

## Before the Federal Trade Commission

In re:  
Competition and Consumer Protection in the  
21st Century hearings

Topic 1: The state of antitrust and consumer  
protection law and enforcement, and their  
development, since the Pitofsky hearings.

Project No. P181201  
Docket No. FTC-2018-0048

### Comments of the R Street Institute

In response to the Federal Trade Commission's request for comments dated June 20, 2018, the R Street Institute respectfully submits the following comments. Submitted in advance of the hearings planned to be held, these are intended to identify topics for those hearings, and will likely be supplemented by more detailed analysis afterward.

This comment is one of several that R Street is submitting, pursuant to the Commission's request of a separate comment per topic. This comment relates to Topic 1 on the state of antitrust and consumer protection law and enforcement, and their development, since the Pitofsky hearings.

Over twenty years ago, FTC Chairman Robert Pitofsky convened a series of public hearings "to determine whether changing economic factors, such as the development of a global economy and the growth of high-tech industries, require adjustments in current antitrust and consumer protection enforcement."<sup>1</sup> In the time since then, the economy has become increasingly global and dominated by high-tech industries, but these are differences in degree rather than kind. The consumer welfare standard is still the best framework for antitrust and consumer protection law, and the Commission should continue advocating for it both at home and abroad.

However, recent changes do warrant an introspective look into the Commission's investigation, enforcement and remedial processes.<sup>2</sup> Procedural irregularities were partially to blame for the Commission's recent loss in the *LabMD* case and similar process failures could sabotage the Commission's attempts to protect consumers in the future. With the Commission back to full

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<sup>1</sup> Federal Trade Commission, "FTC Announces Hearings on Antitrust and Consumer Protection Laws in Global, High-Tech Economy," July 19, 1995. <https://goo.gl/2G6bqL>.

<sup>2</sup> Tom Struble, "Reforming the Federal Trade Commission Through Better Process," *R Street Policy Study* No. 122, December 2017. <https://goo.gl/tEtBMN>.

strength, now is a great time to consider potential reforms.<sup>3</sup> In the upcoming hearings, we therefore encourage the Commission to consider at least the following topics.

**Institutional Expertise and Independence.** The Commission’s work is so valuable because of its institutional expertise and independence. However, both have come under assault recently. Some discount the Commission’s expertise, arguing that it lacks the “specialized expertise” needed to regulate certain high-tech industries.<sup>4</sup> Others question its independence, saying it lacks true autonomy and acts at the behest of the administration.<sup>5</sup> These criticisms are poorly founded, but even the mere perception of impropriety can seriously undercut the Commission’s work, both at home and abroad. Thus, as American policymakers and their foreign counterparts consider potential changes to competition and consumer protection law, the Commission should make every effort to bolster and preserve its institutional expertise and independence.

Holding public hearings will certainly help, but further steps may also be warranted. For example, moving the Office of Technology Research and Investigation out of the Bureau of Consumer Protection and into a new Bureau of Technology may help bolster the Commission’s technical expertise. Nothing, however, justifies throwing out the playbook and starting anew. The Commission’s singular focus on consumer welfare is what makes it the best competition and consumer protection agency in the world.<sup>6</sup> The increasing complexity of the modern economy is not a reason to change course. Rather, it is an opportunity for the Commission to reestablish its global leadership by developing and applying sound economic reasoning to the technical challenges that face consumers today.<sup>7</sup>

**Development of Legal Standards.** Administering and enforcing the broad legal standards in Section 5 requires the Commission to continually adapt to changes in industry and consumer behavior. The need for adaptation and evolution of legal standards is particularly vital for industries undergoing rapid change, as existing precedent — or, indeed, the lack thereof — can quickly come to stifle industry growth and harm consumers.<sup>8</sup> The Commission’s overreliance on consent decrees is evidence of that. Not only do such consent decrees often fail to curb bad behavior, as seen recently with Facebook, but even worse, they sometimes punish a firm

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<sup>3</sup> See, e.g., Tom Struble, “Senate Finally Poised to Restore FTC to Full Strength,” *R Street Institute Blog*, Oct. 19, 2017. <https://goo.gl/TQ5qrE>.

<sup>4</sup> See, e.g., Terrell McSweeney, “The FCC Plans to Kill the Open Internet; Don’t Count on the FTC to Save It,” *Quartz*, Dec. 5, 2017. <https://goo.gl/eg4N63>.

<sup>5</sup> See, e.g., Andrew Orlowski, “Google had Obama’s Ear During Antitrust Probe,” *The Register*, Aug. 18, 2016. <https://goo.gl/PtYEjd>.

<sup>6</sup> See, e.g., Tom Struble, “New FTC Leadership Should Focus on Results, Not Headlines,” *Morning Consult*, May 18, 2018. <https://goo.gl/tM63Cp>.

<sup>7</sup> See, e.g., Tom Struble, “A Positive Agenda for the New FTC,” *Morning Consult*, Feb. 14, 2018. <https://goo.gl/kmkwXb>.

<sup>8</sup> See, e.g., “Reforming the Federal Trade Commission Through Better Process,” p. 3. <https://goo.gl/tEtBMN>.

effectively to death. For example, consent decrees with Toys “R” Us and Sears were subsequently modified to loosen some of their original restrictions.<sup>9</sup> However, that relief came too late for the former<sup>10</sup> and likely too late for the latter, as well.<sup>11</sup>

Can this situation be improved somehow? For example, would greater focus on litigation in industries undergoing rapid evolution reduce these types of incidents, where behavioral remedies extracted via consent decrees deny firms the ability to innovate and compete in new ways? Would adjudicating more cases promote development of legal standards in areas like privacy and data security? Can the Commission reform its investigatory processes to encourage more litigation? Would allowing firms to challenge the scope of an initial civil investigatory demand under seal, without immediately making the investigation public to consumers and investors, encourage more litigation and less out-of-court settlement? Would reorganizing the Commission’s internal structure to separate the investigation and enforcement processes, as some have proposed,<sup>12</sup> further or hinder the development of legal standards?

**Future of Part 3 Administrative Litigation.** When done well, administrative litigation not only drives evolution of the law and the development of legal principles,<sup>13</sup> but also provides a venue for dispute resolution that is faster and cheaper than general Article III courts. However, as Commissioner Ohlhausen recently acknowledged, there is some disagreement as to whether the Commission’s Part 3 administrative litigation functions well.<sup>14</sup> Some may still insist that Part 3 is a “rigged system” or “kangaroo court” because the Commission exercises both quasi-executive and quasi-judicial functions in administering Section 5, but those claims are difficult to square with the data.<sup>15</sup> Nevertheless, there are still changes that could potentially improve both the appearance and substantive outcomes of its Part 3 administrative litigation.

For example, there is some question as to whether the Commission has enough Administrative Law Judges. In 1980, Chairman Michael Pertschuk boasted of “a corps of Administrative Law

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<sup>9</sup> See, e.g., Federal Trade Commission, “Order Reopening and Modifying Order,” In the Matter of Toys “R” Us Inc., Docket No. 9278, Apr. 11, 2014. <https://goo.gl/nmDKqj>; Federal Trade Commission, “Order Reopening and Modifying Order,” In the Matter of Sears Holdings Management Corp., Docket No. C-4264, Feb. 27, 2018. <https://goo.gl/wqtW7L>.

<sup>10</sup> See, e.g., Michael Capetta, “Game Over as Bankrupt Toys R Us Files for Liquidation,” *NBC News*, March 15, 2018. <https://goo.gl/MdD6Zx>.

<sup>11</sup> See, e.g., Lauren Coleman-Lochner and Katherine Doherty, “Sears Buoyed by Plan that Analyst Sees as Bankruptcy Hint,” *Bloomberg*, May 14, 2018. <https://goo.gl/gAtJQW>.

<sup>12</sup> See, e.g., Terry Calvani and Angela M. Diveley, “The FTC at 100: A Modest Proposal for Change,” *George Mason Law Review* 21:5 (2014), pp. 1183–88. <https://goo.gl/YsHgst>.

<sup>13</sup> Maureen K. Ohlhausen, “Administrative Litigation at the FTC: Effective Tool for Developing the Law or Rubber Stamp?” *Journal of Competition Law and Economics* 12:4 (2016), pp. 623–59. <https://goo.gl/LbJ8yc>.

<sup>14</sup> *Ibid.*

<sup>15</sup> *Ibid.*, p. 657.

Judges who are competent, impartial, and independent”<sup>16</sup> but today the Commission’s Chief Administrative Law Judge, D. Michael Chappell, is its only judge. The Commission now also adjudicates only a handful of cases each year, which leads some to wonder whether it is even worth maintaining the Part 3 process.<sup>17</sup> Should the Commission abandon Part 3 entirely, reinvigorate the process, or maintain its current level of minor use? How does the Department of Justice factor into it? Would eliminating Part 3 facilitate coordination between the Commission and Department of Justice in the development of competition law? Could the Justice Department be allowed to participate in Part 3 proceedings, as *amicus curiae* or otherwise? What impact would that have on the Commission’s institutional independence?

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R Street thanks the Federal Trade Commission for the opportunity to submit these comments, and recommends that the Commission pursue the above-identified areas in its ongoing work on promoting competition and innovation.

Respectfully submitted,

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<sup>16</sup> Federal Trade Commission, “Testimony of Michael Pertschuk, Chairman, Federal Trade Commission, Before the Senate Consumer Subcommittee, Committee on Commerce, Science and Transportation,” Sept. 4, 1980, p. 2. <https://goo.gl/8HTPB3>.

<sup>17</sup> See, e.g., David Balto, “McWane: Why Have an Administrative Law Judge?” *Truth on the Market*, Jan. 17, 2014. <https://goo.gl/eSaQxb>.