



Federal Trade Commission

The Federal Trade Commission at 100: Into Our Second Century

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Introduction: The Rationale for a Self-Assessment

Albert Cummins was one of the chief sponsors of the Federal Trade Commission Act of 1914. In the weeks before the passage of the legislation that would create the Federal Trade Commission (FTC), Cummins predicted that the new agency “will be found to be the most efficient protection to the people of the United States that Congress has ever given the people by way of a regulation of commerce.”¹ Just over six years from now, the FTC will reach the one hundredth anniversary of the statute that gave it life. How well is the agency fulfilling the destiny that Congress foresaw for it in 1914? What type of institution should we aspire to be when the Commission’s second century begins in 2014?

In the months ahead, the FTC will undertake a self-assessment to consider these and other basic questions about the agency’s future direction. We do so with two aims in mind. The first is to ask what we must do to continue the valuable work that the agency performs today and to identify steps we must take to do still better in the future. We begin the task with an agency that is one of the great success stories in the modern history of public administration. In the late 1960s, the Commission’s performance attracted scalding criticism that raised doubts about its continued existence.² Forty years later, the agency stands in the front ranks of the world’s competition policy and consumer protection institutions.

None of this happened by chance. One crucial ingredient was the tireless commitment and strenuous labors of our attorneys, economists, and administrative professionals. Another was superior leadership that saw the way to greatness. Yet even more significant was the acceptance, in the face of crisis and in moments of success, of a culture that asked the hardest questions about the agency’s purposes and performance.

The urgency to revisit fundamental questions about the possibilities for improvement stems from several sources. The policymaking challenges to the Commission grow ever more demanding. In carrying out its competition and consumer protection responsibilities, the agency confronts some of the most difficult issues of economic policy. The FTC’s success in a variety of initiatives – whether in protecting the privacy of the home through the Do-Not-Call Rule, striking down unnecessary barriers to rivalry in professional services, preparing reports that shape public debate or legislative deliberations about intellectual property, or contributing to the formation of networks that help promote international agreement on superior techniques – has created high expectations about the Commission’s capacity to respond to these challenges. The agency’s experience in undertaking these and other measures has shown that the pursuit of sensible policy solutions requires an unrelenting search for better practices.

¹ 51 Cong. Rec. 14,770 (1914).

² This episode is recounted in William E. Kovacic, *The Federal Trade Commission and Congressional Oversight of Antitrust Enforcement: An Historical Perspective*, in *Public Choice and Regulation: A View from Inside the Federal Trade Commission* 63 (Robert J. Mackay et al. EDS., 1987).

A further motivation to revisit basic questions is the example of our foreign counterparts. This is an unparalleled era of institutional experimentation and reform in the fields of competition policy and consumer protection. There is much to learn from what is happening outside our borders. Within the past decade, some of our more experienced counterparts – for example, the Australian Competition and Consumer Commission, the Competition Commission and the Office of Fair Trading in the United Kingdom, the Directorate for Competition in the European Commission, and the Competition Bureau of Canada – have undertaken a basic examination of key elements of their authority, organization, and operations. Newer agencies in such countries as Brazil, Hungary, Mexico, Singapore, South Africa, and South Korea also are exploring major institutional improvements. The determination of our foreign counterparts, old and new, to benchmark themselves with their peers and to incorporate superior techniques into their own operations is well worth emulating. If the FTC is to exert effective leadership in forming policy at home and abroad, we must be no less driven to examine and enhance our own institutional framework and operations.

Another reason for the FTC to conduct this self assessment is to ingrain in the agency a habit of periodic self-evaluation to illuminate the way to future improvements. To a large extent, the chief means for evaluating the performance of public institutions in the United States has consisted of convening from time to time (often in the face of crisis) blue ribbon panels of outside experts.³ So it has been with the Federal Trade Commission.⁴ To a point, these blue ribbon studies are helpful, but they have severe limitations. Among other weaknesses, the blue ribbon panels tend too often to glide over basic questions about the appropriate standards for measuring agency performance. There is no substitute for the agency's own sustained efforts to get things right. As George Stigler observed in a comment appended to a blue ribbon study of defense procurement in 1970, “[n]o organization can achieve or maintain efficiency in structure or operation by having a critical review made by expert outsiders once each five or ten years A good organization must have built into its very structure the incentives to its personnel to do the right things.”⁵

Reviews of agency performance also take place through the work of committees assembled to facilitate the transition from one presidential administration to another. Presidential transition reports suffer from their own frailties. The imperative to turn them out in a short time – often a few weeks or months – sometimes imbues a transition report's analysis and recommendations with glibness and superficiality. Because their drafters lack the time to place events in a larger

³On the use of blue ribbon panels as public administration evaluation mechanisms, see William E. Kovacic, *Blue Ribbon Commissions: The Acquisition of Major Weapon Systems, in Arms, Politics, and the Economy – Historical and Contemporary Perspectives* 61 (Robert Highs ed. 1990).

⁴The use of blue ribbon panels to evaluate the FTC is recounted in William E. Kovacic, *The Federal Trade Commission and Congressional Oversight*, 17 *Tulsa Law Journal* 592, 592-602 (1982).

⁵Blue Ribbon Defense Panel, *Report to the President and the Secretary of Defense on the Department of Defense* 198 (1970).

historical context, policy prescriptions in these documents often focus myopically on the short term. Because their assessments of past performance set a benchmark against which future innovations can be assessed, the drafters may tend to devalue past accomplishments.

The FTC at 100 exercise seeks to overcome these limitations by encouraging acceptance of a norm of periodic self-assessment and creating a template for the agency to engage regularly in an analysis of its performance. The project announced here also attempts to decouple the process of self-assessment from any single electoral cycle and to put the focus on adjustments that will improve the agency over the long term. By focusing on the Commission's centennial, this exercise seeks to achieve a longer term perspective and engage the agency in the valuable process of considering the goals that animated the agency's creation and assessing how well the FTC has attained them. The aim is to identify approaches for improvement that are not only good today but will be good in the decades to come.

Focal Points

Our self-assessment will focus on six basic questions.

First, when we ask how well the Commission is carrying out its responsibilities, by what criteria should we assess its work? The scholarly literature and popular commentary on the FTC is replete with rough assessments of whether the Commission is performing "well." The standards for making such judgments frequently are badly specified. It is impossible to form conclusions about an agency's performance without some basic understanding of what the agency ought to do. This, in effect, requires the construction of an agency report card.

Second, by what techniques should we measure the agency's success in meeting the normative criteria by which we determine whether the agency is performing well? Once standards for assessing performance are chosen, it is necessary to decide how to apply them. How, in other words, are grades to be calculated? A major aim of this element of the self-assessment is to identify the best means for measuring the effects and quality of what the FTC has done.

Third, what resources – personnel, facilities, equipment – will the FTC need to perform its duties in the future? Nothing is more vital to the success of the Commission than its human capital. A crucial reason that the FTC today is far better than the agency I first joined thirty years ago is the improvement in the overall quality of its personnel. A second reason is the farsighted investment the agency has made in information technology to improve the productivity of its employees. Nothing will be more vital to our future success than seeing that the modern historical trend toward assembling an ever more capable staff and ever more powerful technological tools to support them continues. This inquiry also requires us to determine what steps the agency should take, once it has attracted talented individuals, to make the workplace a satisfying experience.

Fourth, what methods should the FTC use to select its strategy for exercising its powers? No task of administration is more important than selecting priorities.⁶ Everything the agency does flows from its process for deciding what is most worthy of its attention. Among other features, this exercise involves deciding how to set the agenda for the FTC's research program. From the start, the Commission was intended to undertake studies, to supplement and undergird its enforcement efforts with a broad research agenda. Today, in a world of multiple competition and consumer protection decision makers, intellectual leadership assumes an ever increasing role in determining the ability of an individual agency to shape policy developments. Identifying the best possible form and application of our research activities is indispensable to the FTC's ability to exercise intellectual leadership.

Fifth, how can the FTC strengthen its processes for implementing its programs? The manner in which an agency organizes its operations deeply shapes the quality of its substantive initiatives and affects the costs that firms bear in complying with the agency's commands. Finding better ways to organize our operations not only will improve the Commission's own efficiency but also can reduce the compliance costs for business operators without diminishing the effectiveness of the agency's substantive programs.

Sixth, how can the FTC better fulfill its duties by improving links with other government bodies and nongovernment organizations? Cooperation among government bodies within and across jurisdictions is one of the most important frontiers for improving the productivity and effectiveness of public competition and consumer protection authorities. The broad decentralization of authority within the United States, the emergence of multiple regulatory authorities around the world, and the awareness of heightened interdependence among regulators and national regulatory regimes underscore the need for stronger interagency networks and intensified collaborative projects. The gains from greater cooperation also extend to the FTC's relationships with nongovernment bodies, such as academic research centers, consumer groups, and professional societies.

Means

We will address these questions with a mix of internal deliberations and external consultations. We not only want to ask difficult questions of ourselves, but we want to see ourselves as others see us. The external consultations, which will begin in late July and extend through this calendar year, mainly will take the form of workshops to which the FTC will invite a broad collection of expert observers from academia, business groups, consumer organizations, and government bodies. The workshops will take place in the United States and abroad. We expect to complete the proceedings by the close of 2008. The self-assessment will yield recommendations for future Commission operations and supply a template for future comparable exercises.

⁶William E. Kovacic, *The Importance of History to the Design of Competition Policy Strategy: The Federal Trade Commission and Intellectual Property*, 30 *Seattle Law Review* 319 (2007).

Conclusion

The progress of the Federal Trade Commission in its modern era has built heavily upon the willingness of its people to assess their work critically and explore possibilities for improvement. The FTC at 100 self assessment extends that tradition. We will examine ourselves. We will mark the path for greatness. We will allow nothing to deter us from fulfilling the destiny that Congress in 1914 foresaw for us.