analysis supporting the Commission's decision not to continue such investigation, and the industry sectors of the entities subject to each such investigation.

Of course, there will be many cases where the economists have essentially nothing to say. The point is not that each case merits detailed economic analysis. Rather, the recommendation is intended to ensure that, at the very least, the *opportunity* to produce and disseminate a basic economic analysis by the BE is built into the enforcement process.

Moreover, if an economic analysis is deemed appropriate, the determination of what constitutes an appropriate *level* of analysis should be made by the Bureau of Economics alone. For example, in the *Dollar Tree Stores* letter quoted above, it would have been helpful if the letter had provided *some* quantitative analysis as to the factors mentioned in the letter. To illustrate this point, one might ask the following questions about the factors identified in *Dollar Tree Stores*:

- "the extent to which the risk at issue was reasonably foreseeable at the time of the compromise" and "the nature and magnitude of the risk relative to other

[110] Elisabeth Leamy, *Debit Card Fraud Investigation Involving Michaels Craft Stores PIN Pads Spreads to 20 US States*, ABC NEWS (May 13, 2011) *available at* http://abcnews.go.com/Business/ConsumerNews/debit-card-fraud-michaels-crafts-customers-info-captured/story?id=13593607.

[111] CLEAR Act, *supra* note 101.

risks" — ***How widely known was the vulnerability generally at that time? How fast was awareness spreading among similarly situated companies? How likely was the vulnerability to occur?***

- "the benefits relative to the costs of protecting against the risk" — ***Given the impossibility of completely eradicating risk, how much ex ante "protection" would have been sufficient? Given the*** **ex ante** ***uncertainty of any particular risk occurring, how much would it have cost to mitigate against all such risks, not just the one that actually materialized?***
- "Dollar Tree's overall data security practices" — ***How much did the company spend? How else do its practices compare to its peers? How can good data security be quantified?***
- "the duration and scope of the compromise" — ***How long? How many users?***
- "the level of consumer injury" — ***Can this be quantified specifically to this case? Or can injury be extrapolated from reliably representative samples of similar injury?***
- "Dollar Tree's prompt response to the incident" — ***Just how prompt was it, in absolute terms? And relative to comparable industry practice?***

Given the general scope of the FTC's investigations, it likely already collects the kind of data that could allow it to answer some, if not all, of these questions (and others as well). It may even have performed some of the requisite analysis. Why should the Commission's economists not have a seat at the table in writing the closing analysis? This could be perhaps the greatest opportunity to begin bringing the analytical rigor of law and economics to consumer protection.

Of course, the Commission may be (quite understandably) reluctant to include this data in company-specific closing letters — for the same reasons that investigations are supposed to remain confidential. But therein lies one of the chief virtues of the CLEAR Act: Instead of writing company-specific letters, the FTC could aggregate the information, obscure the identity of the company at issue in each specific case, and thus speak more freely about the details of its situation. Although the tension between the goals of providing analytical clarity and maintaining confidentiality for the subjects of investigation is obvious, it is not an insurmountable conflict, and thus no reason not to require more analysis and disclosure, in principle.

Finally, it is worth noting that if BE is to be competent in its participation in these investigations and the associated reports, it will need a larger staff of economists. Thus, as we discuss below, Congress should devote additional resources to the Commission that are specifically earmarked for hiring additional BE staff.[112]

[112] *See infra* note 123.

Recommendation: Attempt to Make the FTC Take the Analysis Requirement Seriously

We recommend that Congress emphasize *why* such reporting is important with something like the following language, added either to Congressional findings or made clear in the legislative history around the bill:

- Guidance from the Commission as to what is *not* illegal may be the most important form of guidance the Commission can offer; and
- To be truly useful, such guidance should hew closely the FTC's applicable Policy Statements.

We further recommend that Congress carefully scrutinize the FTC's annual reports issued under the CLEAR Act in oral discussions at hearings and in written questions for the record. Indeed, *not* doing so will indicate to the FTC that Congress is not really serious about demanding greater analytical rigor.

Recommendation: Ensure that the Commission Organizes These Reports in a Useful Manner

The legal analysis section of the bill is markedly different from the other three sections. The first two sections require simple counts of investigations commenced and closed with no action. The third section ("disposition of such investigations, if such investigations have concluded and resulted in official agency action") can be satisfied with a brief sentence for each (or less). But the fourth section requires long-form analysis, which could run many pages for each case.

At a minimum, the FTC should do more than it does today to make it easy to identify which closing letters are relevant. Today, the Commission's web interface for closing letters is essentially useless. Letters are listed in reverse chronological order with no information provided other than the name, title and corporate affiliation of the person to whom the letter is addressed. There is no metadata to indicate what the letter is about (e.g., privacy, data security, advertising, product design) or what doctrinal issues (*e.g.,* unfairness, deception, material omissions, substantiation) the letter confronts. Key word searches for, say, "privacy" or "data security" produce zero results.

The CLEAR Act offers Congress a chance to demand better of the Commission. Congress should communicate what a *useful* discussion of closing decisions might look like — whether by including specific instructions in legislation, by addressing the issue in legislative history, or simply (and probably least effectively in the long term) by raising the issue regularly with the FTC at hearings. For instance, the text in the FTC's reports to Congress could be made publicly available in an online database tagged with metadata to make it easier for users to search for and find relevant closing letters.

Ideally, this database would be accessed through the same interface envisioned above for transparency into the FTC's discovery process, and would include the same metadata and search tools. Thus, a user might be able to search for FTC enforcement actions and discovery inquiries regarding, say, data security practices in small businesses, in order to get a better sense of how the FTC operates in that area.

RECOMMENDATION: Require the FTC to Synthesize Closing Decisions and Enforcement Decisions into Doctrinal Guidelines

When the FTC submitted the Unfairness Policy Statement to Congress, it noted, in its cover letter:

> In response to your inquiry we have therefore undertaken a review of the decided cases and rules and have synthesized from them the most important principles of general applicability. Rather than merely reciting the law, we have attempted to provide the Committee with a concrete indication of the manner in which the Commission has enforced, and will continue to enforce, its unfairness mandate. In so doing we intend to address the concerns that have been raised about the meaning of consumer unfairness, and thereby attempt to provide a greater sense of certainty about what the Commission would regard as an unfair act or practice under Section 5.[113]

This synthesis is what the FTC needs to do now — and could get close to doing, in part, through better organized reporting on its closing decisions — only on a more specific level of the component elements of each of its Policy Statements. This is essentially what the various Antitrust Guidelines issued jointly by the DOJ and the FTC's Bureau of Competition do. These are masterpieces of thematic organization. Consider, for example, from the 2000 Antitrust Guidelines for Collaborations Among Competitors, this sample of the table of contents:

- **3.34** Factors Relevant to the Ability and Incentive of the Participants and the Collaboration to Compete
  - **3.34(a)** Exclusivity
  - **3.34(b)** Control over Assets
  - **3.34(c)** Financial Interests in the Collaboration or in Other Participants
  - **3.34(d)** Control of the Collaboration's Competitively Significant Decision Making
  - **3.34(e)** Likelihood of Anticompetitive Information Sharing
  - **3.34(f)** Duration of the Collaboration
- **3.35** Entry
- **3.36** Identifying Procompetitive Benefits of the Collaboration
  - **3.36(a)** Cognizable Efficiencies Must Be Verifiable and Potentially Procompetitive

[113] UPS, *supra* note 9.

3.36(b) Reasonable Necessity and Less Restrictive Alternatives

3.37 Overall Competitive Effect[114]

The guidelines are rich with examples that illustrate the way the agencies will apply their doctrine. As noted in the introduction, these guidelines are one level down the Doctrinal Pyramid: They explain how the kind of concepts articulated at the high conceptual level of, say, the FTC's UDAP policy statements, can actually be applied to real world circumstances.[115]

One obvious challenge is that the antitrust guidelines synthesize litigated cases, of which the FTC has precious few on UDAP matters. This makes it difficult, if not impossible, for the FTC to do *precisely* the same thing on UDAP matters as the antitrust guidelines do. But that does not mean the FTC could not benefit from writing "lessons learned" retrospectives on its past enforcement efforts and closing letters.

Importantly, publication of these guidelines would not actually be a constraint upon the FTC's discretion; it would merely require the Commission to better explain the rationale for what it has done in the past, connecting that arc across time. Like policy statements and consent decrees, guidelines are not technically binding upon the agency. Yet, in practice, they would steer the Commission in a far more rigorous way than its vague "common law of consent decrees [or of congressional testimony or blog posts]." It would allow the FTC to build doctrine in an analytically rigorous way as a second-best alternative to judicial decision-making — and, of course, as a supplement to judicial decisions, to the extent they happen.

RECOMMENDATION: Ensure that Defendants Can Quash Subpoenas Confidentially

Among the biggest deterrents to litigation today is companies' reluctance to make public investigations aimed at them. But a company wishing to challenge the FTC's overly broad investigative demands effectively must accede to public disclosure because the FTC has the discretion to make such fights public.

Specifically, FTC enforcement rules currently allow parties seeking to quash a subpoena to ask for confidential treatment for their motions to quash, but the rules also appear to set public disclosure as the default:

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114 FED. TRADE COMM'N & DEP'T OF JUSTICE, ANTITRUST GUIDELINES FOR COLLABORATIONS AMONG COMPETITORS ii (Apr. 2000), *available at* https://www.ftc.gov/sites/default/files/documents/public_events/joint-venture-hearings-antitrust-guidelines-collaboration-among-competitors/ftcdojguidelines-2.pdf.

115 *See supra* note 12.

> (d) **Public disclosure**. All petitions to limit or quash Commission compulsory process and all Commission orders in response to those petitions shall become part of the public records of the Commission, except for information granted confidential treatment under § 4.9(c) of this chapter.[116]

The referenced general rule on confidentiality gives the FTC's General Counsel broad discretion in matters of confidentiality:

> (c) **Confidentiality and in camera material**.
>
> (1) Persons submitting material to the Commission described in this section may designate that material or portions of it confidential and request that it be withheld from the public record. All requests for confidential treatment shall be supported by a showing of justification in light of applicable statutes, rules, orders of the Commission or its administrative law judges, orders of the courts, or other relevant authority. **The General Counsel or the General Counsel's designee will act upon such request with due regard for legal constraints and the public interest**.[117]

Setting the default to public disclosure for such disputes is flatly inconsistent with the FTC's general policy of keeping investigations nonpublic:

> While investigations are generally nonpublic, Commission staff may disclose the existence of an investigation to potential witnesses or other third parties to the extent necessary to advance the investigation.[118]

This is the right balance: Commission staff should *sometimes* be able to disclose aspects of an investigation. It should *not* be able to coerce a company into settling, or complying with additional discovery, in order to avoid bad press. Even if a company calculates that bad press is inevitable, if the FTC seems determined to extract a settlement, disclosing the investigation earlier can increase the direct expenses and reputational costs incurred by the company by stretching out the total length of the fight with the Commission for months or years longer.

[116] 16 C.F.R. § 2.10(d).

[117] 16 C.F.R. § 4.9(c)(1).

[118] 16 C.F.R. § 2.6; *See also* Federal Trade Commission, *Operating Manual*, Section 3.3.1 (To promote orderly investigative procedures and to protect individuals or business entities under investigation from premature adverse publicity, the Commission treats the fact that a particular proposed respondent is under investigation and the documents and information submitted to or developed by staff in connection with the investigation as confidential information that can be released only in the manner and to the extent authorized by law and by the Commission. In general, even if a proposed respondent in a nonpublic investigation makes a public disclosure that an investigation is being conducted, Commission personnel may not acknowledge the existence of the investigation, or discuss its purpose and scope or the nature of the suspected violation.)

We propose that the default be switched, so that motions to quash are generally kept under seal except in exceptional circumstances.

Economic Analysis of Investigations, Complaints, and Consent Decrees

No Bill Proposed

> The Federal Trade Commission's Bureau of Economics' (BE) role as an independent and expert analyst is one of the most critical features of the FTC's organizational structure in terms of enhancing its performance, expanding its substantive capabilities, and increasing the critical reputational capital the agency has available to promote its missions.[119]
>
> *Former FTC Commissioner Joshua Wright, 2015*

Commissioner Wright wrote as a veteran of both the Bureau of Economics and the Bureau of Competition. He was only the fourth economist to serve as FTC Commissioner (following Jim Miller, George Douglas and Dennis Yao) and the first JD/PhD. His 2015 speech, "On the FTC's Bureau of Economics, Independence, and Agency Performance," marked the beginning of an effort to bolster the role of the Bureau of Economics in the FTC's decision-making, especially in consumer protection matters. Wright warned, pointedly, that the FTC has "too many lawyers, too few economists," calling this "a potential threat to independence and agency performance."[120]

Unfortunately, this was only a beginning: shortly after delivering this speech, Wright resigned from the Commission to return to teaching law and economics. For now, at least, the task of bolstering economic analysis at the Commission falls to Congress.

The RECS Act's proposal that BE be involved in any recommendation for new legislation or regulatory action is an important step towards this goal, but it is too narrow.[121] It does not address the need to bolster the FTC's role in the institutional structure of the agency, or its role in enforcement decisions. The following chart (from Wright's speech) ably captures the first of these problems:

Number of Attorneys to Economists at the FTC from 2003 to 2013[122]

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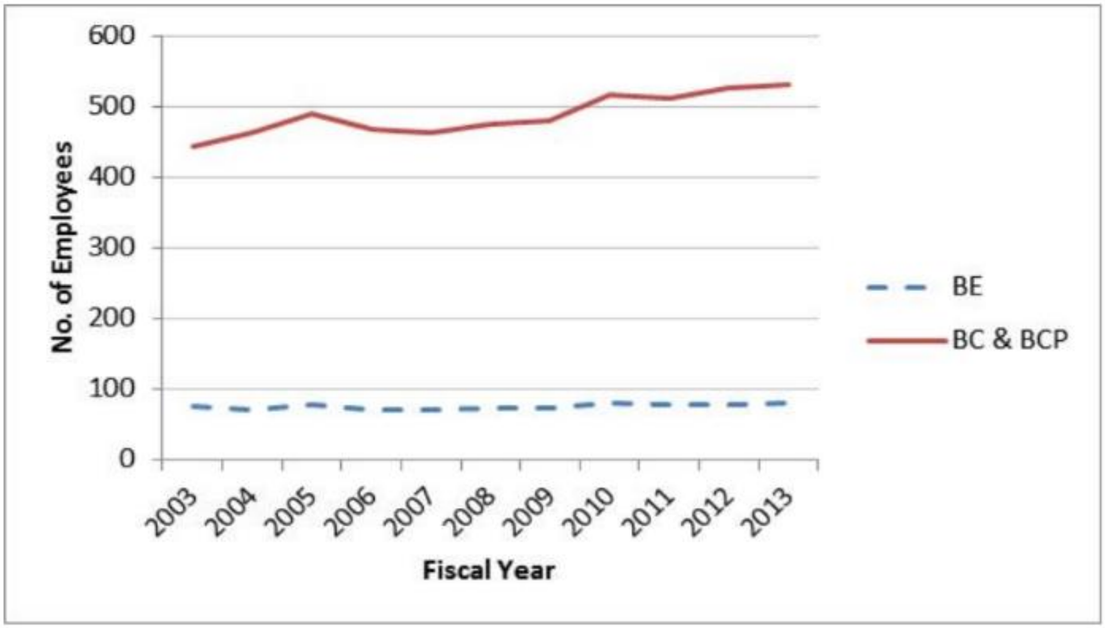
[119] Statement of Commissioner Joshua D. Wright, On the FTC's Bureau of Economics, Independence, and Agency Performance, at 1 (Aug. 6, 2015), *available at* https://www.ftc.gov/system/files/documents/public_statements/695241/150806bestmtwright.pdf.

[120] *Id.* at 5.

[121] *See infra* at 54.

[122] Statement of Commissioner Joshua D. Wright, On the FTC's Bureau of Economics, Independence, and Agency Performance, *supra* note 119, at 6.



RECOMMENDATION: Hire More Economists

Wright recommends:

> Hiring more full-time economists is one obvious fix to the ratio problem. There are many benefits to expanding the economic capabilities of the agency. Many cases simply cannot be adequately staffed with one or two staff economists. **Doubling the current size of BE** would be a good start towards aligning the incentives of the Commission and BE staff with respect to case recommendations. While too quickly increasing the size of BE staff might dilute quality, a gradual increase in staffing coupled with a pay increase and a commitment to research time should help to keep quality levels at least constant.[123]

We wholeheartedly endorse former Commissioner Wright's recommendation.

RECOMMENDATION: Require BE to Comment Separately on Complaints and Consent Orders

In the case of complaints and consent orders issued by the Commission, we recommend that Congress require the Commission to amend its Rules of Practice to require that the Bureau of Economics provide a *separate* economic assessment of the complaint or consent order in conjunction with each. This proposal is consistent with former Commissioner Wright's similar recommendation:

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[123] Statement of Commissioner Joshua D. Wright, On the FTC's Bureau of Economics, Independence, and Agency Performance, *supra* note 119, at 11.

> I suggest the FTC consider interpreting or amending FTC Rule of Practice 2.34 to mandate that BE publish, in matters involving consent decrees, and as part of the already required "explanation of the provisions of the order and the relief to be obtained," a separate explanation of the economic analysis of the Commission's action. The documents associated with this rule are critical for communicating the role that economic analysis plays in Commission decision-making in cases. In many cases, public facing documents surrounding consents in competition cases simply do not describe well or at all the economic analysis conducted by staff or upon which BE recommended the consent.[124]

In order to perform its desired function, this "separate explanation" would be authored and issued by the Bureau of Economics, and not subject to approval by the Commission. The document would express BE's independent assessment (approval or rejection) of the Commission's proposed complaint or consent order, provide a high-level description of the specific economic analyses and evidence relied upon in its own recommendation or rejection of the proposed consent order, and offer a more general economic rationale for its recommendation.

Requiring BE to make public its economic rationale for supporting or rejecting a complaint or consent decree voted out by the Commission would offer a number of benefits. In general, such an analysis would both inform the public and demand rigor of the Commission. As former Commissioner Wright noted,

> First, it offers BE a public avenue to communicate its findings to the public. Second, it reinforces the independent nature of the recommendation that BE offers. Third, it breaks the agency monopoly the FTC lawyers currently enjoy in terms of framing a particular matter to the public. The internal leverage BE gains by the ability to publish such a document… will also provide BE a greater role in the consent process and a mechanism to discipline consents that are not supported by sound economics…, minimizing the "compromise" recommendation that is most problematic in matters involving consent decrees.[125]

Wright explains this "compromise recommendation" problem in detail that bears extensive quotation and emphasis here:

> Both BC attorneys and BE staff are responsible for producing a recommendation memo. The asymmetry is at least partially a natural result of the different nature of the work that lawyers and economists do. But it is important to note that one consequence of this asymmetry, whatever its cause, is that it creates the potential to weaken BE's independence. BE maintains a high level of integrity and independence over core economic tasks – e.g., economic modeling and framing, statistical analyses, and assessments of outside economic work – yet when it comes

[124] *Id.* at 11-12.

[125] *Id.* at 11.

> to the actual policy recommendation, **I think it is fair to raise the question whether the Commission always receives unfiltered recommendations when BE dissents from the recommendation of BC or BCP staff.**
>
> One example of this phenomenon is the so-called "compromise recommendation," that is, a BE staff economist might recommend the FTC accept a consent decree rather than litigate or challenge a proposed merger when the underlying economic analysis reveals very little actual economic support for liability. In my experience, **it is not uncommon for a BE staff analysis to convincingly demonstrate that competitive harm is possible but unlikely, but for BE staff to recommend against litigation on those grounds, but in favor of a consent order**. The problem with this compromise approach is, of course, that a recommendation to enter into a consent order must also require economic evidence sufficient to give the Commission reason to believe that competitive harm is likely. This type of "compromise" recommendation in some ways reflects the reality of BE staff incentives. Engaging in a prolonged struggle over the issue of liability with BC and BC management is exceedingly difficult when the economist is simply outmanned. It also ties up already scarce BE resources on a matter that the parties are apparently "willing" to settle.[126]

The ability of BC or BCP staff to dilute the analysis of BE staffers in a combined compromise recommendation renders moot this provision of the operating manual:

> Dissenting staff recommendations regarding compulsory process, compliance, consent agreements, proposed trade regulation rules or proposed industrywide investigations should be submitted to the Commission by the originating offices, upon the request of the staff member.[127]

For this provision to have any effect, there must be a separate dissenting staff recommendation that can be seen by Commissioners — and, ideally, also made public.

RECOMMENDATION: Require BE to Comment on Upgrading Investigations

Similarly, we recommend enhancing BE's role earlier in the investigation process: at the point where the Bureau Director decides whether to upgrade an initial (Phase I) investigation to a full investigation. This is a critical inflection point in the FTC's investigative process for three reasons:

1. In principle, the staff is not supposed to negotiate consent decrees during the initial investigation phase;
2. In principle, the staff is not supposed to use compulsory discovery process during the initial investigation phase, meaning a target company's cooperation until this point is at least theoretically voluntary; and

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[126] *Id.* at 7-8.

[127] Operating Manual § 3.3.5.1.1.

3. Either the decision to open a formal investigation or the subsequent issuance of CIDs may trigger a public company's duty to disclose the investigation in its quarterly securities filings.

It is also likely the point at which the staff determines (or at least begins to seriously consider) whether or not the Commission is likely to approve a staff recommendation to issue a complaint against any of the specific targets of the investigation.

For all these reasons, converting an initial investigation to a full investigation gives the staff enormous power to coerce a settlement. This decision deserves far more rigorous analysis than it currently seems to receive.

When the BC or BCP staff proposes to their Bureau director that an initial investigation be expanded into a full investigation, the FTC Operating Manual requires a (confidential) memorandum justifying a decision, but does *not* formally require the Bureau of Economics, or require that the analysis performed by any FTC staff correspond to two of the three requirements of Section 5(n) or the materiality requirement of the Deception Policy Statement:

> 3.5.1.4 Transmittal Memorandum
>
> The memorandum requesting approval for full investigation should clearly and succinctly explain the need for approval of the full investigation, including a discussion of relevant factors among the following:
>
> (1) A description of the practices and their impact on consumers and/or on the marketplace;
> (2) Marketing area and volume of business of the proposed respondent and the overall size of the market;
> (3) Extent of consumer injury inflicted by the practices to be investigated, the benefits to be achieved by the Commission action and/or the extent of competitive injury;
> (4) When applicable, an explanation of how the proposed investigation meets objectives and, where adopted, case selection criteria or the program to which it has been assigned;
> (5) When applicable, responses to the policy protocol questions (see OM Ch. 2);[128]

We recommend modifying this in two ways. First, while approving a complaint or a consent decree should absolutely require a separate recommendation from the Bureau of Economics, requiring such a recommendation merely to convert an initial investigation to a full investigation might well pose too great a burden on BE's already over-taxed resources. But that is no reason why the FTC rules should not at least give BE the *opportunity* to write a

[128] Operating Manual § 3.3.5.1.4 (emphasis added).

separate memorandum if it so desires. Having this written recommendation shared with Commissioners would serve as an early warning system, alerting them to potentially problematic cases being investigated by BCP or BC staff *before* the staff has extracted a consent decree — something that regularly has effectively happened by the time the Commission votes on whether to authorize a complaint. Thus, giving BE the opportunity to be involved at this early stage may be critical to scrutinizing the FTC's use of consent decrees.

Second, there is no reason that the memorandum prepared by either BC or BCP staff should not correspond to the doctrinal requirements of the relevant authority. The Operating Manual falls well short of this by merely requiring some analysis of the "[e]xtent of consumer injury." Why not countervailing benefit and reasonable avoidability, too, for Unfairness cases? And materiality in Deception cases? And the various other factors subsumed in the consumer welfare standard of the rule of reason, for Unfair Methods of Competition Cases?

That this would be only an *initial* analysis that will remain confidential under the Commission's rules is all the more reason it should not be a problem for the Staff to produce.

Economic Analysis in Reports & "Recommendations"

The Revealing Economic Conclusions for Suggestions (RECS) Act

Rep. Mike Pompeo's (R-KS) bill (H.R. 5136)[129] would require the FTC to include, in "any recommendations for legislative or regulatory action," analysis from the Bureau of Economics including:

> [T]he rationale for the Commission's determination that private markets or public institutions could not adequately address the issue, and that its recommended legislative or regulatory action is based on a reasoned determination that the benefits of the recommended action outweigh its costs.

Valuable as this is, the bill should be expanded to encompass other Commission pronouncements that aren't, strictly, "recommendations for legislative or regulatory action."

VALUE OF THE BILL: Bringing Rigor to FTC Reports, Testimony, *etc.*

The lack of economic analysis in support of "recommendations for legislative or regulatory action" has grown more acute with time — not only in the FTC's reports but also in its testimony to Congress.

Section 6(b) of the FTC Act gives the Commission the authority "to conduct wide-ranging economic studies that do not have a specific law enforcement purpose" and to require the

[129] The Revealing Economic Conclusions for Suggestions Act, H.R. 5136, 114th Cong. (2016) [hereinafter RECS Act] *available at* https://www.congress.gov/bill/114th-congress/house-bill/5136/text.

filing of "annual or special … reports or answers in writing to specific questions" for the purpose of obtaining information about "the organization, business, conduct, practices, management, and relation to other corporations, partnerships, and individuals" of any company over which the FTC has jurisdiction, except insurance companies. This section is a useful tool for better understanding business practices, particularly those undergoing rapid technological change. But it is only as valuable as the quality of the analyses these 6(b) reports contain. And typically they are fairly short on economic analysis, especially concerning consumer protection matters.

The FTC has consistently failed to include any apparent, meaningful role for the Bureau of Economics in its consumer protection workshops or in the drafting of the subsequent reports. Nor has the FTC explored the adequacy of existing legal tools to address concerns raised by its reports. For example, the FTC's 2014 workshop, "Big Data: A Tool for Inclusion or Exclusion?," included not a single PhD economist or BE staffer.[130] The resulting 2016 report includes essentially just two footnotes on economics.[131] Commissioner Ohlhausen dissented, noting that

> Concerns about the effects of inaccurate data are certainly legitimate, but policymakers must evaluate such concerns in the larger context of the market and economic forces companies face. Businesses have strong incentives to seek accurate information about consumers, whatever the tool. Indeed, businesses use big data specifically to increase accuracy. Our competition expertise tells us that if one company draws incorrect conclusions and misses opportunities, competitors with better analysis will strive to fill the gap….
>
> To understand the benefits and risks of tools like big data analytics, we must also consider the powerful forces of economics and free-market competition. If we give undue credence to hypothetical harms, we risk distracting ourselves from genuine harms and discouraging the development of the very tools that promise new benefits to low income, disadvantaged, and vulnerable individuals. Today's report enriches the conversation about big data. My hope is that future participants in this conversation will test hypothetical harms with economic reasoning and empirical evidence.[132]

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[130] Fed. Trade Comm'n, Public Workshop: Big Data: A Tool for Inclusion or Exclusion? (Sep. 15, 2014), *available at* https://www.ftc.gov/news-events/events-calendar/2014/09/big-data-tool-inclusion-or-exclusion.

[131] FED. TRADE COMM'N, BIG DATA: A TOOL FOR INCLUSION OR EXCLUSION? UNDERSTANDING THE ISSUES FTC REPORT (2016), *available at* https://www.ftc.gov/system/files/documents/reports/big-data-tool-inclusion-or-exclusion-understanding-issues/160106big-data-rpt.pdf

[132] *Id*. at A-1 to A-2.

The Commission's 2016 PrivacyCon conference did include several economists on a panel devoted to the "Economics of Privacy & Security."[133] But, as one of the event's discussants, Geoffrey Manne, noted:

> One of the things I would say is that it's a little bit unfortunate we don't have more economists and engineers talking to each other. As you might have gathered from the last panel, an economist will tell you that merely identifying a problem isn't a sufficient basis for regulating to solve it, nor does the existence of a possible solution mean that that solution should be mandated. And you really need to identify real harms rather than just inferring them, as James Cooper pointed out earlier. And we need to give some thought to self-help and reputation and competition as solutions before we start to intervene….
>
> So we've talked all day about privacy risks, biases in data, bad outcomes, problems, but we haven't talked enough about beneficial uses that these things may enable. So deriving policy prescriptions from these sort of lopsided discussions is really perilous.
>
> Now, there's an additional problem that we have in this forum as well, which is that the FTC has a tendency to find justification for enforcement decisions in things that are mentioned at workshops just like these. So that makes it doubly risky to be talking [] about these things without pointing out that there are important benefits here, and that the costs may not be as dramatic as it seems [just] because we're presenting these papers describing them.[134]

As Manne notes, as a practical matter, these workshops and reports are often used by the Commission either to make legislative recommendations or to define FTC enforcement policy by recommending industry best practices (which the agency will effectively enforce). But, again, because they lack much in the way of economically rigorous analysis, these recommendations may not be as well-founded as they may be presumed to be.

In its 2000 Report to Congress, for example, the FTC called for comprehensive baseline legislation on privacy and data security.[135] Congress has not passed such legislation, but the FTC repeated the recommendation in its 2012 Privacy Report.[136] While that Report called

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[133] Fed. Trade Comm'n, *Conference: PrivacyCon* (Jan. 14, 2016), *available at* https://www.ftc.gov/news-events/events-calendar/2016/01/privacycon.

[134] Fed. Trade Comm'n, *Transcript of the Remarks of Geoffrey A. Manne*, 19 (Jan. 14, 2016), *available at* https://www.ftc.gov/system/files/documents/videos/privacycon-part-5/ftc_privacycon_-_transcript_segment_5.pdf#page=18.

[135] FED. TRADE COMM'N, PRIVACY ONLINE: FAIR INFORMATION PRACTICES IN THE ELECTRONIC MARKETPLACE (2000), *available at* https://www.ftc.gov/sites/default/files/documents/reports/privacy-online-fair-information-practices-electronic-marketplace-federal-trade-commission-report/privacy2000text.pdf.

[136] FED. TRADE COMM'N, PROTECTING CONSUMER PRIVACY IN AN ERA OF RAPID CHANGE: RECOMMENDATIONS FOR BUSINESS AND POLICYMAKERS (2012), *available at*

(cont.)

for significantly stricter legislation, less tied to consumer harm, it did *not* include any economic analysis by the FTC's Bureau of Economics. Indeed, by rejecting the harms-based model of the 2000 Report,[137] the 2012 report essentially dismisses the *relevance* of economic analysis, either in the report itself or in case-by-case adjudication.

In his dissent, Commissioner Rosch warned about the Report's reliance on unfairness rather than deception, noting that "'Unfairness' is an elastic and elusive concept. What is "unfair" is in the eye of the beholder…."[138] In effect, Rosch, despite his long-standing hostility to economic analysis,[139] was really saying that the Commission had failed to justify its *analysis* of unfairness. Rosch objected to the Commission's invocation of unfairness against harms that have not been clearly analyzed:

> That is not how the Commission itself has traditionally proceeded. To the contrary, the Commission represented in its 1980, and 1982 [sic], Statements to Congress that, absent deception, it will not generally enforce Section 5 against alleged intangible harm. In other contexts, the Commission has tried, through its advocacy, to convince others that our policy judgments are sensible and ought to be adopted.[140]

Rosch contrasted the Report's reliance on unfairness with the Commission's Unfair Methods of Competition doctrine, which he called "self-limiting" because it was tied to analysis of market power.[141] Rosch lamented that,

> There does not appear to be any such limiting principle applicable to many of the recommendations of the Report. If implemented as written, many of the Report's recommendations would instead apply to almost all firms and to most information collection practices. It would install "Big Brother" as the watchdog over these practices not only in the online world but in the offline world. That is not only paternalistic, but it goes well beyond what the Commission said in the early 1980s that it would do, and well beyond what Congress has permitted the Commission to do under Section 5(n). I would instead stand by what we have said

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https://www.ftc.gov/sites/default/files/documents/reports/federal-trade-commission-report-protecting-consumer-privacy-era-rapid-change-recommendations/120326privacyreport.pdf.

137 PRIVACY ONLINE: FAIR INFORMATION PRACTICES IN THE ELECTRONIC MARKETPLACE, *supra* note 135.

138 PROTECTING CONSUMER PRIVACY IN AN ERA OF RAPID CHANGE, *supra* note 136, at C-3.

139 *See e.g.*, J. Thomas Rosch, *Litigating Merger Challenges: Lessons Learned* (June 2, 2008), *available at* https://www.ftc.gov/sites/default/files/documents/public_statements/litigating-merger-challenges-lessons-learned/080602litigatingmerger.pdf ("any kind of economic analyses that require the use of mathematical formulae are of little persuasive value in the courtroom setting;" "when I see an economic formula my eyes start to glaze over."); *See generally* Joshua Wright, *Commissioner Rosch v. Economics, Again*, TRUTH ON THE MARKET (Oct. 7, 2008), *available at* https://truthonthemarket.com/2008/10/07/commissioner-rosch-v-economics-again/.

140 PROTECTING CONSUMER PRIVACY IN AN ERA OF RAPID CHANGE, *supra* note 136, at C-4.

141 *Id.* at C-5.

> and challenge information collection practices, including behavioral tracking, only when these practices are deceptive, "unfair" within the strictures of Section 5(n) and our commitments to Congress, or employed by a firm with market power and therefore challengeable on a stand-alone basis under Section 5's prohibition of unfair methods of competition.[142]

The proposed bill would help to correct these defects, and to ensure that FTC Reports, at least those containing legislative or rulemaking recommendations, are based on the rigorous analysis that should be expected of an expert investigative agency's policymaking — especially one that has arguably the greatest pool of economic talent found anywhere in government in America.

RECOMMENDATION: Require Analysis of Recommended Industry Best Practices

In this regard the proposed bill would be enormously beneficial, but it could, and should, do significantly more.

First and foremost, the term "recommendations for legislative or regulatory action" would not encompass the most significant FTC recommendations: those included in "industry best practices" publications and reports produced by the Commission. These documents purport to offer expert suggestions for businesses to follow in order to help them to protect consumer welfare and to better comply with the relevant laws and regulations. But the FTC increasingly treats these recommendations as soft law, not merely helpful guidance, in at least two senses:

1. The FTC uses these recommendations as the basis for writing its 20-year consent-decree requirements, including ones unrelated, or only loosely related, to the conduct at issue in an enforcement action; and
2. The FTC uses these recommendations as the substantive basis for enforcement actions — for example, by pointing to a company's failure to do something the FTC recommended as evidence of the unreasonableness of its practices.

Former Chairman Tim Muris notes this about the "voluntary" guidelines issued by the FTC in 2009 in conjunction with three other federal agencies, comparing them to the FTC's efforts to ban advertising to children:

> The FTC has been down this road before. Prodded by consumer activists in the late 1970s, the Commission sought to stop advertising to children…
>
> One difference between the current proposal and the old rulemaking — called Kid Vid — is that this time the agencies are suggesting that the standards be adopted "voluntarily" by industry. Yet can standards suggested by a government

[142] *Id.*

> claiming the power to regulate truly be "voluntary"? Moreover, at the same workshop that the standards were announced, a representative of one of the same activist organizations that inspired the 1970s efforts speculated that a failure to comply with the new proposal would provoke calls for rules or legislation.[143]

Regulation by leering glare is still regulation.

Informed by the trauma of its near-fatal confrontation with Congress at the end of the Carter administration, the FTC was long skittish about making recommendations for businesses in its reports, beyond high level calls for attention to issues like data security. That changed in 2009, however. The FTC has since issued a flurry of reports recommending best practices like "privacy by design" and "security by design," first generally, and then across a variety of areas, from Big Data to facial recognition.[144]

The FTC's recommendations to industry in its 2005 report on file-sharing were admirably circumspect:

> Industry should decrease risks to consumers through technological innovation and development, industry self-regulation (including risk disclosures), and consumer education.[145]

This is not to say that the FTC could not or should not have done more to address the very real problem of inadvertent online file-sharing. Indeed, one of the authors of this report has lauded the (Democratic-led) FTC for bringing its 2011 enforcement action against Frostwire[146] for designing its peer-to-peer file-sharing software in a way that deceived users into unwittingly sharing files.[147] Rather, it is simply to say that the FTC, in 2005, understood that a report was not a substitute for a rulemaking — *i.e.*, not an appropriate place to make "recommendations" for the private sector that would have any force of law.

By 2012 the FTC had lost any such scruples. Its Privacy Report, issued that year, is entitled "Recommendations for Businesses and Policymakers." The title says it all: The FTC di-

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[143] *Statement of Timothy J. Muris, supra* note 14, at 11-13.

[144] BIG DATA: A TOOL FOR INCLUSION OR EXCLUSION, *supra* note 131; FED TRADE COMM'N, FACING FACTS: BEST PRACTICES FOR COMMON USES OF FACIAL RECOGNITION TECHNOLOGIES (2012), *available at* https://www.ftc.gov/sites/default/files/documents/reports/facing-facts-best-practices-common-uses-facial-recognition-technologies/121022facialtechrpt.pdf.

[145] FED. TRADE COMM'N, PEER-TO-PEER FILE-SHARING TECHNOLOGY: CONSUMER PROTECTION AND COMPETITION ISSUES (2005), *available at* https://www.ftc.gov/sites/default/files/documents/reports/peer-peer-file-sharing-technology-consumer-protection-and-competition-issues/050623p2prpt.pdf.

[146] Fed. Trade Comm'n v. Frostwire LLC, FTC File No. 112 3041, https://www.ftc.gov/enforcement/cases-proceedings/112-3041/frostwire-llc-angel-leon (2011).

[147] *Prepared Statement of Berin Szóka, President of TechFreedom: Hearing Before the H. Energy & Commerce Comm.* 112th Cong. (2012), 23, *available at* https://techliberation.com/wp-content/uploads/2012/11/Testimony_CMT_03.29.12_Szoka.pdf.

rected its sweeping recommendations for "privacy by design" to both the companies it regulates and the elected representatives the FTC supposedly serves:

> The final privacy framework is intended to articulate best practices for companies that collect and use consumer data. These best practices can be useful to companies as they develop and maintain processes and systems to operationalize privacy and data security practices within their businesses. The final privacy framework contained in this report is also intended to assist Congress as it considers privacy legislation.[148]

Of course, the FTC added:

> To the extent the framework goes beyond existing legal requirements, the framework is not intended to serve as a template for law enforcement actions or regulations under laws currently enforced by the FTC.[149]

Also noteworthy is the contrast between the two reports in their analytical rigor. The file sharing report noted:

> The workshop panelists and public comments did not provide a sufficient basis to conclude whether the degree of risk associated with P2P file-sharing programs is greater than, equal to, or less than the degree of risk when using other Internet technologies.[150]

The 2012 report shows no such modesty, as Commissioner Rosch lamented in his dissent ("There does not appear to be any such limiting principle applicable to many of the recommendations of the Report.").[151]

In 2015, Commissioner Wright expressed dismay at this same problem in his dissent from the staff report on the Internet of Things Workshop:

> I dissent from the Commission's decision to authorize the publication of staff's report on its Internet of Things workshop ("Workshop Report") because the Workshop Report includes a lengthy discussion of industry best practices and recommendations for broad-based privacy legislation without analytical support to establish the likelihood that those practices and recommendations, if adopted, would improve consumer welfare….
>
> First…, merely holding a workshop — without more — should rarely be the sole or even the primary basis for setting forth specific best practices or legislative recommendations….

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[148] PROTECTING CONSUMER PRIVACY IN AN ERA OF RAPID CHANGE, *supra* note 136, at iii.

[149] *Id*. at vii.

[150] PEER-TO-PEER FILE-SHARING TECHNOLOGY, *supra* note 145, at 12.

[151] PROTECTING CONSUMER PRIVACY IN AN ERA OF RAPID CHANGE, *supra* note 136, at C-5.

> Second, the Commission and our staff must actually engage in a rigorous cost-benefit analysis prior to disseminating best practices or legislative recommendations, given the real world consequences for the consumers we are obligated to protect….
>
> **The most significant drawback of the concepts of "security by design" and other privacy-related catchphrases is that they do not appear to contain any meaningful analytical content**…. An economic and evidence-based approach sensitive to [] tradeoffs is much more likely to result in consumer-welfare enhancing consumer protection regulation. To the extent concepts such as security by design or data minimization are endorsed at any cost — or without regard to whether the marginal cost of a particular decision exceeds its marginal benefits — then application of these principles will result in greater compliance costs without countervailing benefit. Such costs will be passed on to consumers in the form of higher prices or less useful products, as well as potentially deter competition and innovation among firms participating in the Internet of Things.[152]

The point illustrated by comparing these examples is the difficulty inherent in trying to require greater rigor from the FTC in recommendations to businesses when those recommendations can be either high level and commonsensical (as in 2005) or sweeping and effectively regulatory (as in 2012 and 2015). Thus, we recommend the following simple amendment to the proposed bill:

> [The FTC] shall not submit any ***proposed industry best practices, industry guidance or*** recommendations for legislative or regulatory action without [analysis]….

This wording would not apply to the kind of "recommendation" that the FTC made occasionally before 2009, as exemplified by the 2005 report. In any event, the bill's requirement is easily satisfied: essentially the FTC need only give the Bureau of Economics a role in drafting the report. Because this recommendation would not hamstring the FTC's enforcement actions, nor tie the FTC up in court, it should not be controversial, even if applied to proposed industry best practices and guidance.

Our proposed amendment would be simpler than attempting to broaden the definition of "regulatory action" beyond just rulemakings (which is how the FTC would likely limit its interpretation of the bill as drafted now) to include the kind of "regulatory action" that matters most: its use of reports to indicate how it will regulate through case by case enforcement, *i.e.*, its "common law of consent decrees."

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[152] Dissenting Statement of Commissioner Joshua D. Wright, *Issuance of The Internet of Things: Privacy and Security in a Connected World Staff Report* (Jan. 27, 2015) (emphasis added), available at https://www.ftc.gov/system/files/documents/public_statements/620701/150127iotjdwstmt.pdf.

Recommendation: Clarify the Bill's Language to Ensure It Applies to All FTC Reports

Another important difference between the 2000 and 2012 privacy reports is that the 2000 report is labelled "A Report to Congress," while the 2012 report is not and, indeed, barely mentions Congress. This reflects a little-noticed aspect of the way Section 6(f) is currently written, with subsection numbers added for clarity:

> (f) Publication of information; reports
>
> To [i] make public from time to time such portions of the information obtained by it hereunder as are in the public interest; and to [ii] make annual and special reports to the Congress and to submit therewith recommendations for additional legislation; and to [iii] provide for the publication of its reports and decisions in such form and manner as may be best adapted for public information and use.[153]

In other words, the Commission has shifted from relying upon 6(f)(ii) to 6(f)(i) and (iii). This distinction may seem unimportant, but it may cause the bill as drafted to be rendered meaningless, because the way it is worded could be read to apply only to 6(f)(ii). The bill would amend the existing proviso in Section 6(f) as follows:

> Provided [t]hat the Commission shall not submit any recommendations for legislative or regulatory action without an economic analysis by the Bureau of Economics….

The use of the words "submit" and "recommendations" clearly tie this proviso to 6(f)(ii). Thus, the FTC could claim that it need not include the analysis required by the bill unless it is specifically submitting recommendations to Congress, which it simply does not do anymore.

Instead we propose the following slight tweak to the bill's wording, to ensure that it would apply to the entirety of Section 6(f):

> Provided [t]hat the Commission shall not ***make*** any recommendations for legislative or regulatory action without an economic analysis by the Bureau of Economics…

This would require the participation of the Bureau of Economics in *all* FTC reports (that make qualifying recommendations), whatever their form. It would also require BE's participation in at least two other contexts where such recommendations are likely to be made: (i) Congressional testimony and (ii) the competition advocacy filings the Commission makes with state and local regulatory and legislative bodies, and with other federal regulatory

[153] 15 U.S.C. § 46(f)

agencies. This is a feature, not a bug: participation by BE is not something to be minimized; it should be woven into the fabric of *all* of the FTC's activities. As we have noted previously:

> The most important, most welfare-enhancing reform the FTC could undertake is to better incorporate sound economic- and evidence-based analysis in both its substantive decisions as well as in its process. While the FTC has a strong tradition of economics in its antitrust decision-making, its record in using economics in other areas is mixed.[154]

Because the bill does not in any way create a cause of action against the FTC for failing to comply with the requirement, it will not hamstring the FTC if the agency fails to take the bill's requirements seriously. That, if anything, is a weakness of the bill, but it is largely inevitable. It will always be up to the discretion of the Commission itself (subject, of course, to congressional oversight) to decide how much "economic analysis" is "sufficient" under the bill.

Recommendation: Require a Supermajority of Commissioners to Decide What Analysis is "Sufficient"

As written, the bill might do little more than shame the Chairman into involving the Bureau of Economics somewhat more in the writing of reports and the workshops that lead to them — if only because the bill might embolden a single Commissioner to object to the FTC's lack of analysis, as Commissioner Wright objected to the FTC's Internet of Things report.[155] This change in incentives for the Chairman and other commissioners, alone, may not significantly improve the analytical quality of the FTC's reports, given the hostility of the Bureau of Consumer Protection to economic analysis, although having *any* involvement by BE would certainly be an improvement.

Again, the question of "sufficiency" is inherently something that will be left to the Commission's discretion, but there is no principled reason that it has to be resolved through simple majority votes. On the other hand, giving a single Commissioner the right to veto an FTC "recommendation" as lacking a "sufficient" analytical basis might go too far.

We recommend striking a balance by requiring a supermajority (majority plus one, except in the case of a three-member Commission) of Commissioners to approve of the sufficiency of the analysis — essentially that this vote be taken, or at least recorded, separately from the vote on the issuance of the report itself. (The "sufficiency" vote would not stop the FTC from issuing a report.) At the same time, we recommend that the outcome of the "sufficien-

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[154] Geoffrey A. Manne, *Humility, Institutional Constraints and Economic Rigor: Limiting the FTC's Discretion*, ICLE White Paper 2014-1 (Feb. 28, 2014) at 4, *available at* http://docs.house.gov/meetings/IF/IF17/20140228/101812/HHRG-113-IF17-Wstate-ManneG-20140228-SD002.pdf.

[155] *See Issuance of The Internet of Things: Privacy and Security in a Connected World Staff Report*, *supra* note 152, at 4.

cy" vote be disclosed on the first page of all reports or other documents containing recommendations.

Such a mechanism would effectively expand the set of options for which Commissioners could vote, enabling them to express subtler degrees of preference without constraining them, as now, into making the binary choice between approving or rejecting a recommendation *in toto*. In other words, while the cost of expressing disapproval today, in the form of a dissent from a report, may be too high in some cases (especially for Commissioners in the majority party), the cost of expressing disapproval for the sufficiency of analysis without vetoing an entire report would be much lower. Allowing such a vote, and publishing its results, would offer important information to the public. It would also increase the leverage of commissioners most concerned with ensuring that FTC recommendations are supported by sufficient rigor to influence the content and conclusions of FTC reports and similar documents.

In cases where the three-member majority feels the two-member minority's objections to analytical rigor are merely a pretense for objections to the recommendations themselves, the bill as we envision it would do nothing to stop the majority from issuing its recommendations anyway, of course; the "sufficiency" vote in this sense may sometimes be merely an expression of preference. Nonetheless, the majority Commissioners would likely be compelled to do more to explain why they believe the analysis included in support of a recommendation is sufficient, and why the minority is conflating its own policy views with the question of analytical sufficiency. These would also be valuable additions to the public's understanding of the basis for Commission recommendations

The virtue of our proposed approach is that it would further lower the bar for the Commission to do something it ought to do anyway: involve the Bureau of Economics in its decision-making.

RECOMMENDATION: Codify Congress's Commitment to Competition Advocacy

As we propose amending the RECS Act, consistent with the spirit with which we believe the bill is intended, BE would also have to be involved in any competition advocacy filings made by the FTC. Again, we believe this is all for the good. But it might, on the margin, discourage the FTC from issuing such filings in the first place — something we believe the FTC already does not do enough of. Thus, as discussed below, we recommend that Congress do more to encourage competition advocacy filings by the FTC.[156] At minimum, this means amending Section 6 to provide specific statutory authority for competition advocacy, something the FTC only vaguely divines from the Section today. As the text stands today, this authority is far from apparent, especially because the current Section 6 makes reference

[156] *See infra* note 87.

to "recommendations" only with respect to *Congress* in what we above refer to as Section 6(f)(ii).

Other Sources of Enforcement Authority (Guidelines, etc.)

The Solidifying Habitual & Institutional Explanations of Liability & Defenses (SHIELD) Act

Rep. Mike Pompeo's (R-KS) bill (H.R. 5118)[157] clarifies what is already black letter law: agency guidelines do not create any binding legal obligations, either upon regulated companies or the FTC. This means the FTC can bring enforcement actions outside the bounds of its Unfairness and Deception Policy Statements, its Unfair Methods of Competition Enforcement Policy Statement, and its regulations promulgated under other statutes enforced by the Commission (*e.g.*, the "Safeguards Rule," promulgated under the Gramm-Leach-Bliley Act)[158] unless Congress codifies the Statements in the statute. The only substantively operative provision of the bill is section (B), which provides that:

> Compliance with any guidelines, general statement of policy, or similar guidance issued by the Commission may be used as evidence of compliance with the provision of law under which the guidelines, general statement of policy, or guidance was issued.

This does not create a formal safe harbor; it merely allows companies targeted by the FTC to cite FTC's past guidance in their defense. This should be uncontroversial.

VALUE OF THE BILL: Increasing Legal Certainty and Decreasing the Coercive Regulatory Effect of the FTC's Soft Law

The bill would accomplish two primary goals. First, it would formally bar the FTC from doing something it has likely been doing in practice for some time: treating its own informal guidance as quasi-regulatory. To the extent that the Commission actually does so, it would effectively be circumventing the safeguards Congress imposed in 1980 upon the FTC's Section 5 rulemaking powers by amending the FTC Improvement Act of 1975 (commonly called "Magnuson-Moss").[159] But of course, for exactly this reason, the Commission would

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[157] Solidifying Habitual and Institutional Explanations of Liability and Defenses Act, H.R. 5118, 114th Cong. (2016) [hereinafter SHIELD Act], *available at* https://www.congress.gov/bill/114th-congress/house-bill/5118/text.

[158] Standards for Safeguarding Customer Information, 16 C.F.R. § 314.

[159] The term Magnuson-Moss is inapt for two reasons. First, as former Chairman Muris explains, "Although within the Commission these procedures are uniformly referred to as 'Magnuson Moss,' in fact, the procedures are contained within Title II of the Magnuson Moss Warranty–Federal Trade Commission Improvement Act of 1975. Only Title I involved the Magnuson Moss Warranty Act…" *Statement of Timothy J. Muris*, *supra* note

(cont.)

never *admit* that this is what it is doing when its enforcement agenda just happens to line up with its previous recommendations.

More clear and more troubling is that, in the *LabMD* case, the Commission argued that the company, a small cancer testing lab, had committed an unfair trade practice sometime between 2006 and 2008 by failing to take "reasonable" measures to prevent the installation and operation of peer-to-peer file-sharing software on its network, which made patient billing information accessible to Tiversa, a company with specialized tools capable of scouring P2P networks for sensitive information. Crucial to the FTC's Complaint was its allegation that:

> Since at least 2005, security professionals and others (including the Commission) have warned that P2P applications present a risk that users will inadvertently share files on P2P networks.[160]

The Commission was referring, obliquely, to its 2005 report,[161] which offered this rather unhelpful suggestion to affected companies:

> Industry should decrease risks to consumers through technological innovation and development, industry self-regulation (including risk disclosures), and consumer education.

Not until January 2010 did the FTC issue "Peer-to-Peer File Sharing: A Guide for Business"[162] — about the same time, it appears, that the FTC undertook its investigation of LabMD. The SHIELD Act would clearly bar the FTC from pointing to its own past guidance as creating a legal trigger for liability. The Commission's assessment of "reasonableness" would have to be proven through other factors; indeed, since "reasonable" is found nowhere in Section 5 or even in the Unfairness Policy Statement, the Commission would have to prove the underlying elements of unfairness, without shortcutting this analysis by oblique reference to its own past reports.

A related concern is the Commission's application of rules promulgated in one context, in which they have binding authority, to other contexts in which they do not. The most striking example of this practice is the Commission's use of the Safeguards Rule, which "applies to the handling of customer information by all financial institutions over which the [FTC]

14, at 22, n. 44. Second, the safeguards at issue were adopted in 1980, not 1975, when "Mag-Moss" was passed.

[160] Complaint, In the Matter of LabMD, Inc., Docket No. 9357 at 4, *available at* https://www.ftc.gov/sites/default/files/documents/cases/2013/08/130829labmdpart3.pdf.

[161] PEER-TO-PEER FILE-SHARING TECHNOLOGY, *supra* note 145.

[162] Fed. Trade, Comm'n, *Peer-to-Peer File Sharing: A Guide for Business* (Jan. 2010), *available at* https://www.ftc.gov/tips-advice/business-center/guidance/peer-peer-file-sharing-guide-business.

has jurisdiction,"[163] to define unfair data security practices, and the remedies applied by the FTC in consent decrees, outside the financial sector. Although the Safeguards Rule has regulatory authority for financial institutions, its authority is no different than informal guidance (or recommended "best practices") the Commission offers for everyone else. Nevertheless, the Commission has imposed remedies virtually identical to the Safeguards Rule in nearly every data security consent order into which it has entered.

> [T]he majority of the FTC's [data security] cases, regardless of cause of action or facts, impose the same remedy: the set of security standards laid out in the FTC's Safeguards Rule. Most notably, this is true regardless of whether the respondents were financial institutions (to which the Safeguards Rule directly applies) or not (to which the Rule has no direct application), and regardless of whether the claim is generally one of deception or unfairness.[164]

Second, the SHIELD Act would allow companies to raise their compliance with FTC guidance as part of their defense. This would, at a minimum, help encourage companies to resist settling legally questionable or analytically unsupported enforcement actions.

RECOMMENDATION: Clarify that Consent Decrees, Reports, and FTC Best Practices are not Binding

We propose expanding the bill's language slightly to ensure that it achieves its intended goal:

> No guidelines, general statements of policy, ***consent decrees, settlements, reports, recommended best practices***, or similar guidance issued by the Commission shall confer any right.

As should be clear by now, these other forms of soft law are the most important aspects of the FTC's discretionary model, especially given the paucity of policy statements (building upon the three major ones, such as on materiality, for example) or issue-specific "Guides."

Specifically, the Commission regularly applies its recommended best practices (grouped under catchphrases like "privacy by design" and "security by design") as mandatory company-specific regulations in consent decrees that are themselves applied, in cookie-cutter fashion, across enforcement actions brought against companies that differ greatly in their circumstances, and regardless of the nature or extent of the injury or the specific facts of their case.

Second, the *LabMD* case provides at least one clear example wherein the FTC has treated its own previous reports, making vague recommendations about the need for better industry data security practices (regarding peer-to-peer file-sharing), as a critical part of the trigger for

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[163] 16 C.F.R. § 314.1(b).

[164] Manne & Sperry, *supra* note 52, at 20.

legal liability.[165] We suspect this is the tip of the iceberg — that the FTC in fact does this kind of thing quite often, but usually does not have to admit it, because it is able to settle cases without revealing its legal arguments. Only in the *LabMD* case (one of the first (of two) data security cases to be litigated after more than a decade of FTC consent decrees in this area) did the Commission have to make the connection between its previous "recommendations" and its application of Section 5. Even here, in its *LabMD* Complaint, it should be noted, the Commission did not specifically cite its 2005 P2P file-sharing report, but instead vaguely alluded to it — suggesting that even FTC staff were wary of revealing this connection.

RECOMMENDATION: Specify When a Defendant May Raise Evidence of Its Compliance with FTC Guidance

The bill does not currently specify *when* in the enforcement process evidence of compliance may be cited. It is important that a defendant be able to raise a compliance defense as early as possible. Without such an opportunity, the Commission can drag out an investigation that should have been terminated early, as when the subject of the investigation acted in good faith reliance upon the Commission's own statements. Ideally, this would occur during motions to quash CIDs.

Further, it would help if the FTC amended its rule on such motions, 16 C.F.R. § 2.10, to specify that this defense could be raised at part of a motion to quash. And, as we noted above,[166] it is critical that these challenges be permitted to remain confidential, as many companies may choose to avoid the risk the public exposure that comes with challenging CIDs.

At a minimum, the defendant should be able to raise this defense in a way that is communicated to Commissioners *before* the Commission's vote on whether to issue a complaint.

RECOMMENDATION: Encourage the FTC to Issue More Policy Statements & Guides

As the proposed SHIELD Act reflects, while there is some risk of ossification from over-reliance on *ex ante* guidelines and policy statements, the absence of such guidance documents can leave consumers and economic actors with insufficient notice of FTC enforcement principles and practices. Absent meaningful constraints on the Commission's discretionary authority, the costs of over-enforcement may be as great or greater than the costs of over-regulation. For these reasons, the bill should require the FTC to issue substantive

[165] *See supra* note 66 and note 161.

[166] *See supra* at 46.

guidelines, allow private parties to petition the FTC to issue guidelines, or allow a single Commissioner to force the issue.

A good place to start would be privacy regulation, where the Commission has issued no meaningful guides.[167] The Commission has done better on data security, with guides, for example, on photocopier data security (2010),[168] P2P software (2010),[169] and mobile app security (2013).[170] But none of these, and even the particularly thorough "Start with Security: A Guide for Business" (2015),[171] does the kind of thing the various antitrust guidelines do: expand upon the *analytical framework* by which the Commission determines how much security is enough. This must be grounded in the component elements of Section 5, not the Commission's policy agenda or technical expertise.

More important than issue-specific guides would be guidance one step up the Doctrinal Pyramid, explaining how concepts like materiality, weighing injury with benefits, and measuring reasonable avoidability will be measured.[172] Such a document would greatly enhance the value of issue-specific guides by allowing regulated companies to understand not just what the Commission might demand in the future, but the doctrinal legal basis for doing so.

Remedies

Appropriate Tailoring of Remedies

No Bill Proposed

The FTC has, perhaps predictably, also pushed the envelope with regard to the sorts of remedies it seeks against a broader category of targets. Initially, the Commission was given authority to pursue permanent injunctions under Section 13(b) as part of its ongoing mission to curb outright fraud.[173] Over time, however, the FTC has expanded its use of Section 13(b)

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[167] See, e.g., Fed. Trade Comm'n, *Federal Trade Commission Enforcement of the U.S.-EU and U.S.-Swiss Safe Harbor Frameworks* (Dec. 2012), *available at* https://www.ftc.gov/tips-advice/business-center/guidance/federal-trade-commission-enforcement-us-eu-us-swiss-safe-harbor

[168] Fed. Trade Comm'n, *Copier Data Security: A Guide for Businesses* (Nov. 2010), *available at* https://www.ftc.gov/tips-advice/business-center/guidance/copier-data-security-guide-businesses

[169] *Peer-to-Peer File Sharing: A Guide for Business*, *supra* note 162.

[170] Fed. Trade Comm'n, *Mobile App Developers: Start with Security* (Feb. 2013), *available at* https://www.ftc.gov/tips-advice/business-center/guidance/mobile-app-developers-start-security

[171] Fed. Trade Comm'n, *Start with Security: A Guide for Business* (Jun. 2015), *available at* https://www.ftc.gov/tips-advice/business-center/guidance/start-security-guide-business

[172] *See supra* note 12.

[173] *See generally* Beales & Muris, *supra* note 21.

in order to target companies that engage in conduct that implicates issues from substantiation claims to product design — all far from fraudulent territory.[174]

For instance, Apple, Google, and Amazon have all been targets of the Commission for issues related to the design and function of their respective mobile app stores.[175] Amazon, one of the rare parties to proceed to full litigation on a Section 5 unfairness case, recently lost a summary judgment motion on a claim that its in-app purchasing system permitted children to make in-app purchases without parental "informed consent," thus engaging in an "unfair practice."[176] As part of its case the Commission sought a permanent injunction under Section 13(b) against Amazon on the basis of the Commission's claim that it was "likely to continue to injure consumers, reap unjust enrichment, and harm the public interest."[177]

This practice, called "fencing-in,"[178] may be appropriate for the inveterate fraudsters — against whom it is authorized under Section 19 of the Act:

> If the Commission satisfies the court that the act or practice to which the cease and desist order relates is **one which a reasonable man would have known under the circumstances was dishonest or fraudulent**, the court may grant… such relief as the court finds necessary.[179]

The FTC — in the past — indeed viewed Section 13(b) as a tool to police clearly fraudulent practices. "Consistent with the limitations in Section 19, the agency used Section 13(b) for a narrow class of cases involving fraud, near fraud, or worthless products."[180] Meanwhile, courts, for their part, "blessed this limited expansion of FTC authority," and still see the appropriate scope of Section 13(b) as a limited one.

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[174] *Id.* at 4.

[175] *See* Geoffrey A. Manne, *Federal Intrusion: Too Many Apps for That*, WALL STR. J. (Sep. 16, 2014), http://www.wsj.com/articles/geoffrey-manne-federal-intrusion-too-many-apps-for-that-1410908397.

[176] Fed. Trade Comm'n v. Amazon.com, Inc., Case No. C14-1038-JCC, slip op. at 10 (W.D. Wash 2016), available at https://www.ftc.gov/system/files/documents/cases/160427amazonorder.pdf.

[177] *Id.* at 10.

[178] *See, e.g.*, Federal Trade Commission V. RCA Credit Services, LLC, Case No. 8:08-CV-2062-T-27AEP. (M.D. Fla. Jul 21, 2010) at 20 ("Courts also have discretion to include 'fencing-in' provisions that extend beyond the specific violations at issue in the case to prevent Defendants from engaging in similar deceptive practices in the future.").

[179] 15 U.S.C. § 57(b)-(a)(2) and -(b).

[180] Beales & Muris, *supra* note 21, at 22.

But the argument for extending fencing-in beyond the fraud context is extremely weak. Nevertheless, the FTC has more recently, as in the *Amazon* case, sought to use 13(b) against legitimate companies, dramatically expanding its scope — and its *in terrorem* effect.[181]

> Such broad "fencing in" relief (imposition of behavioral requirements that are more extensive than required [in order] to avoid future violations) goes well beyond prior FTC practice and may be aimed at "encouraging" other firms in similar industries to adopt costly new testing.[182]

Effectively, from the Commission's perspective, Amazon — with its app store that satisfied the needs of a huge number of consumers — was legally equivalent to "defendants engaged in continuous, fraudulent practices [who] were deemed likely to reoffend based on the 'systemic nature' of their misrepresentations."[183] This could not have been what Congress intended.

The courts, when they are presented with the opportunity to review this approach (as they sometimes are in Deception cases and as they virtually never are in Unfairness cases, given the lack of litigation) have been less than receptive. Although Amazon lost its motion for summary judgment, it prevailed on the question of whether Section 13(b) presented an appropriate remedy for its alleged infractions.

> While permanent injunctions are often awarded in cases where liability under the FTC Act is determined, Amazon correctly distinguishes those cases from the facts of this case… [C]ases in which a permanent injunction has been entered involved deceptive, ongoing practices.[184]

The court properly noted that it was incumbent upon the Commission to "establish, with evidence, a cognizable danger of a recurring violation."[185]

Similarly, in *FTC v. RCA Credit* (a Deception case), the court rejected the FTC's use of 13(b) — in that case, accepting the permanent injunction but questioning the expansion of its scope:

> The undisputed facts demonstrate that this is a proper case for permanent injunctive relief. However, the Court will defer ruling on the appropriate scope of an injunction (including whether, as the FTC requests, the injunction should include a

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[181] *Id.* at 4 ("The FTC now threatens to expand the use of the Section 13(b) program beyond fraud cases, suggesting that it may use Section 13(b) to seek consumer redress even against legitimate companies.").

[182] Alden Abbott, *Time to Reform FTC Advertising Regulation*, Heritage Foundation Legal Memorandum #140 on Regulation (Oct. 29, 2014), *available at* http://www.heritage.org/research/reports/2014/10/time-to-reform-ftc-advertising-regulation#_ftnref21.

[183] Amazon case at 11.

[184] Amazon case at 11.

[185] *Id.* at 11.

> broad fencing-in provision enjoining misrepresentations of material fact in connection with the sale of any goods and services) until after hearing evidence on the issue.[186]

The reluctance of some courts to abet the FTC's expansion of its use of fencing-in remedies to reach legitimate companies is reassuring — and affirms our belief as to what Congress intended in Section 13(b). Unfortunately, however, most parties do not proceed to ruinously expensive litigation with the Commission, and will accede to the demands of a consent order. This creates undue costs of both the first order (companies agreeing to remedies that are larger or more invasive than what a court would impose) and the second order (the systemic cost of companies settling cases they might otherwise litigate, all regulated entities losing the benefit of litigation, and the FTC having to do less rigorous analysis).

The FTC's ability to threaten a permanent injunction, or to dramatically extend its scope beyond the practices at issue in a case, gives parties an inefficiently large incentive to settle in order to avoid the risk of the more draconian remedy. But, in doing so, parties end up opting in to consent orders that allow the FTC to evade any judicially enforced limits on the remedies it imposes, which is what the Commission *really* wants. Whatever the benefits to the agency from permanent injunctions, it arguably receives even more benefit from the ability to impose more detailed behavioral remedies than a court might permit (and to do so in the context of a consent order, the violation of which is subject to the lower burden of proving contempt rather than an initial violation).

The Commission's general resistance to constraints upon its remedial discretion was aptly illustrated by its abrupt revocation, in 2012,[187] of its 2003 Policy Statement On Monetary Equitable Remedies in Competition Cases (commonly called the Disgorgement Policy Statement).[188] As Commissioner Ohlhausen noted in her dissent from the withdrawal of the policy:

> Rescinding the bipartisan Policy Statement signals that the Commission will be seeking disgorgement in circumstances in which the three-part test heretofore utilized under the Statement is not met, such as where the alleged antitrust violation

[186] RCA Credit case at 24.

[187] Fed. Trade Comm'n, *FTC Withdraws Agency's Policy Statement on Monetary Remedies in Competition Cases; Will Rely on Existing Law* (Jul. 31, 2012), *available at* https://www.ftc.gov/news-events/press-releases/2012/07/ftc-withdraws-agencys-policy-statement-monetary-remedies.

[188] Fed. Trade Comm'n, Policy Statement On Monetary Equitable Remedies — Including in Particular Disgorgement and Restitution, in FEDERAL TRADE COMMISSION COMPETITION CASES ADDRESSING VIOLATIONS OF THE FTC ACT, THE CLAYTON ACT, OR THE HART-SCOTT-RODINO ACT (2003), *available at* https://www.ftc.gov/public-statements/2003/07/policy-statement-monetary-equitable-remedies-including-particular.

> is not clear or where other remedies would be sufficient to address the violation.[189]

Not only does this mean that parties in general are more likely to settle, but it also means that parties that are facing novel, untested antitrust theories are more likely to settle. This allows the Commission to expand its antitrust enforcement authority beyond judicially recognized conduct without risk of reversal by the courts.

Section 13(b) and the Commission's disgorgement powers represent tremendous weapons to wield over the heads of investigative targets. Their expanding use to impose expansive or draconian remedies in cases involving non-fraudulent, legitimate companies and questionable legal theories is extremely troubling. Not only is this bad policy, it is also inconsistent with the spirit of the FTC Act, which was designed to find and punish actively fraudulent conduct, and to deter anticompetitive behavior that is not countervailed by pro-consumer benefits. But most of all, this gives the FTC greater ability to coerce companies that might otherwise litigate into settlements, pushing us further away from the Evolutionary Model and towards the Discretionary Model.

To correct these problems, at least two things should be done:

RECOMMENDATION: Limit Injunctions to the "Proper Cases" Intended by Congress

First, the Commission's use of Section 13(b) remedies should be reevaluated in light of the law's original purpose:

> [O]ne class of cases clearly improper for awarding redress under Section 13(b): traditional substantiation cases, which typically involve established businesses selling products with substantial value beyond the claims at issue and disputes over scientific details with well-regarded experts on both sides of the issue. In such cases, the defendant would not have known ex ante that its conduct was "dishonest or fraudulent." Limiting the availability of consumer redress under Section 13(b) to cases consistent with the Section 19 standard strikes the balance Congress thought necessary and ensures that the FTC's actions benefit those that it is their mission to protect: the general public.[190]

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[189] Dissenting Statement of Commissioner Maureen K. Ohlhausen, *Commission's Decision to Withdraw its Policy Statement on Monetary Equitable Remedies in Competition Cases* (Jul. 31, 2012), *available at* https://www.ftc.gov/sites/default/files/documents/public_statements/statement-commissioner-maureen-k.ohlhausen/120731ohlhausenstatement.pdf.

[190] Beales & Muris, *Striking the Proper Balance*, *supra* note 21, at 6.

[190] 15 U.S.C. § 57(b)-(a)(2) and -(b).

[190] Beales & Muris, *Striking the Proper Balance*, *supra* note 21, at 6–7.

This same logic applies to a host of other types of cases, as well, including the Commission's recent product design cases.[191] Thus the tailoring of the Commission's Section 13(b) powers should not stop merely with substantiation cases, but should extend, as a general principle, to any party that had not intentionally or recklessly engaged in conduct it should have known was dishonest or fraudulent. As Josh Wright noted in his dissent in the Apple product design case:

> The economic consequences of the allegedly unfair act or practice in this case — a product design decision that benefits some consumers and harms others — also differ significantly from those in the Commission's previous unfairness cases.
>
> The Commission commonly brings unfairness cases alleging failure to obtain express informed consent. These cases invariably involve conduct where the defendant has intentionally obscured the fact that consumers would be billed. Many of these cases involve unauthorized billing or cramming – the outright fraudulent use of payment information. Other cases involve conduct just shy of complete fraud — the consumer may have agreed to one transaction but the defendant charges the consumer for additional, improperly disclosed items. Under this scenario, the allegedly unfair act or practice injures consumers and does not provide economic value to consumers or competition. In such cases, the requirement to provide adequate disclosure itself does not cause significant harmful effects and can be satisfied at low cost.
>
> However, the particular facts of this case differ in several respects from the above scenario.[192]

The same logic that undergirds former Commissioner Wright's objection to the majority's aggressive application of the UPS in *Apple* applies equally to the aggressive 13(b) remedies sought in similar cases.

RECOMMENDATION: Narrow Overly Broad "Fencing-in" Remedies

Similarly, the imposition of unreasonable behavioral demands — "fencing-in" of conduct beyond that at issue in the case — upon parties subject to FTC enforcement is problematic.

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[191] Fed. Trade Comm'n, *FTC Alleges Amazon Unlawfully Billed Parents for Millions of Dollars in Children's Unauthorized In-App Charges* (Jul. 10, 2014), *available at* https://www.ftc.gov/news-events/press-releases/2014/07/ftc-alleges-amazon-unlawfully-billed-parents-millions-dollars; In the Matter of Apple Inc., FTC File No 112 3108, https://www.ftc.gov/enforcement/cases-proceedings/112-3108/apple-inc (2014); Fed. Trade Comm'n, *Google to Refund Consumers at Least $19 Million to Settle FTC Complaint It Unlawfully Billed Parents for Children's Unauthorized In-App Charges* (Sept. 4, 2014), *available at* https://www.ftc.gov/news-events/press-releases/2014/09/google-refund-consumers-least-19-million-settle-ftc-complaint-it.

[192] Dissenting Statement of Commissioner Joshua D. Wright, In the Matter of Apple, Inc., FTC File No. 1123108, at 3 (Jan. 15, 2014), *available at* https://goo.gl/0RCC9E.

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For instance, in *Fanning v. FTC*, the Commission imposed upon defendant John Fanning a requirement that the First Circuit characterized as "not reasonably related to [the alleged] violation."[193] In 2009, Fanning founded jerk.com, a social networking website that controversially enabled users to nominate certain persons to be "jerks."[194] In issuing a variety of challenges to jerk.com's business practices — including an alleged failure of the site to facilitate paid customers' removal of negative information — the Commission additionally applied a "compliance monitoring" provision aimed directly at Fanning.[195] This provision required that Fanning "notify the Commission of… his affiliation with any new business or employment," and submit information including the new business's "address and telephone number and a description of the nature of the business" for a period of ten years.[196] Under the Commission's cease and desist order, it did not matter whether Fanning engaged in reputation work, or started social media sites, or not — the requirement applied regardless of what type of work Fanning did and for whom he did it.[197]

The First Circuit rebuked the Commission on this point:

> When asked at oral argument, the Commission conceded that this provision would ostensibly require Fanning to report if he was a waiter at a restaurant. The only explanation offered by the Commission for this breadth is that it has traditionally required such reporting.[198]

Moreover, the Commission cited a string of district court cases upholding similar provisions which the court characterized as "almost entirely bereft of analysis that might explain the rationale for such a requirement."[199] While it is encouraging that the First Circuit saw fit to rein in the Commission, it is also apparent that the FTC frequently receives an extraordinary degree of deference from district courts, even when creating punitive provisions that bear little or no connection to challenged subject matter.

In order to deter the Commission from taking advantage of this frequent judicial deference by imposing such disconnected "fencing-in" remedies in non-fraud cases — which, of course, is compounded by the fact that most cases are never reviewed by courts at all — Congress should consider imposing some sort of minimal requirement that provisions in

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[193] Fanning v. Fed. Trade Comm'n, FTC File No. 15-1520, slip op. at 13 (May 9, 2016), *available at* https://www.ftc.gov/system/files/documents/cases/051816jerkopinion.pdf.

[194] *Id.* at 2-3.

[195] *Id.* at 21-22.

[196] *Id.* at 22.

[197] Final Order, Fanning v. Fed. Trade Comm'n, FTC File No. 15-1520 (March 13, 2015), *available at* https://www.ftc.gov/system/files/documents/cases/150325jerkorder.pdf

[198] *Id.* at 23-24.

[199] *Id.* at 24.

proposed orders and consent decrees be (i) reasonably related to challenged behavior, and (ii) no more onerous than necessary to correct or prevent the challenged violation.

This reform is also important to minimizing the daisy-chaining of consent decrees discussed in the next Section.[200] As we note there, the ability of the Commission to bring a second enforcement action not premised on Section 5, but rather on the terms of a consent decree that is vaguely related to the challenged conduct creates several problems. The Commission's ability to do this is magnified if the initial consent order already contains provisions that reach a broad range of conduct or that include a host of difficult conduct remedies that the company may even inadvertently violate.

RECOMMENDATION: Revive the 2003 Disgorgement Policy

Second, Congress should consider requiring the Commission to return to its previous disgorgement policy, or to propose targeted amendments to it. At a minimum, the Commission should be required to perform *some* process to examine the issue and take public comment on it. As Commissioner Ohlhausen noted in her dissent, objecting to the vote to rescind the Policy Statement:

> I am troubled by the seeming lack of deliberation that has accompanied the withdrawal of the Policy Statement. Notably, the Commission sought public comment on a draft of the Policy Statement before it was adopted. That public comment process was not pursued in connection with the withdrawal of the statement. I believe there should have been more internal deliberation and likely public input before the Commission withdrew a policy statement that appears to have served this agency well over the past nine years.[201]

Consent Decree Duration & Scope

The Technological Innovation through Modernizing Enforcement (TIME) Act

Subcommittee Chairman Rep. Michael C. Burgess, M.D.'s (R-TX) bill (H.R. 5093)[202] would, in non-fraud cases, limit FTC consent orders to eight years — instead of the 20 years the FTC usually imposes. If the term runs five years or more, the FTC must reassess the decree after five years under the same factors required for setting the length of the consent decree from the outset:

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200 *See infra* at 76.

201 *Id*. at 2.

202 The Technological Innovation through Modernizing Enforcement Act, H.R. 5118, 114th Cong. (2016) [hereinafter TIME Act], *available at* https://www.congress.gov/bill/114th-congress/house-bill/5093/text.

1. The impact of technological progress on the continuing relevance of the consent order.
2. Whether there is reason to believe that the entity would engage in activities that violate this section without the consent order 8 years after the consent order is entered into by the Commission.

Shortening the length of consent decrees will do much to address the abuse of consent decrees, but it will not fix the underlying problems, as we discuss below.

VALUE OF THE BILL: Reducing the Abuse of Consent Decrees as *De Facto* Regulations

This reform is critical to reducing the FTC's use of consent decrees as effectively regulatory tools. It is entire commonplace for the FTC to impose the same twenty-year consent decree term and the same conditions (drawn from its quasi-regulatory reports) on every company, regardless of the facts of the case, the size of the company etc. Limiting the duration of consent decrees would not entirely stop abuse of consent decrees as a way to circumvent Section 5 rulemaking safeguards (because each consent decree is effectively a mini-rulemaking, which implements the FTC's pre-determined policy agenda), but it would at least limit the damage, and clear overly broad consent decrees more quickly.

The bill would also make it less likely that the FTC could daisy-chain additional enforcement actions — that is, bring a second enforcement action not premised on Section 5 (and therefore not even paying lip service to its requirements) but on the terms of a consent decree that is only vaguely related to the subsequent conduct. Such daisy-chaining has allowed enormous leverage in forcing settlements, since the FTC Act gives the Commission civil penalty authority only for violations of consent decrees (and rules), not Section 5 itself. Thus, the FTC gains the sledgehammer of potentially substantial monetary fines the second time around. It also allows the FTC to further extend the term of the consent decree beyond the initial 20 years — and potentially keep a company operating under a consent decree forever.

This is essentially what the FTC did to Google. First, in 2011, the FTC and Google settled charges that Google had committed an unfair trade practice in 2010 in by opting Gmail users into certain features of its new (and later discontinued) Buzz social network.[203] A year later, the FTC imposed a $22.5 million penalty against Google in settling charges that Google had violated the 2011 consent decree by misleading consumers by, essentially, failing to update an online help page that told users of Apple's Safari browser that they did not need to take further action to avoid being tracked, after a technical change made *by Apple*

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[203] Fed. Trade Comm'n, *FTC Charges Deceptive Privacy Practices in Googles Rollout of Its Buzz Social Networ*k (Mar. 30, 2011), available at https://www.ftc.gov/news-events/press-releases/2011/03/ftc-charges-deceptive-privacy-practices-googles-rollout-its-buzz.

had rendered this statement untrue.[204] The FTC's Press Release boasted "Privacy Settlement is the Largest FTC Penalty Ever for Violation of a Commission Order."[205] The case raised major questions about the way the FTC understood its deception authority,[206] none of which were dismissed because (a) Google, already being under the FTC's thumb and facing a potentially even-larger monetary penalty, was eager to settle the case, and (b) the FTC technically did not have to prove the normal elements of deception, such as the materiality of a help page seen by a tiny number of users, because it was enforcing the consent decree, not Section 5.

Perhaps most disconcertingly, the Commission's 2012 action against Google had precious little to do with the conduct that gave rise to its 2011 consent order. To be sure, the 2011 order was written in the broadest possible terms, arguably covering nearly every conceivable aspect of Google's business. But this just underscores the regulation-like nature of the Commission's consent orders, as well as the FTC's propensity to treat cases with dissimilar facts and dissimilar circumstances essentially the same. While that kind of result might be expected of a regulatory regime, it is inconsistent with the idea of case-by-case adjudication, which also puts paid to the idea that of a "common law of data security consent decrees":

> In this sense the FTC's data security settlements aren't an evolving common law — they are a static statement of "reasonable" practices, repeated about 55 times over the years and applied to a wide enough array of circumstances that it is reasonable to assume that they apply to *all* circumstances. This is consistency. But it isn't the common law. The common law requires consistency of application — a consistent theory of liability, which, given different circumstances, means *inconsistent* results. Instead, here we have consistent results which, given inconsistent facts, means [] *in*consistency of application.[207]

RECOMMENDATION: Allow Petitions for Appeal of Mooted Consent Decrees

Noticeably *not* addressed by this bill is the situation in which the FTC has found a company in violation of Section 5 for some practice (and imposed a consent decree for the violation), then lost in court on essentially the same doctrinal point. At a minimum, part of the reassessment of any consent decree should include assessing whether court decisions have called into question whether the original allegation actually violated Section 5. Ideally, the bill

[204] Fed. Trade Comm'n, *Google Will Pay $22.5 Million to Settle FTC Charges it Misrepresented Privacy Assurances to Users of Apple's Safari Internet Browser* (Aug. 9, 2012) available at https://www.ftc.gov/news-events/press-releases/2012/08/google-will-pay-225-million-settle-ftc-charges-it-misrepresented.

[205] *Id.*

[206] *See*, *e.g.*, *FTC's Google Settlement a Pyrrhic Victory for Privacy and the Rule of Law*, International Center for Law & Economics (Aug. 9, 2012), *available at* http://www.laweconcenter.org/component/content/article/84-ftcs-google-settlement-a-pyrrhic-victory-for-privacy-and-the-rule-of-law.html.

[207] Manne & Sperry, *supra* note 52, at 13.

should also include a procedure by which the company subject to a consent decree could petition for review of its consent decree on these grounds.

Such an amendment should not be controversial, given that the FTC so rarely (if ever) litigates its consumer protection cases.

Other Process Issues

Open Investigations

The Start Taking Action on Lingering Liabilities (STALL) Act

Rep. Susan Brooks' (R-IN) bill (H.R. 5097)[208] would automatically terminate investigations six months after the last communication from the FTC. Commission staff can keep an investigation alive either by sending a new communication to the target or the Commissioners can vote to keep the investigation open (without alerting the target). Current FTC rules allow the staff to inform targets that their investigation has ended, but does *not* require them to do so.[209]

VALUE OF THE BILL: Good Housekeeping, Reduces *In Terrorem* Effects of Lingering Investigations

This should be among the least controversial of the pending bills. It is simply a good housekeeping measure, ensuring that companies will not be left hanging in limbo after initial investigation-related communications from the FTC.

Closing open investigations could have several benefits.

First, in some circumstances, publicly traded companies may conclude that they are required to disclose the FTC's inquiry in their SEC filings.[210] That, in turn, can spark a media frenzy that could be as damaging to the company as whatever terms the FTC might impose in a consent decree — or at least seem to be less costly to managers who are more incentivized to care about the immediate performance of the company than the hassle of being sub-

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[208] Start Taking Action on Lingering Liabilities Act, H.R. 5097, 114th Cong. (2016) [hereinafter STALL Act], *available at* https://www.congress.gov/bill/114th-congress/house-bill/5097/text.

[209] Fed. Trade Comm'n, *Operating Manual: Chapter 3: Investigations*, 46 (last visited May 20, 2016), *available at* https://www.ftc.gov/sites/default/files/attachments/ftc-administrative-staff-manuals/ch03investigations_0.pdf (providing, in .3.7.4.5, that "[i]n investigations which have been approved by Bureau Directors, closing letters are ordinarily sent to both the applicant and the proposed respondent, with copies to their attorneys, if any[,]" but not requiring such letters in any case).

[210] *See, e.g.*, Deborah S. Birnbach, *Do You Have to Disclose a Government Investigation?*, *supra* note 99.

ject to an FTC consent decree for the next 20 years.[211] Making such disclosures can be particularly problematic if management intends to shop the company around for acquisition.

Presumably, a company that feels compelled to disclose an investigation in an SEC filling would, today, *eventually* feel justified in modifying the disclosure to indicate its belief that the investigation has concluded, given a long enough period of silence from the Commission. But this could take years, during which time the "lingering liability" could continue to damage the company. The bill (if it includes our proposed amendment, below) would give companies a clear indication whether or not they can modify their quarterly disclosures and inform shareholders and the general public that an investigation has concluded.

Second, giving subject companies repose after six months of silence from the FTC would allow management to focus on running their businesses. This could be especially critical for small companies.

Third, giving companies greater certainty in this way would reduce the leverage that staff may have to coerce companies into settling cases that might otherwise not be brought at all, or that companies might litigate. That means, in the first instance, moving closer to the optimal number of cases settled and, in the second instance, increasing the potential for litigation where it is warranted, which benefits everyone by allowing "the underlying criteria [of Section 5] to evolve and develop over time" through "judicial review," as the Unfairness Policy Statement explicitly intends.[212]

Fourth, holding target companies *in terrorem* may have other indirect costs besides driving companies to settle questionable cases. The longer an investigation lingers, or the longer it *could* linger (before the company can safely assume it is over), the more likely the company is to treat the FTC's "recommended" best practices as effectively mandatory, regulatory requirements. This regulation-by-terror is impossible to quantify, but it is a very real concern. To the extent it happens, it contributes to transforming the FTC's "inquisitorial powers" into a tool by which the FTC may treat its workshops and reports as de facto rulemakings, thus at least partially circumventing the Section 5 rulemaking safeguards.

Finally, the bill makes it harder for FTC staff to circumvent Bureau Director oversight — and thus avoid any possibility of alerting Commissioners. Current FTC rules allow an Initial Phase Investigation to be conducted for up to 100 hours of staff time, after which Staff must

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[211] Notably, this also includes the potential for the FTC to bring additional enforcement actions premised on violating the terms of the consent decree, however attenuated the subsequent enforcement action might be, which is even easier than bringing an enforcement action premised directly on Section 5 (in that the FTC need not even purport to satisfy the requirements of Section 5). *See e.g.*, United States v. Google, Inc., Case 5:12-cv-04177-HRL (N.D.Ca. 2012), *available at* https://www.ftc.gov/news-events/press-releases/2012/08/google-will-pay-225-million-settle-ftc-charges-it-misrepresented.

[212] UPS, *supra* note 9.

draft a memo and obtain approval from the Bureau Director to continue the investigation.[213] Today, the staff may be able to shoehorn a new investigation into an old investigation for which they have already received Director approval, thus avoiding or forestalling having to seek new approval from the Bureau Director. One can imagine that this would be particularly appealing if the Commission's majority — and thus also its Bureau Directors, who are appointed by the Chairman — has switched parties. This shoehorning may be very easy to do given the breadth of the FTC's investigations: one inquiry about questionable data security could very easily morph into another, potentially years later. The proposed bill would reduce this possibility by reducing the menu of available investigations from which staff could pick and choose. In other words, it would help to draw lines between old investigations and new ones. While this should not be a significant burden for the Staff, it should help to ensure that other internal decisionmaking safeguards are respected.

RECOMMENDATION: Bar Secret Votes as a Means of Evading the Bill

As drafted, the bill would allow the Commission to take a (non-public) vote to keep an investigation alive without the subject receiving additional communications. We can think of no reason to permit the Commission to hide the existence of a continuing investigation from its subject, however. In fact, although doing so requires a small price (an affirmative vote of the Commission), the price is so small that it is reasonable to expect that the exception would subsume the rule, and permit the Commission to evade the overall benefits of the proposed bill. Thus, we suggest amending section (2)(B) of the proposed bill, which authorizes an investigation to continue if "the Commission votes to extend the covered investigation before the expiration of such period,"[214] to also require the Commission to send a communication to the subject informing it of the vote. This would add no appreciable cost to the Commission's ability to extend an investigation, but, unlike a non-public vote, it ensures that the subject is made aware of the extension.

This amendment would have the benefit of allowing the subject's management to take *true* repose, knowing that an investigation had truly ended. Only then, for instance, would many managers feel comfortable revising a public securities disclosure about the company's lingering potential liability. In short, this would allow companies to clear their good names and get on with the business of serving consumers.

[213] Operating Manual at 9, § 3.2.1.1.

[214] STALL Act, *supra* note 208.

Commissioner Meetings

The Freeing Responsible & Effective Exchanges (FREE) Act

Rep. Pete Olson's (R-TX) bill (HR 5116)[215] would allow a bipartisan quorum of FTC Commissioners to meet confidentially under certain circumstances: no vote or agency action may be taken, the meeting must be FTC staff only, with a lawyer from the Office of General Counsel present, and the meeting must be disclosed publicly online. This would greatly empower other Commissioners by allowing them to meet with each other and with Commission staff — potentially without the Chairman, or without the Chairman having organized the meeting.

The bill does essentially the same thing as the FCC Process Reform Act of 2015 (H.R. 2583), which was so uncontroversial that it passed the House on a voice vote in November 2015.[216] Both bills would, for the affected agency, undo an unintended consequence of the Government in the Sunshine Act of 1976. That well-intentioned effort to bring transparency to agency decision-making in the aftermath of the Watergate scandal has the had the perverse result of undermining the very purpose of multi-member commissions.

VALUE OF THE BILL: Restoring the Collegiality of the FTC

The Sunshine Act calls multi-member commissions "collegial bod[ies],"[217] but the effect of the law has been to greatly contribute to the rise of the Imperial Chairmanship, because the law not only requires that "disposing of" (*i.e.*, voting on) major items (*e.g.*, rulemakings or enforcement actions) be conducted in public meetings (organized by the Chairman), it also bars Commissioners from "jointly conduct[ing]… agency business" except under the Act's tight rules. In effect, this makes it difficult for other Commissioners to coordinate without the Chairman.

The bill would continue to require that any "vote or any other agency action" be taken at meetings held under the Sunshine Act. This would ensure that the FTC generally continues to operate in full public view and according to valid process.

But the bill would allow Commissioners to meet privately, potentially without the Chairman present.

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[215] The Freeing Responsible and Effective Exchanges Act, H.R. 5116, 114th Cong. (2016) [hereinafter FREE Act], *available at* https://www.congress.gov/bill/114th-congress/house-bill/5116/text.

[216] Federal Communications Commission Process Reform Act of 2015, H.R. 2583, 114th Cong. (2016), *available at* https://www.congress.gov/bill/114th-congress/house-bill/2583/actions

[217] 5 U.S.C. § 552b(a)(1) & (3).

The benefits of such meetings are self-evident. They would encourage collegiality and facilitate bipartisan discussions, leading to a more open and inclusive process. They would also provide opportunities for minority commissioners to be apprised earlier in the process when the Commission is considering various actions, from investigations to issuing consent decrees.

The fact that the Energy & Commerce Committee has already vetted these reforms for the FCC, and that the full House has already voted for them as part of a larger FCC reform package, should make passage of this bill straightforward.

RECOMMENDATION: Ensure that Two of Three Commissioners Can Meet

As amended by the bill, 15 U.S.C. § 552b(d)(2)(A) would require that the group consist of at least three or more Commissioners. This would have the perverse result of rendering the bill useless at present, when the Commission has only three Commissioners — because all three would have to be present for a meeting. We recommend simply striking this subsection, so that, on a three-member commission, the Democrat and Republican commissioners can meet without the Chairman.

Part III Litigation

Numerous commentators have raised serious questions about the FTC's use of adjudication under Part III of the FTC's Rules. Commissioner Wright put it best in a 2015 speech:

> Perhaps the most obvious evidence of abuse of process is the fact that over the past two decades, the Commission has almost exclusively ruled in favor of FTC staff. That is, when the ALJ agrees with FTC staff in their role as Complaint Counsel, the Commission affirms liability essentially without fail; when the administrative law judge dares to disagree with FTC staff, the Commission almost universally reverses and finds liability. Justice Potter Stewart's observation that the only consistency in Section 7 of the Clayton Act in the 1960s was that "the Government always wins" applies with even greater force to modern FTC administrative adjudication.
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> Occasionally, there are attempts to defend the FTC's perfect win rate in administrative adjudication by attributing the Commission's superior expertise at choosing winning cases. And don't get me wrong – I agree the agency is pretty good at picking cases. But **a 100% win rate is not pretty good; Michael Jordan was better than pretty good and made about 83.5% of his free throws during his career, and that was with nobody defending him. One hundred percent isn't Michael Jordan good; it is Michael Jordan in the cartoon movie "Space Jam" dunking from half-court good.** Besides being a facially implausible defense – the data also show appeals courts reverse Commission decisions at four times the rate of feder-

al district court judges in antitrust cases suggests otherwise. This is difficult to square with the case-selection theory of the FTC's record in administrative adjudication.[218]

Former FTC Chairman Terry Calvani provides an apt summary of empirical research on the FTC's perfect win rate.[219] He notes FTC practitioner David Balto's study of eighteen years of FTC litigation, in which "the FTC has never found for the respondent and has reversed all ALJ decisions finding for the respondent."[220] Balto concluded "there appears to be a lack of impartiality by the Commission that really undermines the credibility of the process, and I think that makes it more difficult for the FTC to effectively litigate tough cases and get the court of appeals to support [its] decisions going forward."[221]

We recommend that Congress consider one of two structural reforms.

RECOMMENDATION: Separate the FTC's Enforcement & Adjudicatory Functions

Former Chairman Calvani proposes that

> the FTC be reorganized to separate the prosecutorial and adjudicatory functions. The former would be vested in a director of enforcement appointed by and serving at the pleasure of the president. Commissioners would hear the cases brought before the agency. This model is not alien to American administrative law and independent agencies. Labor complaints are evaluated and issued by National Labor Relations Board ("NLRB") regional directors. Administrative hearings are held before ALJs, and appeals from the ALJs are vested in the NLRB. Similarly, the Securities and Exchange Commission's ("SEC's") prosecutorial functions are vested in the Division of Enforcement while administrative hearings are held before ALJs and appeals are vested in the SEC.
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> This change in organization would eliminate the existence or perception of unfairness associated with the same commissioners participating in both the decision to initiate a case and in its ultimate resolution. It would also make the deci-

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[218] Joshua D. Wright, Commissioner, Fed. Trade Comm'n, *Remarks at the Global Antitrust Institute Invitational Moot Court Competition*,16-17 (Feb. 21, 2015) (emphasis added), *available at* https://www.ftc.gov/system/files/documents/public_statements/626231/150221judgingantitrust-1.pdf.

[219] Terry Calvani & Angela M. Diveley, *The FTC At 100: A Modest Proposal for Change*, 21 GEO. MASON L. REV. 1169, 1178-82 (2014).

[220] *Id.* at 1179 (quoting David A. Balto, *The FTC at a Crossroads: Can It Be Both Prosecutor and Judge?*, LEGAL BACKGROUNDER (Wash. Legal Found.) (Apr. 23, 2013), 1).

[221] Wash. Lgl Found., *FTC's Administrative Litigation Process: Should the Commission Be Both Prosecutor and Judge?*, YOUTUBE (Mar. 11, 2014), http://youtu.be/a9zvyDr4a-Y, at 9:24.

> sion to prosecute more transparent. One person would be responsible for the agency's enforcement agenda.[222]

Calvani notes that this would not significantly alter the responsibility of the powers of Commissioners, since "the power of a commissioner is relatively slight. The only real power of a commissioner is a negative one: blocking an enforcement initiative."[223] But it would "rather dramatically, [the responsibilities] of the chair."[224] In our view, this is a bug, not a feature.

RECOMMENDATION: Abolish or Limit Part III to Settlements

More fundamentally, Congress should re-examine the continued need for Part III as an alternative to litigation in Federal court. There are important differences between adjudications that originate in Part III proceedings as opposed to those that originate in Article III proceedings. Foremost, the selection of venue is an important determinant of the FTC's likelihood of success as well as the level of deference it will enjoy. Defendants will likewise see major differences between litigation in the different fora: from the range of discovery options available to the range and sort of materials considered by the tribunal (e.g., through amicus briefs). And, perhaps most important, the different venues each will create different legal norms and rules binding upon parties to future proceedings.

There is also a question regarding to what extent Part III proceedings are more than a mere formality. On the one hand, the FTC's Administrative Law Judge takes his job seriously, and has reversed the Commission in, most notably, two recent consumer protection decisions.[225] However, on the other hand, the Commission *always* reverses decisions of the ALJ that find against it.[226] Which leads to an important question: if the Commission is simply going to reverse its ALJ anyway what is the point of having an ALJ?

Even the threat of Part III litigation has a significant effect in coercing defendants to settle with the FTC during the investigation stage — not merely because of the direct financial costs of two additional rounds of litigation (first before the ALJ and then before the full Commission) prior to facing an independent Article III tribunal, but also because the Part III process drags out the other, less tangible but potentially far greater costs to the company in reputation and lost management attention. The threat of suffering two rounds of bad

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[222] Calvani & Diveley, *supra* note 219, at 1184.

[223] *Id.* at 1185.

[224] *Id.* at 1184.

[225] In the Matter of LabMD, Inc., FTC File No. 102 3099 (May 16, 2016), *available at* https://www.ftc.gov/enforcement/cases-proceedings/102-3099/labmd-inc-matter; POM Wonderful LLC v. FTC, 777 F.3d 478 (D.C. Cir. 2015).

[226] Joshua D. Wright, *Recalibrating Section 5: A Response to the CPI Symposium*, CPI ANTITRUST CHRONICLE, 4 (2012).

press before going to federal court (or at least one, if the ALJ rules for a defendant but the Commission reverses) may persuade some defendants who wouldn't otherwise to settle. Thus, the current operation of Part III rarely, if ever, serves to actually advance the interests of a fair hearing on disputed issues, and is more a tool to coerce settlements.

Congress could end this dynamic by requiring the FTC to litigate in federal court while potentially still preserving Part III for the supervision of the settlement process and discovery. This is not a novel idea, nor would it be disruptive to the FTC as the Commission has had independent litigating authority since the 1970s.[227] The Smarter Act (H.R. 2745) effectively abolishes Part III with respect to merger cases, by requiring the FTC to bring Clayton Act Section 7 cases (for preliminary injunctions to stop mergers) in federal court under the same procedures as the Department of Justice.[228] This bill passed by a vote of 230 to 170.[229]

Finally, those who might object that abolishing Part III would hamstring the agency should take comfort in the fact that the FTC uses Part III so rarely anyway. Abolishing Part III will not bury the FTC in an avalanche of litigation in federal court. At most it would marginally increase the willingness of companies to resist the siren song of settlement, thus resulting in slightly more litigation (and perhaps also slightly more cases simply abandoned by staff, if they do not think they could win). But this is a trivial price to pay in comparison with the benefit of getting more judicial review and consistent enforcement standards and judicial standards of review. The difference between essentially no litigation and *some* litigation is the key difference between the Discretionary and Evolutionary Models.

RECOMMENDATION: Allow Commissioners to Limit the Use Part III

The least draconian reform would be to empower one or two Commissioners to insist that the Commission bring a particular complaint in Federal court. This would allow them to steer cases out of Part III either because they are doctrinally significant or because the Commissioners fear that, unless the case goes to federal court, the defendant will simply settle, thus denying the entire legal system the benefits of litigation in building the FTC's doctrines. In particular, it would be a way for Commissioners to act on the dissenting recommendations of staff, particularly the Bureau of Economics, about cases that are problematic from either a legal or policy perspective.

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[227] Elliott Karr, *Essay: Independent Litigation Authority and Calls for the Views of the Solicitor General*, 77 GEO. WASH. L. REV. 1080, 1090-91 (2009).

[228] Standard Merger and Acquisition Reviews Through Equal Rules Act of 2015, H.R. 2745, 114th Cong. (2015), *available at* https://www.congress.gov/bill/114th-congress/house-bill/2745 [hereinafter SMARTER Act].

[229] U.S. House of Rep., *Final Vote Results For Roll Call 137* (Mar. 23, 2016) available at http://clerk.house.gov/evs/2016/roll137.xml

Standard for Settling Cases

No Bill Proposed

RECOMMENDATION: Set a Standard for Settling Cases Higher than for Bringing Complaints

Currently there is no standard for settling cases. The Commission simply applies the "reason to believe" standard set forth in Section 5(b) — and very often combines the vote as to whether to bring the complaint with the vote on whether to settle the matter, when the staff has already negotiated the settlement during the investigation process (because of the enormous leverage it has in this process, as we explain above). As Commissioner Wright has noted, "[w]hile the Act does not set forth a separate standard for accepting a consent decree, I believe that threshold should be at least as high as for bringing the initial complaint."[230] Reform in this area is especially critical if Congress chooses not to enact the "preponderance of the evidence" standard for issuing complaints.[231]

While it would certainly be an improvement to adopt even a "preponderance of the evidence" standard for the approval of consent decrees (relative to the status quo), we believe that this should be the standard for the approval of *complaints*, and that approval of *consent decrees* should be even higher (although, as we emphasis above, the "preponderance of the evidence" is not a particularly high standard).[232] The standard and process required by the Tunney Act for antitrust settlements would be a good place to begin. That act requires the FTC to file antitrust consent decrees with a federal court, and requires the court make the following determination:

> Before entering any consent judgment proposed by the United States under this section, the court shall determine that the entry of such judgment is in the public interest. For the purpose of such determination, the court shall consider:
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> (A) the competitive impact of such judgment, including termination of alleged violations, provisions for enforcement and modification, duration of relief sought, anticipated effects of alternative remedies actually considered, whether its terms are ambiguous, and any other competitive considerations bearing upon the adequacy of such judgment that the court deems necessary to a determination of whether the consent judgment is in the public interest; and

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[230] Dissenting Statement of Commissioner Joshua D. Wright, In the Matter of Nomi Technologies, Inc., FTC. File No. 132 3251 (Sept. 3, 2015), 2, *available at* https://www.ftc.gov/system/files/documents/public_statements/638371/150423nomiwrightstatement.pdf.

[231] See, *supra*, at 18.

[232] *See infra* at 18.

> (B) the impact of entry of such judgment upon competition in the relevant market or markets, upon the public generally and individuals alleging specific injury from the violations set forth in the complaint including consideration of the public benefit, if any, to be derived from a determination of the issues at trial.[233]

If anything, a standard for settlements should require *more* analysis than this, as the Tunney Act has been relatively ineffective. In particular, any approach based on the Tunney act should allow third parties to intervene to challenge the FTC's assertions about the public interest.[234] This reform could go a long way toward inspiring the agency to perform more rigorous analysis.

Competition Advocacy

The FTC occupies a unique position in its role as the federal government's competition scold. Despite the absence of direct legal authority over federal, state and local actors (which limits the efficacy of competition advocacy efforts), some have argued that "the commitment of significant Commission resources to advocacy is nonetheless warranted by the past contributions of competition authorities to the reevaluation of regulatory barriers to rivalry, and by the magnitude and durability of anticompetitive effects caused by public restraints on competition."[235]

The FTC performs two different, but related, kinds of "competition advocacy":

1. **Competition advocacy *litigation***: The Bureau of Competition occasionally brings antitrust cases against nominally public bodies that the FTC believes are ineligible for state action immunity, either because they are effectively operating as marketplace participants (*e.g.*, state-run hospitals) or because state-created regulatory boards have been so completely coopted by private actors that they operate as private cartels, lacking sufficiently clear statement of legislative intent to maintain their state action immunity.
2. **Competition advocacy *filings***: The Office of Policy Planning files comments with state, local, tribal and federal lawmakers and regulators as to the impact of proposed (or existing) legislation or regulation upon consumers and competition.

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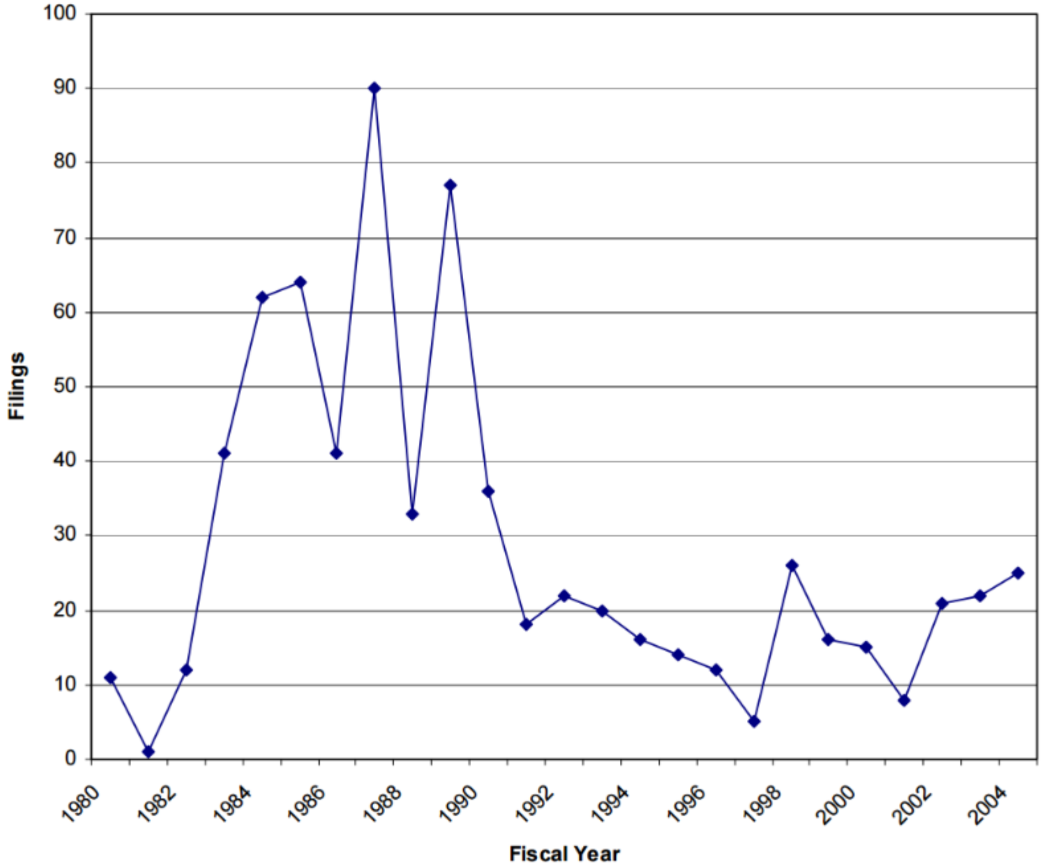
[233] 15 U.S.C. § 16(b)(1).

[234] The act currently provides that "Nothing in this section shall be construed to require the court to conduct an evidentiary hearing or to require the court to permit anyone to intervene." 15 U.S.C. § 16(b)(2).

[235] Ernest Gellhorn, & William E. Kovacic, *Analytical Approaches and Institutional Processes for Implementing Competition Policy Reforms by the Federal Trade Commission* (Dec. 12, 1995), *available at* https://www.ftc.gov/system/files/documents/public_statements/418071/951212comppolicy.pdf.

In 2004, James Cooper, Paul Pautler and Todd Zywicki (all FTC veterans) provided an empirical basis for comparing the FTC's level of activity on competition advocacy filings.[236] Their analysis included this chart:

FTC Advocacy Filings, 1980 to 2004[237]



Since 2009, the FTC has averaged just nineteen competition advocacy filings per year.[238] On high-tech matters, the Commission has been particularly inactive, making just four filings on ride-sharing,[239] four on direct sale of cars to consumers (*i.e.*, online),[240] and none on

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[236] James C. Cooper, Paul A. Pautler & Todd J. Zywicki, *Theory and Practice of Competition Advocacy at the FTC* at 3, *available at* https://www.ftc.gov/sites/default/files/documents/public_events/FTC%2090th%20Anniversary%20Symposium/040910zywicki.pdf.

[237] *Id*.

[238] A search of the FTC's Advocacy Filings reveals that between January 2009 and January 2016, 115 separate documents have been filed. *See* Fed Trade Comm'n, Advocacy Filings *available at* https://www.ftc.gov/policy/advocacy/advocacy-filings.

[239] Fed Trade Comm'n, "Transportation" Advocacy Filings, *available at* https://www.ftc.gov/policy/advocacy/advocacy-filngs?combine=&field_matter_number_value=&field_advocacy_document_terms_

(cont.)

house-sharing. It has also made few other broadly tech-related miscellaneous filings to other federal agencies on privacy and data security, vehicle-to-vehicle communications, mobile financial services, and the National Broadband Plan.

The FTC held a workshop on the sharing economy in June 2015,[241] but has since missed the opportunity to do significant competition advocacy work in the area, despite growing protectionist state and local regulation aimed at upstarts like Uber, Lyft, Airbnb and others. Recent legislation in Austin, Texas, is sadly illustrative. An Austin City Council ordinance,[242] essentially regulating ride-sharing services out of existence, was approved by (the few) voters who showed up to vote in a referendum.[243] This type of overly broad law regulating innovative technology is exactly the sort of thing the FTC should be taking initiative to advocate against, and it is unfortunate that, in the face of it, the FTC's competition advocacy has receded.

By contrast, in the early 2000s, OPP's State Action Task Force and Internet Task Force made a concerted effort to challenge anticompetitive state and local regulations that hindered online commerce through litigation, testimony and comments. The FTC started several campaigns, including one challenging rules making it harder to participate in e-commerce. Unlike the current Commission's stunted approach, the early 2000s FTC started with a workshop,[244] released reports explaining the problem the FTC's planned approach,[245]

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tid=5283&field_date_value%5Bmin%5D%5Bdate%5D=January%2C+2009&field_date_value%5Bmax%5D%5Bdate%5D=January%2C+2016&items_per_page=100.

[240] Fed Trade Comm'n, "Automobiles" Advocacy Filings, *available at* https://goo.gl/lq9ACP.

[241] Fed. Trade Comm'n, The "Sharing" Economy: Issues Facing Platforms, Participants, and Regulators (Jun. 9, 2015), *available at* https://www.ftc.gov/news-events/events-calendar/2015/06/sharing-economy-issues-facing-platforms-participants-regulators

[242] Austin, Texas, Ordinance No. 20151217-075 (2015), *available at* http://www.austintexas.gov/edims/document.cfm%3Fid=245769.

[243] Jared Meyer, *The Reverse of Progress. Austin's new rules strangle Uber, Lyft – and the ridesharing economy,* U.S. NEWS & WORLD REPORT (May 18, 2016), *available at* http://www.usnews.com/opinion/articles/2016-05-18/austins-very-un-progressive-example-on-uber-and-lyft.

[244] Fed. Trade Comm'n Workshop, Possible Anticompetitive Efforts to Restrict Competition on the Internet, Oct. 8-10, 2002, *available at* https://www.ftc.gov/news-events/events-calendar/2002/10/possible-anticompetitive-efforts-restrict-competition-internet.

[245] FED. TRADE COMM'N, REPORT OF THE STATE ACTION TASK FORCE (2003), *available at* https://www.ftc.gov/sites/default/files/documents/advocacy_documents/report-state-action-task-force/stateactionreport.pdf; FED. TRADE COMM'N, POSSIBLE ANTICOMPETITIVE BARRIERS TO E-COMMERCE: WINE (2003), *available* at https://www.ftc.gov/sites/default/files/documents/advocacy_documents/ftc-staff-report-concerning-possible-anticompetitive-barriers-e-commerce-wine/winereport2.pdf; FED. TRADE COMM'N, POSSIBLE BARRIERS TO E-COMMERCE: CONTACT LENSES: A REPORT FROM THE STAFF OF THE FEDERAL TRADE COMMISSION (Mar. 29, 2004), *available at* https://www.ftc.gov/sites/default/files/documents/advocacy_documents/possible-anticompetitive-barriers-e-commerce-contact-lenses-report-staff-ftc/040329clreportfinal.pdf.

and then went on to systematically challenge e-commerce-related regulations (among other things) inconsistent with consumer welfare. Filings included:

- Comment on Ohio legislation to allow direct shipment of wine to Ohio consumers;[246] and on similar New York legislation;[247]
- Congressional Testimony regarding online wine sales;[248]
- Comment on Arkansas legislation regarding online contact sales;[249] and
- Comment on Connecticut regulation of contact sales.[250]

The current FTC has many ripe targets for public interest advocacy around the nation as incumbents are, predictably, using regulation to try to stop Internet- and app-based competition, especially disruptive new "sharing economy" business models.

VALUE OF THE IDEA: Competition Advocacy Is the Most Cost-Effective Way to Serve Consumers

As Cooper, Pautler & Zywicki explain:

> The economic theory of regulation ("ETR") posits that because of relatively high organizational and transaction costs, consumers will be disadvantaged relative to businesses in securing favorable regulation. This situation tends to result in regulations — such as unauthorized practice of law rules or per se prohibitions on sales-below-cost — that protect certain industries from competition at the expense of consumers. Competition advocacy helps solve consumers' collective ac-

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[246] Comment on Proposed Direct Shipment Legislation of the Federal Trade Commission to the Ohio State Senate (2006), *available at* https://www.ftc.gov/sites/default/files/documents/advocacy_documents/ftc-staff-comment-honorable-eric-d.fingerhut-concerning-ohio-s.b.179-allow-direct-shipment-wine-ohio-consumers/v060010commentreohiosb179directshipmentofwine.pdf

[247] *Letter of the Federal Trade Commission regarding Assembly bill 9560-A, Senate bills 6060-A and 1192 to the New York State legislature (2004)*, https://www.ftc.gov/sites/default/files/documents/advocacy_documents/ftc-staff-comment-honorable-william-magee-et-al.concerning-new-york.b.9560-s.b.606-and-s.b.1192-allow-out-state-vendors-ship-wine-directly-new-york-consumers/v040012.pdf

[248] Prepared Statement of Todd Zywicki, Fed. Trade Comm'n, before the Subcommittee on Commerce, Trade, and Consumer Protection, Committee on Energy and Commerce United States House of Representatives (Oct. 13, 2003), available at https://www.ftc.gov/sites/default/files/documents/advocacy_documents/ftc-statement-u.s.house-representatives-energy-and-commerce-concerning-e-commerce-wine-sales-and-direct-shipment/031030ecommercewine.pdf

[249] *Letter of the Federal Trade Commission regarding Arkansas HB 2286 to the Arkansas House of Representatives (2015)*, *available at* https://www.ftc.gov/sites/default/files/documents/advocacy_documents/ftc-staff-comment-honorable-doug-matayo-concerning-arkansas-h.b.2286-and-fairness-contact-lens-consumers-act-and-contact-lens-rule/041008matayocomment.pdf.

[250] Comments of the Staff Of the Federal Trade Commission In Re: Declaratory Ruling Proceeding on the Interpretation and Applicability of Various Statutes and Regulations Concerning the Sale of Contact Lenses (2002), *available at* https://www.ftc.gov/sites/default/files/documents/advocacy_documents/ftc-staff-comment-connecticut-board-examiners-opticians-intervenor-re-declaratory-ruling-proceeding/v020007.pdf

> tion problem by acting within the political system to advocate for regulations that do not restrict competition unless there is a compelling consumer protection rationale for imposing such costs on citizens. Furthermore, advocacy can be the most efficient means to pursue the FTC's mission, and when antitrust immunities are likely to render the FTC impotent to wage ex post challenges to anticompetitive conduct, advocacy may be the only tool to carry out the FTC's mission.[251]

Competition advocacy is probably the most cost-effective way the FTC can promote consumer welfare. Anticompetitive practices and agreements backed up by the power of the state are much less likely to be corrected by the power of competition than those that exist in the marketplace, and antitrust law cannot be used to remove such barriers to competition. The only way for the FTC to even get at such conduct is through its competition advocacy arm.

RECOMMENDATION: Clarify Section 6(f) & the FTC May File Unsolicited Comments

The FTC currently relies on Sections 6(a) (information gathering) and 6(f) (issuance of reports) as the basis for its competition advocacy filings.[252] But as discussed above,[253] Section 6(f) could be read to allow the FTC to make recommendations for legislation only to Congress, not to states or local governments. This is the kind of small discontinuity between the statute's plain meaning and the agency's practice (on an issue that enjoys broad bipartisan support) that should be addressed by Congress in regular reauthorization.

In the same vein, we gather that, if only by standing convention, the FTC does not file comments with state and local lawmakers or regulators unless invited to do so by someone on the relevant body. This is undoubtedly well-intentioned, perhaps grounded in some kind of sense of federalism, but it may have the perverse result of denying consumers the benefit of the FTC's competition-advocacy work where it is most needed: when state regulators are so captured by incumbents, or otherwise blinded to the benefits of new technologies, that they will resent the FTC's comment as an intrusion upon their decision-making.

We urge Congress to kill two birds with one stone by amending Section 6(f) to add the following bolded text (and, for clarity's sake, roman numeral subsection numbers):

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[251] Cooper, Pautler & Zywicki, *Theory and Practice of Competition Advocacy at the FTC supra* note 236, at 2.

[252] See, e.g., *id.* at 1, n.3:

> The legal authority for competition advocacy is found in Section 6 of the FTC Act, which allows the FTC to "gather and compile information" that concerns persons subject to the FTC Act, and "to make public such portions of the information obtained" that are "in the public interest."

(Quoting 15 U.S.C. § 46(a), (f) (2005)).

[253] *See supra* 61.

> To (i) make public from time to time such portions of the information obtained by it hereunder as are in the public interest; and to (ii) make annual and special reports to the Congress and to submit therewith recommendations for additional legislation; ***and to (iii) file recommendations for legislation or regulatory action with state, local, tribal and federal bodies***; and to (iv) provide for the publication of its reports and decisions in such form and manner as may be best adapted for public information and use

RECOMMENDATION: Create an Office of Bureau of Competition Advocacy with Dedicated Funding

The FTC's Competition advocacy *filing* function has languished, in part, because while competition advocacy *litigation* resides inside the Bureau of Competition, the filings are primarily the responsibility of the Office of Policy Planning (OPP), a relatively tiny organization attached to the Chairman's office, which has a staff of just over a dozen compared to 285 for the Bureau of Competition, 331 for the Bureau of Consumer Protection, and 114 for the Bureau of Economics.[254]

Congress should seriously consider creating an independent office of Competition Advocacy, which would manage competition-advocacy filings, and share joint responsibility for competition-advocacy litigation with the Bureau of Competition. In particular, this would mean giving this new Bureau a line item in the FTC's budget.

RECOMMENDATION: In the Alternative, Reconstitute the Task Force

As noted above, the Internet Task Force, which was spun off from the broader State Action Task Force, had considerable effect through its research, reports, and associated filings. A standing Task Force of this nature could provide dividends by picking up where the Sharing Economy Workshop left off and studying the effects of regulation on the sharing economy around the nation. A well-done report could then be followed by strategic litigation, amicus briefs, and other filings in order to promote sound public policy and combat the Internet-age protectionism that is slowing down innovation and competition and the attendant benefit to consumers.

Expanding FTC Jurisdiction

Section 5 of the FTC Act empowers the Commission to prevent unfair and deceptive acts and practices by nearly all American businesses (and business people). The exceptions are

[254] *Cf.* Fed. Trade Comm'n, Federal Trade Commission Office of Policy Planning Organizational Chart, https://www.ftc.gov/system/files/attachments/office-policy-planning/opp-org-chart-may2016.pdf; Fed. Trade Comm'n, Shutdown of Federal Trade Commission Operations Upon Failure of the Congress to Enact Appropriations, https://www.ftc.gov/system/files/attachments/office-executive-director/130925ftcshutdownplan.pdf.

few: "banks, savings and loan institutions…, federal credit unions…, common carriers subject to the Acts to regulate commerce, air carriers and [certain meat packers and stockyards]...." One important limitation is that the FTC Act does not expressly give the Commission jurisdiction over nonprofit organizations. Nevertheless, courts have held that nonprofit status is not in itself sufficient to exempt an organization from FTC jurisdiction.[255] In *Cal Dental Ass'n v. FTC*, the Supreme Court noted that the FTC has jurisdiction over both "'an entity organized to carry on business for its own profit' … [as well as] one that carries on business for the profit 'of its members.'"[256] Thus, various types of nonprofits — notably trade associations — can be reached by the FTC *depending on their activities*, but "purely charitable" organizations remain outside of the FTC's enforcement purview.[257]

Subcommittee Democrats have revived two sensible proposals from 2008 to expand the FTC's jurisdiction. Both have long enjoyed bipartisan support, and have been endorsed by the Commission under both Republican and Democratic chairmen.

FTC Jurisdiction over Common Carriers

The Protecting Consumers in Commerce Act of 2016

Jerry McNerney's (D-CA) bill (H.R. 5239)[258] would allow the FTC to regulate common carriers currently regulated by the Federal Communications Commission. In particular, this would ensure that the FTC and FCC have dual jurisdiction over broadband — effectively restoring the jurisdiction the FTC lost when the FCC "reclassified" broadband in 2015.

The FCC recently issued a controversial NPRM proposing privacy and data security rules for broadband that are significantly different from the approach the FTC has taken. This bill would moot the need for new FCC privacy and data security rules as a "gap filler." The bill would also allow the FTC to police net neutrality concerns, interconnection and other broadband practices (to the extent it finds unfair or deceptive practices) even if the FCC's Open Internet Order fails in pending litigation.

[255] *See, e.g.*, Community Blood Bank v. FTC, 405 F.2d 1011 (8th Cir. 1969).

[256] Cal. Dental Ass'n v. FTC, 526 U.S. 756, 766 (1999).

[257] *See Statement of William C. Macleod, Dir. of FTC Bureau of Consumer Protection, Before The U.S. House of Representatives Committee on Energy & Commerce; Subcommittee on Transportation & Hazardous Materials; Hearing On Deceptive Fundraising By Charities* (Jul. 28, 1989), *available at* http://www.freespeechcoalition.org/macleod.htm.

[258] Protecting Consumers in Commerce Act of 2016, H.R. 5239, 114th Cong. (2016), *available at* https://www.congress.gov/bill/114th-congress/house-bill/5239/text.

VALUE OF THE BILL: Reclassification of Broadband by the FCC Should Not Remove FTC Jurisdiction

There has long been unusual bipartisan agreement on ending the common carrier exemption. This was proposed by Sen. Byron Dorgan's proposed FTC Reauthorization Act of 2002,[259] and supported by Republican Commissioner Thomas Leary and Democrat Commissioner Sheila Anthony.[260] Sen. Dorgan last proposed the same reform in 2008.[261] More recently, in 2015, Democrat Chairman Edith Ramirez and Republican Commissioner Josh Wright supported this reform.[262]

Section 5 jurisdiction excludes "common carriers subject to the Acts to regulate commerce."[263] The bill simply edits the definition of "Acts to regulate commerce" in Section 4 to remove the Communications Act.[264] Thus, the FTC *could* regulate common carriers regulated by the FCC but *not* transportation common carriers.

Former Commissioner Joshua Wright summarized the many advantages of keeping the FTC as a cop on the broadband beat:

> The FTC has certain enforcement tools at its disposal that are not available to the FCC. Unlike the FCC, the FTC can bring enforcement cases in federal district court and can obtain equitable remedies such as consumer redress. The FCC has only administrative proceedings at its disposal, and rather than obtain court-ordered consumer redress, the FCC can require only a "forfeiture" payment. In addition, the FTC is not bound by a one-year statute of limitations as is the FCC. The FTC's ability to proceed in federal district court to obtain equitable remedies that fully redress consumers for the entirety of their injuries provides comprehen-

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259 Federal Trade Commission Reauthorization Act of 2002, S. 2946, 104th Cong. (2002), *available at* https://www.congress.gov/bill/107th-congress/senate-bill/2946/text.

260 *Additional Statement of Commissioner Thomas B. Leary*, *Hearing Before the H. Subcomm. on Commerce, Trade and Consumer Protection of the H. Comm. on Energy and Commerce*, 108th Cong. (2003), *available at* https://www.ftc.gov/sites/default/files/documents/public_statements/prepared-statement-federal-trade-commission-reauthorization/030611learyhr.pdf; Federal Trade Commission Testifies Before Senate in Support of Reauthorization Request for Fiscal Years 2003 to 2005, *available at* https://www.ftc.gov/es/node/63553.

261 Federal Trade Commission Reauthorization Act of 2008, S. 2831 §14, 110th Cong. (2008), *available at* https://www.govtrack.us/congress/bills/110/s2831/text

262 *Prepared Statement of Commissioner Joshua D. Wright, Federal Trade Commission: Wrecking the Internet to Save It? The FCC's Net Neutrality Rule Before the H. Comm. on the Judiciary*. 114th Cong. (2015), *available at* https://www.ftc.gov/system/files/documents/public_statements/632771/150325wreckinginternet.pdf; Ramirez urges repeal of common carrier exemption, FTC WATCH, *available at* http://www.ftcwatch.com/ramirez-urges-repeal-of-common-carrier-exemption/.

263 15 U.S.C. § 45(a)(2).

264 *Cf.* 15 U.S.C. § 44.

sive consumer protection and can play an important role in deterring consumer protection violations.[265]

Recommendation: Pass the Protecting Consumers in Commerce Act to End the Exemption for Telecom Common Carriers

Ending the common carrier exemption for telecom companies is long overdue. "As the telecommunications and Internet industries continue to converge, the common carrier exemption is likely to frustrate the FTC's efforts to combat unfair or deceptive acts and practices and unfair methods of competition in these interconnected markets."[266] Moreover, the uncertainty surrounding the application of the exemption to new technologies, as well as the long-standing uncertainty around application of the exemption to non-common-carrier activities carried out by common carriers introduce needless administrative costs.

Recommendation: Require the FCC to Terminate Its Privacy Rulemaking

With respect to the common carrier exception, the fortunes of the FTC are tied to those of the FCC; adopting optimal policy for one requires adopting complimentary policy for the other. The conclusions above are complicated by the FCC's ongoing efforts to exercise the *exclusive* authority it claimed when it reclassified Internet service providers as common carriers, particularly with respect to privacy and similar matters.[267] Because the FCC's rationale for its proposed privacy rules is to fill the gap it created by "reclassifying" broadband and thus removing it from the FTC's jurisdiction, enactment of this legislation would moot the need for new FCC rules. Accordingly, this bill should include a provision directing the FCC to terminate that rulemaking — so that the FTC may resume its former role in policing broadband privacy and data security without unnecessary and costly duplicative regulations.

This situation is very much unlike that in the 1980 FTC Improvements Act, by which Congress both tightened the FTC's Section 5 rulemaking processes (as instituted in 1975) and also ended the FTC's children's advertising rulemaking.[268] In signing the bill, President Carter lauded the former but objected to the latter:

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[265] *Prepared Statement of Commissioner Joshua D. Wright*, *supra, available at* https://www.ftc.gov/system/files/documents/public_statements/632771/150325wreckinginternet.pdf (internal citations omitted).

[266] Fed Trade Comm'n, Broadband Connectivity Competition Report, 41 (2007), *available at* https://www.ftc.gov/sites/default/files/documents/reports/broadband-connectivity-competition-policy/v070000report.pdf.

[267] Protecting the Privacy of Customers of Broadband and Other Telecommunications Services, *Notice of Proposed Rulemaking*, WC Docket No. 16-106 (rel. Apr. 1, 2016), *available at* https://apps.fcc.gov/edocs_public/attachmatch/FCC-16-39A1_Rcd.pdf.

[268] FTC Improvements Act Section 11 added the following language to 17 U.S.C. § 57a: "The Commission shall not have any authority to promulgate any rule in the children's advertising proceeding pending on the date of the enactment of the Federal Trade Commission Improvements Ante, p. 374. Act of 1980 or in any

(cont.)

> We need vigorous congressional oversight of regulatory agencies. But the reauthorization bills passed by the Senate and the House went beyond such oversight and actually required termination of specific, major, ongoing proceedings before the Commission. I am pleased that the conferees have modified these provisions. If powerful interests can turn to the political arena as an alternative to the legal process, our system of justice will not function in a fair and orderly fashion.[269]

President Carter had a point, in general. But in this case, Congress would not be telling an agency to stop a pending rulemaking because of a policy difference; it would be telling the FCC to stop a rulemaking that it claims is necessary only because of a regulatory vacuum of its own creation.

If the FCC insists on issuing its own rules, the bill will result in overlapping jurisdiction, which could create problems of its own: forum-shopping, inconsistent results, and politicization of the enforcement process. The Memorandum of Understanding reached between the two agencies on how to handle enforcement where their authority *does* overlap will do little to minimize potential conflicts.[270] It would be particularly incongruous to enact legislation authorizing overlapping and conflicting jurisdiction while Congress is also considering the SMARTER Act, aimed at mitigating exactly such problematic overlap in the antitrust enforcement authority of the FTC and DOJ.[271] None of these concerns are inherent reasons not to restore the FTC's jurisdiction; after all, the FTC is the better regulator, in large part because applying standards of general applicability makes the FTC a more difficult agency to capture than a sector-specific regulator like the FCC. But these concerns do make it important that passage of this bill be tied to ending the FCC's foray into privacy and data-security regulation.

FTC Jurisdiction over Tax-Exempt Organizations & Nonprofits

The Tax Exempt Organizations Act

Representative Rush's (D-IL) bill (H.R. 5255)[272] would add tax-exempt, 501(c)(3) nonprofits to the definition of "corporation" subject to the FTC Act in Section 4 (15 U.S.C. § 44). It

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substantially similar proceeding on the basis of a determination by the Commission that such advertising constitutes an unfair act or practice in or affecting commerce."

[269] Carter, *supra* note 19.

[270] Memorandum of Understanding on Consumer Protection Between the Federal Trade Commission and the Federal Communications Commission (Nov. 2015), *available at* https://www.ftc.gov/system/files/documents/cooperation_agreements/151116ftcfcc-mou.pdf.

[271] SMARTER Act, *supra* note 228.

[272] A Bill to Amend the Federal Trade Commission Act to Permit the Federal Trade Commission to Enforce Such Act Against Certain Tax-exempt Organizations, H.R. 5255, 114th Cong. (2016) *available at* https://www.congress.gov/bill/114th-congress/house-bill/5255/text.

would not, however, amend Section 4 to remove the language that limits the FTC's jurisdiction to corporations that "carry on business for [their] own profit or that of [their] members." Thus, the FTC would still be limited to policing for-profit activities but would have an easier time establishing that a nonprofit was essentially conducting for-profit activities.

VALUE OF THE BILL: Would Reduce Litigation Expenses for the FTC

This bill does precisely the same thing proposed by Sen. Byron Dorgan's FTC Reauthorization Act of 2008.[273] The Republican-led FTC supported this provision at the time.[274]

In 2008, in supporting Sen. Dorgan's version of this bill, the FTC explained the advantage of this reform, even though it would not technically change the substance of the FTC's jurisdiction:

> The proposed legislation would also help increase certainty and reduce litigation costs in this area. Although the FTC has been successful in asserting jurisdiction against "sham" nonprofits and against non-profit trade associations, the proposed legislation would help avoid protracted factual inquiries and litigation battles to establish jurisdiction over such entities.[275]

We agree with the FTC's 2008 assessment.

RECOMMENDATION: Extend Jurisdiction to Tax-Exempt Entities, Including Trade Associations

In 2008, in supporting Sen. Dorgan's version of this bill, the FTC also said:

> The Commission would be pleased to work with Congressional staff on crafting appropriate language. The Commission notes that, as drafted, Section 6 would reach only those non-profit entities that have tax-exempt status under section 501(c)(3) of the Internal Revenue Code. The Commission would benefit from broadening this provision to cover certain other nonprofits, such as Section 501(c)(6) trade associations. The Commission has previously engaged in protracted litigation battles to determine whether such entities are currently covered under the FTC Act. *See, e.g., California Dental Ass'n v. FTC*, 526 U.S. 756, 765-69 (1999) (holding that FTC Act applies to anticompetitive conduct by non-profit dental association whose activities provide substantial economic benefits to for-profit members); *American Medical Ass'n v. FTC*, 638 F.2d 443, 447-448 (1980) (finding FTC jurisdiction over non-profit medical societies whose activities

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[273] Federal Trade Commission Reauthorization Act of 2008, *supra* note *261*, § 6, *available at* https://www.govtrack.us/congress/bills/110/s2831/text.

[274] *Prepared Statement of the Federal Trade Commission: Hearing Before the S. Comm. on Commerce, Science, and Transportation*. 110th Cong. (2008), 19, *available at* https://www.ftc.gov/sites/default/files/documents/public_statements/ftc-testimony-reauthorization/p034101reauth.pdf.

[275] *Id*. at 16.

> "serve both the business and non-business interests of their member physicians").[276]

RECOMMENDATION: Extend Jurisdiction to *All* Non-Profits

We likewise recommend expanding the bill to encompass all nonprofit corporations, regardless of their tax-exempt status.[277] The logic of the FTC's jurisdiction doesn't turn on the tax-exempt status of organizations, which, for these purposes, is essentially a meaningless dividing line between entities. It makes little sense to include tax-exempt nonprofits within the FTC's ambit while excluding nonprofits without federal tax-exempt status.

Rulemaking

The FTC makes rules in two ways: (1) under Section 5, through the process created by Congress in 1980 to require additional economic rigor and evidence; and (2) under narrow grants of standard APA rulemaking authority specific to a particular issue.

Economic Analysis in All FTC Rulemakings

No Bill Proposed

RECOMMENDATION: Require BE to Comment on Rulemakings

The RECS Act, discussed below, would require the FTC to include BE analysis of any recommendations it makes for rulemakings. However, this would not apply to the FTC's own rulemakings because that bill is focused on the FTC's statutory authority to make recommendations to Congress, other agencies, and state and local governments.

Requiring regulatory agencies to do cost-benefit analysis has been uncontroversial for decades, dating back at least to the Carter Administration. Indeed, in 2011, shortly after President Obama issued Executive Order 13563,[278] his version of President Clinton's 1993 Executive Order 12866[279] applying to Executive Branch agencies, he issued a second order, Regu-

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[276] *Id.* at 18 n.49.

[277] The nonprofit designation is a creature of state incorporation law, and obligates corporations to adopt certain governance rules and structures. Federal tax-exempt status is a creature of federal tax law, and, while it obligates companies to limit their corporate purpose (*e.g.*, to education, religious activities, etc.), it doesn't appreciably affect their governance structure. Companies can be nonprofit but not tax-exempt, although all tax-exempt companies are nonprofit.

[278] Exec. Order No. 13,563, 3 C.F.R. 13563 (2012) *available at* https://www.whitehouse.gov/the-press-office/2011/01/18/executive-order-13563-improving-regulation-and-regulatory-review.

[279] Exec. Order No. 12,866 3 C.F.R. 12866 (1993) *available at* https://www.whitehouse.gov/sites/default/files/omb/inforeg/eo12866/eo12866_10041993.pdf.

lation and Independent Regulatory Agencies, Executive Order 13579.[280] The key difference between the two is that the President said Executive agencies "must" do cost-benefit analysis for each new regulation, but that independent agencies "should" undertake retrospective analysis of its rules and periodically update them.

FTC Chairman Jon Leibowitz fully endorsed the idea in the White House's blog about the Order:

> President Obama deserves enormous credit for ensuring regulatory review throughout the federal government, including at independent agencies. Although regulations are critically important for protecting consumers, they need to be reviewed on a regular basis to ensure that they are up-to-date, effective, and not overly burdensome. For all agencies – independent or not – periodic reviews of your rules is just good government. The announcement raises the profile of this issue, and I think that's a constructive step.[281]

The chief (indeed, perhaps the only) reason for the difference is that the President has no authority over independent agencies, which are creatures and servants of Congress. The bipartisan Independent Agency Regulatory Analysis Act of 2015 (S. 1607) would solve this problem, giving the President the authority to set cost-benefit standards for independent agencies as well.[282] We fully support that bill and believe this requirement should apply to *all* independent agencies. But there is no reason to wait for passage of the more comprehensive bill. The FTC in particular would benefit from a commitment to cost-benefit analysis in its rulemakings immediately.

Of course, it is true that the Commission has abandoned using its Section 5 rulemaking power (precisely because it reflects the Carter-era commitment to cost-benefit analysis). But the Commission *does* continue to make rules under a variety of issue-specific statutes such as several of those now pending before the House Energy and Commerce Committee, Subcommittee on Commerce, Manufacturing and Trade in May 2016.[283] As the chief example of the need for greater economic rigor in FTC rulemakings, we note the FTC's 2012 COPPA rulemaking: the agency expanded the definition of "personal information," thus greatly

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[280] Exec. Order No. 13,579, 3 C.F.R. 13579 (2012) *available at* https://www.whitehouse.gov/the-press-office/2011/07/11/executive-order-13579-regulation-and-independent-regulatory-agencies.

[281] Cass Sunstein, *The President's Executive Order on Improving and Streamlining Regulation by Independent Regulatory Agencies*, WHITEHOUSE.GOV BLOG (Jul. 11, 2011), https://www.whitehouse.gov/blog/2011/07/11/president-s-executive-order-improving-and-streamlining-regulation-independent-regula.

[282] Independent Agency Regulatory Analysis Act of 2015, S. 1607, 114th Cong. (2015), *available at* https://www.congress.gov/bill/114th-congress/senate-bill/1607/text.

[283] *See* Press Release, HEARING: #SubCMT to Review 17 Bills Modernizing the FTC for the 21st Century NEXT WEEK, THE ENERGY AND COMMERCE COMMITTEE (May 17, 2016), https://energycommerce.house.gov/news-center/press-releases/hearing-subcmt-review-17-bills-modernizing-ftc-21st-century-next-week.

expanding the number of children's-oriented media subject to the rule, with no meaningful analysis of what this would do to children's media.

Despite loud protests from small operators that the rule might cause them to cease offering child-oriented products, the FTC produced a meaningless estimate that the rule would cost $21.5 million in the aggregate.[284] Of course, the *real* cost of the new rule is not the direct compliance cost but the second-order effects of the number of providers who exit the children's' market, reduce functionality, slow innovation or raise prices — none of which did the FTC even attempt to estimate. This was a clear failure of economic analysis.

We also note Commissioner Ohlhausen's 2015 dissent from the Commission's vote to update the Telemarketing Sales Rule to ban telemarketers from using four "novel" payment methods. Ohlhausen cited no less an authority than the Federal Reserve Bank of Atlanta (FRBA), which is not merely one of twelve Federal Reserve Branches, but the one responsible for "operat[ing] the Federal Reserve System's Retail Payments Product Office, which manages and oversees the check and Automated Clearing House (ACH) services that the Federal Reserve banks provide to U.S. financial institutions."[285] Ohlhausen explained:

> The amendments do not satisfy the third prong of the unfairness analysis in Section 5(n) of the FTC Act, which requires us to balance consumer injury against countervailing benefits to consumers or competition. Although the record shows there is consumer injury from the use of novel payment methods in telemarketing fraud, it is not clear that this injury likely outweighs the countervailing benefits to consumers and competition of permitting novel payments methods….
>
> In sum, the FRBA's analysis of the prohibition of novel payments in telemarketing indicates that any reduction in consumer harm from telemarketing fraud is outweighed by the likely benefits to consumers and competition of avoiding a fragmented law of payments, not limiting the use of novel payments prematurely, and allowing financial regulators working with industry to develop better consumer protections.[286]

Again, it appears that the Commission majority failed to undertake an economically rigorous analysis of the sort BE would likely perform, in this case failing to properly weigh injury and countervailing benefits as Section 5(n) requires.

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[284] 78 Fed. Reg. 4002 *available at* https://www.ftc.gov/system/files/documents/federal_register_notices/2013/01/2012-31341.pdf

[285] Separate Statement of Commissioner Maureen K. Ohlhausen, Dissenting in Part, In the Matter of the Telemarketing Sales Rule, Project No. R411001, at n. 3 (Nov. 18, 2015), *available at* https://www.ftc.gov/system/files/documents/public_statements/881203/151118tsrmkospeech.pdf.

[286] *Id*. at 1-2.

At a minimum, the Commission would have done well to solicit further public comment on its rule, heeding the experience of past chairmen, as summarized by Former Chairman Tim Muris:

> By their nature, however, rules also must apply to legitimate actors, who actually deliver the goods and services they promise. Remedies and approaches that are entirely appropriate for bad actors can be extremely burdensome when applied to legitimate businesses, and there is usually no easy or straightforward way to limit a rule to fraud. Rather than enhancing consumer welfare, overly burdensome rules can harm the very market processes that serve consumers' interests. For example, the Commission's initial proposal for the Telemarketing Sales Rule was extremely broad and burdensome, and one of the first acts of the Pitofsky Commission was to narrow the rule. More recently, the Commission found it necessary to re-propose its Business Opportunity Rule, because the initial proposal would have adversely affected millions of self-employed workers.[287]

Issue-Specific Rulemakings

Several Bills Proposed

Congress has long enacted legislation tasking the FTC with enacting regulations in a specific area through standard rulemaking under the Administrative Procedure Act. This, in effect, has allowed the FTC to avoid having to conduct rulemakings under the Magnuson-Moss Act of 1975 (as amended in 1980). The result has been that there may not be anyone left at the FTC who has ever conducted a Section 5 rulemaking. This contributes to the common misconception that the FTC lacks rulemaking authority — something the Chairman and other Commissioners have said casually. Of course, they mean that the FTC lacks *APA* rulemaking authority, and that they believe Section 5 rulemaking is too difficult.

But this belief is unfounded. There is good reason to think that the FTC could have conducted a Section 5 rulemaking to address telemarketing complaints, for example, in about the same amount of time it took Congress to pass the Do Not Call Act and for the FTC to conduct an APA rulemaking, and perhaps even less. As Former Chairman Tim Muris explained, in 2010:

> The Commission's most prominent rulemaking endeavor, the creation of the National Do Not Call Registry, could have proceeded in a timely fashion under Magnuson-Moss procedures. It took two years from the time the rule was first publicly discussed until it was implemented. Although it would have been neces-

[287] *Statement of Timothy J. Muris, supra* note 14, at 24.

> sary to structure the proceedings differently, there would have been little, if any, additional delay from using Magnuson-Moss procedures.[288]

This is not idle speculation. Muris actually ran the FTC during its creation of the Do Not Call registry. Attempting a Section 5 rulemaking would have been a valuable experience for the FTC, and it might have avoided some of the unintended consequences of ex ante legislation.

We make two broad recommendations applicable to all six rulemaking bills.

RECOMMENDATION: Require the FTC to Conduct Section 5 Rulemakings & Report on the Process

The FTC would greatly benefit from conducting a Section 5 rulemaking. Congress should direct the FTC to conduct such a rulemaking on at least one, and preferably two or three, of the issues to be addressed by these proposed issue-specific bills. Having multiple rulemakings would produce a more representative experience with the FTC's Section 5 rulemaking powers. However many Section 5 rulemakings the FTC does, Congress should direct the FTC to report back in, say, three years as to the state of these rulemakings and the FTC's general experience with its Section 5 rulemaking procedures. This is the only way Congress will ever be able to make informed decisions about how existing Section 5 rulemaking processes might be expedited or streamlined without removing the safeguards that Congress rightly imposed to prevent the FTC from abusing its rulemaking powers.

Any reconsideration of the FTC's Section 5 rulemaking processes should be undertaken with the utmost caution. Unfairness is a uniquely elastic concept, which requires unique procedural safeguards if it is to serve as the basis for rulemaking. If anything, FTC's approach to enforcing Section 5 in high tech matters over the last 15–20 years reconfirms the need for safeguards: in its "common law of consent decrees," the FTC has paid little more than lip service to the balancing test inherent in unfairness, and has increasingly nullified the materiality requirement at the heart of the deception policy statement.

RECOMMENDATION: Include Periodic Re-Assessment Requirements in Any New Grants of APA Rulemaking Authority

It is impossible to predict the unintended consequences of any of the proposed issue-specific bills granting the FTC new rulemaking authority.[289] However narrowly targeted they may

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[288] *Id.* at 27.

[289] *See* Press Release, *#SubCMT Releases Reform Package to Modernize the FTC and Promote Innovation*, THE ENERGY AND COMMERCE COMMITTEE (May 5, 2016), https://energycommerce.house.gov/news-center/press-releases/subcmt-releases-reform-package-modernize-ftc-and-promote-innovation.

seem, they may wind up constraining new technologies or business models that would otherwise serve consumers.

Consider the Video Privacy Protection Act of 1988 ("VPPA"), which barred "wrongful disclosure of video tape rental or sale records."[290] After the experience of Judge Robert Bork, whose video rental records were made an issue at his (failed) Supreme Court confirmation hearings, this quick-fix bill must have seemed utterly uncontroversial. Yet it proved overly rigid in the digital age. In 2009, an anonymous plaintiff sued Netflix over its release of data sets for the Netflix Prize, alleging that the company's release of the information constituted a violation of the VPPA.[291] In 2011 Netflix launched a feature integrating its service with Facebook — everywhere *except* in the U.S., citing the 2009 lawsuit and concerns over the VPPA. After two years, President Obama signed legislation (H.R. 6671) amending the VPPA to allow Netflix and other video companies to *give consumers the option* of sharing information about their viewing history on social networking sites like Facebook.[292] Despite this amendment, the VPPA continues to threaten to overly restrict novel online transactions that were never contemplated or intended by the drafters of the statute.[293]

The VPPA is just one of many laws that have proven unable to keep up with technological change (the 1996 Telecommunications Act, (largely) a classic example of the Rulemaking Model, comes readily to mind). To protect against this inevitability, Congress should include regular review of legislation as a "safety hatch." The 1998 Children's Online Privacy Protection Act (COPPA) included this review provision:

> Not later than 5 years after the effective date of the regulations initially issued under … this title, the Commission shall —
>
> (1) review the implementation of this chapter, including the effect of the implementation of this chapter on practices relating to the collection and disclosure of information relating to children, children's ability to obtain access to information of their choice online, and on the availability of websites directed to children; and (2) prepare and submit to Congress a report on the results of the review under paragraph (1).[294]

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[290] Video Privacy Protection Act of 1988, Pub. L. 100-618, 102 Stat. 3195 (Nov. 5, 1988), *available at* https://www.gpo.gov/fdsys/pkg/STATUTE-102/pdf/STATUTE-102-Pg3195.pdf.

[291] *See* Kristian Stout, *Pushing Ad Networks Out of Business: Yershov v. Gannett and the War Against Online Platforms*, TRUTH ON THE MARKET (May 10, 2016), https://truthonthemarket.com/2016/05/10/pushing-ad-networks-out-of-business-yershov-v-gannett-and-the-war-against-online-platforms/.

[292] Video Privacy Protection Act Amendments Act of 2012, H.R. 6671, 112th Cong (2012), *available at* https://www.congress.gov/bill/112th-congress/house-bill/6671?q=%7B%22search%22%3A%5B%22%5C%22hr6671%5C%22%22%5D%7D&resultIndex=1.

[293] *See* Stout, *supra* note 291.

[294] 15 U.S.C. § 6506.

In principle, this is the right idea. However, in practice, this requirement has proven ineffective. The FTC's review of COPPA included little meaningful analysis of the cost of COPPA.[295] Indeed, the FTC used the discretion afforded it by Congress in the statute to expand the definition of the term "personal information" in ways that appear to have reduced the availability, affordability and diversity of children's media — yet without any economic analysis by the Commission.

At a minimum, Congress should include something like the following in any issue-specific grant of new APA rulemaking authority it enacts:

> Not later than 5 years after the effective date of the regulations initially issued under… this title, ***and every 5 years thereafter,*** the Commission shall —
>
> (1) ***direct the Bureau of Economics, with the assistance of the Office of Technology Research and Investigation,*** to review the implementation of this chapter, including the effect of the implementation of this chapter on practices relating to ***[affected industries]***; and
>
> (2) prepare and submit to Congress a report on the results of the review under paragraph (1).

Conclusion

The letter by which the FTC submitted the Unfairness Policy Statement to the Chairman and Ranking Member of the Senate Commerce Committee in December 1980 concludes as follows:

> We hope this letter has given you the information that you require. Please do not hesitate to call if we can be of any further assistance. With best regards,
>
> /s/Michael Pertschuk, Chairman[296]

We believe it's high time Congress picked up the phone.

To be effective, any effort to reform the FTC would require a constructive dialogue with the Commission — not just those currently sitting on the Commission, but past Commissioners and the agency's staff, including veterans of the agency. Along with the community of practitioners who navigate the agency on behalf of companies and civil society alike, all of these will have something to add. We do not presume to fully understand the inner workings of the Commission as only veterans of the agency can. Nor do we presume that the ideas presented here are necessarily the best or only ones to accomplish the task at hand. But reform

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[295] *See supra* note 284.

[296] Fed. Trade Comm'n, FTC Policy Statement on Unfairness (Dec. 17, 1980), *available at* https://www.ftc.gov/public-statements/1980/12/ftc-policy-statement-unfairness

cannot be effective if it begins from the presumption that today's is the "best of all possible FTCs," or that any significant reform to the agency would cripple it.

Unfortunately, many of those who would tend to know the most about the inner workings of the agency are also the most blinded by status quo bias, the tendency not just to take for granted that the FTC works, and has always worked, well, but to dismiss proposals for change as an attacks upon the agency. It would be ironic, indeed, if an agency that wields its own discretion so freely in the name of flexibility and adaptation were itself unwilling to adapt.

We believe that reforms to push the FTC back towards the Evolutionary Model can be part of a bipartisan overhaul and reauthorization of the agency, just as they were in 1980 and 1994. At stake is much more than how the FTC operates; it is nothing less than the authority of Congress as the body of our democratically elected representatives to steer the FTC. Congress should not, as Justice Scalia warned in 2014 in *UARG v. EPA*, willingly "stand on the dock and wave goodbye as [the FTC] embarks on this multiyear voyage of discovery."[297]

[297] Util. Air Regulatory Grp. v. EPA, 134 S. Ct. 2427, 2446 (2014).