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Federal Trade Commission

Antitrust Policy for a New Administration

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¹ The views expressed in these remarks are my own and do not necessarily reflect the views of the Federal Trade Commission or any other Commissioner.

Introduction

Thanks to Heritage and Alden Abbott for convening today's conference. This event could not be more timely. President Trump took office four days ago, and all signs point toward a new antitrust policy.

Today, I will provide my ideas for how the FTC can improve its work for consumers and the American economy. Although well intentioned, the majority Commission under President Obama at times pursued an antitrust agenda that disregarded sound economics. It imposed unnecessary costs on businesses, and substituted rigorous analysis of competitive effects for conclusory assertions of "unfair competition." It also undermined U.S. inventors' IP rights. But it is not always a question of what was done wrong. It is also what the Commission failed to do or could have done better.

As I explain how the FTC should change course, however, please recall that the views I express today are mine alone.

Steering the Prior Commission in a Better Direction

There is fertile ground for enhancing the FTC's effectiveness in serving the public. But before I explore that ground, I will highlight a few areas in which the Commission succeeded in its efforts to protect competition focusing on healthcare. Between clamping down on pay-for-delay agreements that cost consumers billions of dollars and challenging potentially anticompetitive hospital mergers like *Hershey-Pinnacle*² and *Advocate-North Shore*³, I have supported the FTC in bringing meritorious cases. Similarly, I have championed efforts to reign in possible abuses of government processes, as when a state fails to supervise regulatory boards

² Fed. Trade Comm'n v. Penn State Hershey Med. Ctr., 838 F.3d 327 (3d Cir. 2016).

³ Fed. Trade Comm'n v. Advocate Health Care Network, 841 F.3d 460 (7th Cir. 2016).

comprised of active market participants. I count the FTC’s victory at the Supreme Court in *North Carolina Dental* as being particularly notable.⁴

Furthermore, it is important to understand that the pursuit of consensus can sometimes yield stronger outcomes. Where possible, for instance, I worked to achieve acceptable outcomes in matters from which I would have otherwise dissented or taken a different approach if I had the majority. As a recent example, consider the FTC’s 2016 report on patent-assertion entities.⁵ PAEs became the boogeyman of the patent world, and gave rise to several competing bills in 2013 that would have affected the rights of all patent holders. I worried that such reforms would have harmed US innovation.

I favor an evidence-based solution to all issues, including patent issues, and I supported the FTC’s PAE report for three reasons.⁶ First, it was a case study that provided new insights into the mechanics of how PAEs actually operate, revealing a vivid distinction between two business models—Portfolio and Litigation PAEs. Such empiricism is the cornerstone of effective policy. Second, the PAE report explicitly recognized that “infringement litigation plays an important role in protecting patent rights, and that a robust judicial system promotes respect for the patent laws.”⁷

Third, the proposed reforms in the study were modest, and were largely limited to procedural changes that already exist in certain patent-heavy courts’ local rules. The report called for no radical changes. In that respect, I favored the PAE report because it enhanced public knowledge—which is an undeniable benefit—without imposing additional costs.

⁴ *N. Carolina State Bd. of Dental Exam’rs v. Fed. Trade Comm’n*, 135 S. Ct. 1101 (2015).

⁵ FED. TRADE COMM’N, PATENT ASSERTION ENTITY ACTIVITY: AN FTC STUDY (2016) [“FTC PAE REPORT”], <https://www.ftc.gov/reports/patent-assertion-entity-activity-ftc-study>.

⁶ Prepared Remarks of Commissioner Maureen K. Ohlhausen, *The FTC PAE Study in Context*, Oct. 20, 2016, <https://www.ftc.gov/public-statements/2016/10/prepared-remarks-commissioner-maureen-k-ohlhausen-ftc-pae-study-context>.

⁷ FTC PAE REPORT, *supra* note 5, at 9.

Similar examples of my efforts are the FTC’s recent joint guidelines with the DOJ on IP Licensing, and on International Enforcement and Cooperation. I consider it an important achievement that, under a Democratic administration, the revised IP Licensing guidelines lacked any reference to standard-essential patents, limits on the pursuit of injunctive relief, and PAEs. Their omission is notable when contrasted with recent (and regrettable) antitrust interventions on SEPs and patent remedies. That is what effective engagement can achieve.

So, too, I embrace the IP Guidelines’ recognition that the “antitrust laws generally do not impose liability upon a firm for a unilateral refusal to assist its competitors, in part because doing so may undermine incentives for investment and innovation.”⁸ That is a principle upon which the agencies should build going forward, as I alluded to in my separate statement accompanying the release of the IP Guidelines.⁹

Finally, international antitrust can trigger controversial questions of comity and extraterritoriality, especially with respect to remedies. The Guidelines contain important limits on the agencies’ pursuit of extraterritorial remedies, recognizing that the FTC or DOJ will never seek “a remedy that includes conduct or assets outside the United States” unless it “is needed to effectively redress harm or threatened harm to U.S. commerce and consumers[,] and is consistent with the Agency’s international comity analysis.”¹⁰ It is no accident that the Guidelines contain such limits.

⁸ U.S. Dep’t of Justice & the Fed. Trade Comm’n, Antitrust Guidelines For the Licensing of Intellectual Property 3 (2017), <https://www.justice.gov/atr/IPguidelines/download>.

⁹ Statement of Commissioner Maureen K. Ohlhausen, U.S. Dep’t of Justice & Fed. Trade Comm’n, Antitrust Guidelines for the Licensing of Intellectual Property, Jan. 13, 2017, https://www.ftc.gov/system/files/documents/public_statements/1049793/mkohlhausen_statement_ip_guidelines.pdf.

¹⁰ Antitrust Guidelines for International Enforcement and Cooperation Issued by the U.S. Department of Justice and Federal Trade Commission 47, Jan. 13, 2017, <https://www.ftc.gov/public-statements/2017/01/antitrust-guidelines-international-enforcement-cooperation-issued-us>.

Opportunities for the FTC under the Trump Administration

Despite my best efforts, however, compromise towards an acceptable outcome was not always possible. My Democratic colleagues on the Commission sometimes wished to embark on a course that I simply could not follow. On those occasions, I would dissent, laying down a marker for better competition policy going forward. Without recounting all my antitrust dissents here, I will identify a few clear areas where a course correction is needed.

1. *Excessive Costs on U.S. Business*

First, I worry that the FTC imposes unnecessary and disproportionate costs on business. The most obvious examples occur when the Commission wrongly sues a firm to potentially devastating effect. But there is a more insidious effect that pervades the government generally.

As Heritage observed in Chapter 4 of its 2017 Blueprint for Reform¹¹, regulation has become pervasive—its tentacles invading almost every aspect of business life. Although regulations like the FCC’s Open Internet Order¹² and Dodd-Frank¹³ capture the most attention, it is not just large corporations that suffer. I remember a 2011 article in *The Economist*, which detailed the perverse and unending red tape that a family tried to endure simply to sell yogurt in California.¹⁴

Although the FTC is not principally a rule-making agency that engages in prescriptive, ex ante regulation, it contributes its share of costs on legitimate U.S. business. I proffer two examples and solutions.

¹¹ The Heritage Foundation, *Blueprint for Reform: A Comprehensive Policy Agenda for a New Administration in 2017* (2016), http://thf_media.s3.amazonaws.com/2016/BlueprintforReform.pdf.

¹² FCC Open Internet Order (2015), <https://www.fcc.gov/general/open-internet>.

¹³ Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. 111-203, H.R. 4173 (2010).

¹⁴ *Red Tape in California: Beware of the Yogurt*, THE ECONOMIST, May 19, 2011, <http://www.economist.com/node/18712862>.

First, I worry about the cost of compulsory process and second requests that firms experience in merger review and similar burdens in consumer protection investigations. Thus, I would like to convene a meeting of the FTC's Bureaus of Competition and Consumer Protection leadership to address possible overbreadth of discovery.

The goal would be to narrow the scope and expense of compulsory process (especially as to third parties), without depriving the FTC's staff of the information they need to evaluate mergers and other matters.

Second, I want to see the Commission approach its intervention decisions with a philosophy of regulatory humility that has been absent in the last several years. I have made that philosophy a bedrock of my tenure as an FTC Commissioner, arguing consistently that government actors must heed the limits of their knowledge, consider the repercussions of their actions, and be mindful of the private and social costs that government actions inflict.¹⁵

2. *Disregarding IP Rights and Hurting U.S. Business Overseas*

Next, I want to address a tendency of the Obama-era Commission to discount the value of intellectual-property rights. I have written at length—most recently in the *Harvard Journal of Law & Technology*—that respecting patents is indispensable to an innovative economy.¹⁶ America produces more technological innovation than any other country on earth—a reality that reflects, in part, inventors' rights under U.S. law. And yet we see countries—especially in Asia—that take or allow the taking of American proprietary technologies without due payment.

¹⁵ See, e.g., Remarks by FTC Commissioner Maureen K. Ohlhausen, *Regulatory Humility in Practice*, Apr. 1, 2015, <https://www.ftc.gov/public-statements/2015/04/regulatory-humility-practice-remarks-ftc-commissioner-maureen-k-ohlhausen>.

¹⁶ Maureen K. Ohlhausen, *Patent Rights in an Era of IPR Skepticism*, 30 HARV. J.L. & TECH. __ (2017) (forthcoming), draft available at <https://www.ftc.gov/public-statements/2017/01/patent-rights-climate-intellectual-property-rights-skepticism>.

The FTC has unfortunately contributed to that dynamic. The essential quality of a patent is the right to exclude.¹⁷ And yet the FTC sees a competition problem when owners of standard-essential patents ask a court to enjoin unlicensed infringers. In doing so, the Commission wrongly heeded calls by technology users that want to pay the smallest possible royalties for their inputs.

Over my dissent, the FTC in *Google-MMI*¹⁸ and *Robert Bosch*¹⁹ alleged that it was an unfair method of competition for a RAND-encumbered SEP owner to seek an injunction. In the FTC's view, there was no need to ask whether deception of an SSO or other conduct eliminated a substitute technology in an upstream licensing market, or—indeed—whether any competitive effects actually followed at all.

Those decisions were not only wrong on their own merits, they sent a most unfortunate message overseas. During one of my many trips to China as a Commissioner, Chinese scholars stated that the FTC's *Google-MMI* decision shows that U.S. law recognizes an essential-facilities doctrine for patent rights. Nothing could be further from the truth, but that was the message received abroad.

Those unfortunate events preceded the FTC's decision last week to sue Qualcomm.²⁰ No doubt, we'll spend some time today discussing that case. As many of you know, I took the unusual step of writing a dissent to accompany a vote to authorize a complaint.²¹

¹⁷ 35 U.S.C. § 154(a)(1).

¹⁸ *In re* Motorola Mobility LLC & Google Inc., Dissenting Statement of Commissioner Maureen K. Ohlhausen, Jan. 3, 2013, <https://www.ftc.gov/public-statements/2013/01/statement-commissioner-maureen-ohlhausen-0>.

¹⁹ *In re* Robert Bosch GmbH, FTC File No. 121-0081, Statement of Commissioner Ohlhausen, Nov. 26, 2012, <https://www.ftc.gov/public-statements/2012/11/dissenting-statement-commissioner-maureen-ohlhausen-matter-robert-bosch>.

²⁰ FTC Charges Qualcomm with Monopolizing Key Semiconductor Device Used in Cell Phones, Jan. 17, 2017, <https://www.ftc.gov/news-events/press-releases/2017/01/ftc-charges-qualcomm-monopolizing-key-semiconductor-device-used>.

²¹ *In re* Qualcomm, Inc., Dissenting Statement of Commissioner Maureen K. Ohlhausen, Jan. 17, 2017, https://www.ftc.gov/system/files/documents/cases/170117qualcomm_mko_dissenting_statement_17-1-17a.pdf.

Suffice it to say that I hope that the Commission under the Trump Administration will act to protect IP rights.

3. *Economic Liberty and Abuse of the Government Process*

Finally, I want to address a promising avenue for further work by the FTC. Everyone who cares about economic liberty should worry about efforts to use the government process to suppress competition. Occupational-licensing requirements sometimes impose disproportionate burdens on prospective entrants with dubious public-safety justifications. Through political capture, some favored companies can induce government to pass anticompetitive legislation for their favor.

I am proud to have played an ongoing role in the FTC's efforts to challenge abuses of government process and to promote economic liberty. The FTC has already made real strides in this area through wins at the Supreme Court in *Phoebe Putney*²² and *North Carolina Dental*.²³ Going forward, I would like to see the Commission build on this important work.

Thus, the FTC should increase its advocacy efforts before legislatures that weigh potentially anticompetitive legislation through its Office of Policy Planning—which I am proud to say I used to run.

²² Fed. Trade Comm'n v. Phoebe Putney Health Sys., Inc., 133 S. Ct. 1003 (2013).

²³ *N. Carolina State Bd. of Dental Exam'rs*, 135 S. Ct. at 1101.

Conclusion

We have a tremendous amount to discuss today, and thus here I can address issues unique to the FTC only in the most cursory way. What I can safely conclude, however, is that we should be excited about the possibilities that now await. Collectively, we have an opportunity to build on past successes at the FTC, while correcting missteps. Seeing ample room for improvement, and being honored to share this panel with such an illustrious group, I am interested to hear your thoughts on where the FTC is today and where it should go tomorrow.

Thank you for your time and I look forward to the discussion ahead.