



Federal Trade Commission

STATEMENT

OF

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FEDERAL TRADE COMMISSION

BEFORE THE

SUBCOMMITTEE ON COMMERCE, MANUFACTURING, AND TRADE
COMMITTEE ON ENERGY AND COMMERCE
UNITED STATES HOUSE OF REPRESENTATIVES

HEARING ON

“THE FTC AT 100: WHERE DO WE GO FROM HERE?”

WASHINGTON, D.C.
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* The views expressed in this statement are my own and do not necessarily reflect the views of the Federal Trade Commission or any other Commissioner.

Thank you, Chairman Terry, Ranking Member Schakowsky, and distinguished Members of the Subcommittee for this opportunity to speak to you today about the “FTC at 100.”

I. Institutional Advantages and Expertise

As both an economist and a lawyer, I appreciate the unique structure of the FTC and how its organization enhances our ability to protect consumers. As you know, the FTC has three Bureaus: Competition, Consumer Protection, and Economics. The Bureau of Competition endeavors to promote and protect free markets and vigorous competition, and the Bureau of Consumer Protection works to prevent fraud, deception, and unfair business practices in the marketplace. The FTC’s dual missions complement each other in promoting consumer welfare—encouraging the disclosure of accurate information to consumers in the marketplace, which in turn facilitates free and healthy competition. What is sometimes lost in that discussion, however, is the vital role played by the Bureau of Economics in achieving both of these missions.

The Bureau of Economics provides guidance and support to the agency’s antitrust and consumer protection activities. Working with the Bureaus of Competition and Consumer Protection, the Bureau of Economics participates in the investigation of mergers and alleged anticompetitive, deceptive, and unfair acts or practices. The Bureau provides an independent recommendation on the merits of antitrust and consumer protection matters to the Commission. The Bureau also integrates economic analysis into enforcement proceedings and works with the Bureaus to devise appropriate remedies.

The Bureau of Economics also conducts rigorous economic analyses of various markets and industries. Some recent examples include:

Consumer Fraud Survey: The Consumer Fraud Survey provides insights into the frequency of certain types of consumer fraud and how the incidence of fraud has changed over time.

Merger Retrospectives: The Bureau of Economics conducts merger retrospectives that help the agency assess how a particular transaction affected the market, and allow the agency to evaluate enforcement decisions to improve future analysis and decision-making.

Analysis of Government Regulations: Finally, the Bureau also analyzes the economic impact of government regulation, and provides Congress, the Executive Branch, and the public with policy recommendations relating to competition and consumer protection issues. Recent examples include work on the Children’s Online Privacy Protection Rule and the Endorsement and Testimonials Guides.

II. Modernization Initiatives

Analyzing the impact of regulations also is one of the main components of the FTC’s modernization efforts. To ensure that the Commission’s regulations and compliance advice remain cost effective, the agency has engaged in a systematic regulatory review program for the last two decades. Pursuant to that program, the Commission has rescinded 13 trade rules and 24 guides and updated dozens of others since the early 1990s. The FTC is committed to continuing its systematic regulatory review program in order to reduce burdens on the business community while providing real benefits to consumers.

As the FTC enters its second century it is an appropriate time to reflect upon whether the agency’s enforcement and policy tools are being put to the best possible use to help the agency fulfill its mission. One of these tools—the Commission’s authority to prosecute “unfair methods

of competition” as standalone violations of Section 5 of the FTC Act—is a particularly suitable candidate for evaluation.

The historical record reveals an unfortunate gap between the theoretical promise of Section 5 as articulated by Congress and its application in practice by the FTC. This gap has grown in large part due to the persistent absence of any meaningful guidance articulating what constitutes an unfair method of competition. For at least the past twenty years, commissioners from both parties have acknowledged that a principled standard for application of Section 5 would be a welcome improvement and have called for formal guidelines. With that goal in mind, I have offered a detailed Proposed Policy Statement articulating my own views on how best to modernize the agency’s Section 5 authority.

The fundamental problem with the Commission’s Section 5 enforcement is caused by a combination of the agency’s administrative process advantages and the vague nature of the Section 5 authority governing unfair methods of competition. This combination gives the FTC the ability, in some cases, to elicit a settlement even when the conduct in question may benefit consumers. This is because firms typically prefer to settle Section 5 claims rather than go through lengthy and costly administrative litigation in which they are both shooting at a moving target and may have the chips stacked against them. Indeed, the empirical evidence documents a near perfect rate at which the Commission rules in favor of FTC staff after administrative adjudication. The evidence also reveals that the FTC’s own decisions are reversed by federal courts of appeal at a much greater rate than those of generalist district court judges with little or no antitrust expertise.

Formal guidelines would focus the Commission’s unfair methods enforcement upon plainly anticompetitive conduct and provide businesses with important guidance about what

conduct is lawful and what conduct is unlawful under Section 5. Indeed, the FTC has issued nearly fifty sets of guidelines on a variety of topics, many of them much less important than Section 5. The Commission can and should provide similar guidance for its signature competition statute.

In closing, the FTC is committed to effectively updating and modernizing to achieve its goal of protecting consumers through its consumer protection and competition missions. I am happy to answer any questions.