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Competition Policy at the FTC in the New Administration

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Introduction

Thank you to Bill for that warm introduction and for the invitation to speak here this afternoon. The topic of this conference is antitrust in the Trump Administration. As the only Senate-confirmed Republican antitrust official in place since the inauguration, it is a topic on which I can speak authoritatively, at least in recounting what has happened so far. Since President Trump designated me Acting FTC Chairman in January, I have emphasized topics that I have long-championed—economic liberty and regulatory humility. I believe these topics are consistent with the President’s theme of closely examining the government’s role in people’s everyday lives and in the economy overall. I will address each topic in greater depth.

Economic Liberty

First, economic liberty. My first major initiative as Acting Chairman was to establish a task force to advance economic liberty, with a particular focus on occupational licensing reform.²

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.

² See Maureen K. Ohlhausen, Acting Chairman, Fed. Trade Comm’n, Keynote Address at the George Mason Law Review’s 20th Annual Antitrust Symposium: *Advancing Economic Liberty* (Feb. 23, 2017), <https://www.ftc.gov/public-statements/2017/02/advancing-economic-liberty>.

In the past 50 years, the U.S. has experienced a tremendous growth in occupational licensing, which has created barriers for low- and middle-income Americans seeking new job opportunities. This can happen because of government overreach or at the behest of incumbent market participants. I've spoken in the past about what I call the "Brother, May I" problem.³ That problem occurs when a competitor controls the market entry of others, often through some kind of regulatory permission. Public choice theory recognizes that industry capture of regulators for private economic gain is most likely when incumbent providers can obtain a concentrated benefit while dispersing the costs widely to all consumers.⁴

In February of this year, I formed the Economic Liberty Task Force to help shine a spotlight on the harms of unnecessary or overbroad occupational licensing and to partner with state leaders and other stakeholders to try to remove and reform these regulations. The task force has done a lot in the last seven months. We've held one roundtable session during which experts from across the country gathered in Washington to discuss ways to facilitate license portability—where a worker licensed in one state can practice in another state without having to obtain a new license. We announced today a second roundtable scheduled on November 7th to discuss empirical evidence of the effects occupational licensing has on consumers and workers. We've created a centralized resource, ftc.gov/econliberty, for licensing reform efforts. We've drawn significant media attention to the problem and its harmful effects on middle- and low-income Americans and military families. And we've received a terrific response from a coalition of the willing—legislators and governors and other citizens who want to bring jobs and talent to their

³ See Maureen K. Ohlhausen & Gregory P. Luib, *Brother, May I?: The Challenge of Competitor Control over Market Entry*, 4 J. Antitrust Enforcement 111 (2015), https://www.ftc.gov/system/files/documents/public_statements/801861/150917brothermayi.pdf.

⁴ Paul J. Larkin Jr., *Public Choice Theory and Occupational Licensing*, 39 Harv. J.L. & Pub. Pol'y 209, 323-24 (2016).

states and cities. Furthermore, the task force has held dozens of informational meetings with outside parties to learn about the extent of the problem and potential solutions.

Along with the Task Force, the FTC's long-standing competition advocacy program continues to do yeoman's work in highlighting the potential anticompetitive effects of occupational licensing and other government restraints on competition. One example is an advocacy letter FTC staff sent to Nebraska related to four proposed bills designed to reduce or eliminate certain occupational licensing requirements.⁵ Our staff explained the competitive benefits of loosening unnecessary and overbroad licensing restrictions, which include not only benefits to consumers of products and services offered by licensed professionals, but also to workers who have been kept out of those professions because of such restraints.

The FTC has a critical role to play in ensuring that legislators consider consumer interests and competition concerns. In my past career at the FTC, I ran the FTC office responsible for this work. So I am well aware of both the challenges competition advocacy presents and important role this work ultimately plays in protecting the public interest. We will continue speaking up for consumers through our competition advocacy program, and we're looking for additional ways to partner with interested policymakers to foster economic liberty.

⁵ See FTC Staff Comments To the Nebraska State Senate Regarding A Number of Proposed Senate Bills That Would Loosen or Eliminate Certain Occupational Licensing Requirements In Nebraska, Mar. 2017, <https://www.ftc.gov/policy/policy-actions/advocacy-filings/2017/03/ftc-staff-comments-nebraska-state-senate-regarding>.

Regulatory Humility

Next, regulatory humility. I have spoken and written about the need for regulatory humility many times.⁶ Although the newsletter *FTC:Watch* recently declared this term out of style, I sincerely hope that humility never goes out of fashion. I've argued repeatedly 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.

Today I'd like to speak more about how humility should apply in antitrust. In general, free markets work well in serving consumers' needs. Antitrust is well suited to address behavior that undermines free market competition, such as concerted restraints of trade or attempts to gain market power through acquisitions. Antitrust can also remedy unilateral conduct by a monopolist that harms the competitive process when the harm is not outweighed by consumer benefits. Antitrust humility means recognizing that antitrust is not a panacea, however. There are many social and economic problems—such as income or wealth inequality between individuals or between regions of the country—that antitrust is simply not well suited to address. Antitrust is a precision tool, designed to remedy specific harms to the *process* of competition, not to address macroeconomic issues. These broader problems likely have many causes, and I submit that the exercise of market power through restraints of trade or exclusionary conduct is near the bottom of that list of causes, if they are on the list at all.

This is not to say that these are unimportant problems; rather, they are some of the most significant public policy questions of our time. There is a mismatch, however, between the proper role for antitrust and the efforts by some to characterize many socio-economic problems

⁶ See, e.g., Maureen K. Ohlhausen, Acting Chairman, Fed. Trade Comm'n, *Regulatory Humility in Practice* Remarks at the American Enterprise Institute (Apr. 1, 2015), <https://www.ftc.gov/public-statements/2015/04/regulatory-humility-practice-remarks-ftc-commissioner-maureen-k-ohlhausen>.

that have very little to do with competition as “antitrust” problems. I think many of those who see antitrust as the solution to a wide variety of economic problems believe there is a simple relationship between industry concentration and competition. As we all know, industry concentration refers to the number of firms in an industry. Economists have developed a number of tools to measure concentration—the simple counting of firms and the HHI, among others. Commentators get into trouble, however, when they make inferences about competition just by looking at information about concentration. Assessing concentration requires simple arithmetic; assessing competition requires a more complex and nuanced analysis. Sometimes more concentration means less competition, but sometimes the opposite is true. Among those who regularly work in this field, the need to go deeper than a simple concentration analysis is both well known and hardly controversial.

Even more problematic than making an inference about competition in a market simply by looking at concentration in that market is making an inference about the level of competition economy-wide by looking at cross-sectional inter-industry evidence. For example, the Council of Economic Advisers in the Obama Administration, *the Economist*, *the New York Times*, and others observed industry census data; noted that concentration across certain industries like retail, transportation, finance, and utilities had risen; and saw that firms’ returns on invested capital had increased.⁷ From this, they inferred that monopoly power was rising and called for stricter antitrust enforcement.

⁷ See Council of Economic Advisers Issue Brief, *Benefits of Competition and Indicators of Market Power*, May 2016, https://obamawhitehouse.archives.gov/sites/default/files/page/files/20160502_competition_issue_brief_updated_cea.pdf; *Too Much of a Good Thing*, *ECONOMIST*, Mar. 26, 2016; *The Problem With Profits*, *ECONOMIST*, Mar. 26, 2016; *With Competition in Tatters, the Rip of Inequality Widens*, *NEW YORK TIMES*, July 12, 2016.

In a speech and journal article last year, I explained that those conclusions were not based on sound evidence.⁸ Proponents of these views committed basic errors that industrial-organization economists have warned about for decades. Specifically, using a cross-sectional, inter-industry analysis, they saw a correlation between structure and profits, inferring a causal relationship between the two. But those who know the history of antitrust know that the Structure-Conduct-Performance approach has long been discredited.

I won't repeat the specifics of my article, beyond a brief summary. Industry classifications identified by the census bureau are not antitrust markets. Even if they were, shifting trends in concentration may not reflect lost competition. And it is error to necessarily tie rising concentration and profits to increased economic power. Market shares, entry, profits, and markups are the *outcomes* of a competitive process as opposed to the inputs into an analysis of the existing level of competition.⁹ Some markets have diminishing long-run average-cost curves, whereas others produce dominant firms or oligopolies due to superior efficiency or innovation. Because markets differ along these and other key dimensions, most cross-sectional studies simply do not tell us much—if anything—about competition. I am not saying this research is useless or should not continue, just that it is of very limited relevance to antitrust law enforcers, like me, who must examine conduct in individual markets.

Nevertheless, even if the antitrust laws were—unwisely, in my view—revised to focus on concentration for concentration's sake, there is compelling evidence to suggest that the change advocates are hoping for will not occur. Our gracious host, Bill Kovacic, addressed this issue head on in 1989 in an article titled “Failed Expectations: The Troubled Past and Uncertain Future

⁸ Maureen K. Ohlhausen, *Does the U.S. Economy Lack Competition?*, 1 CRITERION J. INNOVATION 47 (2016).

⁹ See Richard Schmalensee, *Industrial Economics: An Overview*, 98 Econ. J. 643 (1988); Harold Demsetz, *Industry Structure, Market Rivalry, and Public Policy*, 16 J. Law & Econ. 1 (1973).

of the Sherman Act as a Tool for Deconcentration.”¹⁰ He recounts three periods of aggressive efforts to achieve industry deconcentration, 1904-1920, 1937-1956, and 1969-1982 and explains that “federal enforcement agencies seldom have achieved fundamental structural change in concentrated industries.”¹¹ In his view, the “chief tenets” of past deconcentration efforts were “size begets political corruption and superior performance never accounts for dominance, while predatory conduct invariably does.”¹² He concludes that “[p]ast experience supplies scant basis for predicting that the next round of initiatives will improve upon the disappointing results of former deconcentration eras. Why, then, will a new collection of enforcement officials set off to climb a mountain that routinely has conquered its challengers? The answer may be that the durability of the deconcentration impulse has little to do with realistic expectations that a broad-based program of Sherman Act divestiture suits will dissolve existing aggregations of market power. Its recurring hold on public policy instead derives from its attractiveness as a symbolic outlet for public antipathy toward large corporate size.”¹³

Bill was prescient in predicting that unfocused, general antipathy toward large corporate size would explain the current calls for increased antitrust enforcement. As I and many before me have explained, large corporate size does not inevitably lead to monopoly power in a defined antitrust market and decreased consumer welfare. And even if it did, more aggressive antitrust enforcement is unlikely to have a significant effect on corporate size or industry concentration writ large. Antitrust is a discrete tool, its interventions are necessarily narrow and specific. The task of the antitrust enforcer is to look market-by-market for conduct that harms the competitive

¹⁰ Bill Kovacic, *Failed Expectations: The Troubled Past and Uncertain Future of the Sherman Act as a Tool for Deconcentration*, 74 Iowa L. Rev. 1105 (1989).

¹¹ *Id.* at 1112.

¹² *Id.* at 1131.

¹³ *Id.* at 1150.

process. Antitrust is not industrial policy, nor should it be, and humility requires that we recognize this.

Enforcement

So what do economic liberty and regulatory humility mean for antitrust enforcement? One area on which I have focused is illegal restraints of trade that flow from government action, which can be some of the most destructive restrictions on competition we encounter. Put simply, government regulation can be the barrier to entry that will never fall. And too often, government regulations directly block or suppress competition and diminish economic opportunities, or facilitate efforts by private firms to do the same.

Although antitrust only polices private-firm conduct, it is important not to overlook the role of the state. To be clear, I believe in federalism. But that does not leave us powerless to advance consumers' interests in our federal system. We can work to define and confine the anticompetitive effects that flow from state action. That was one lesson of *Phoebe Putney* and *North Carolina Dental*, which force states wishing to limit competition to clearly articulate that goal and to actively supervise its application by market participants.¹⁴

From one perspective, federal antitrust enforcement can make governments be politically accountable for state-imposed restrictions on competition. I hasten to add, however, that FTC action regarding state-action immunity need not be adversarial. For example, *North Carolina Dental* gave FTC staff a welcome opportunity to work with state and local governments on how they might reduce barriers to more robust competition and the Economic Liberty Task Force is continuing these efforts.

¹⁴ *FTC v. Phoebe Putney Health Sys.*, 568 U.S. 216, 218 (2013); *N.C. State Bd. Of Dental Exam'rs v. FTC*, 135 S. Ct. 1101, 1110 (2015).

It is important to recognize that this category of conduct includes more than just actions *taken* by government actors; it can include *abuse* of government processes by private actors. One example is the first case I brought as Acting Chairman. In our complaint, we charged that ViroPharma delayed generic competition to its branded prescription drug, Vancocin HCL Capsules, by allegedly waging a campaign of serial, repetitive, and unsupported filings with the FDA to delay the FDA's approval of a generic version.¹⁵ ViroPharma made a total of 46 filings to the FDA, which is by far the most filings a firm has ever made to the FDA about a single drug product. We have alleged that this abuse of FDA process caused generic entry to be delayed a number of years, costing consumers hundreds of millions of dollars.

Conclusion

Today, I have discussed two themes — economic liberty and regulatory humility — that I have pursued at the FTC at the start of the Trump Administration. The early returns of the Economic Liberty Task Force have been significant in shining a light on the desire of individual workers to pursue their chosen jobs without need of a government permission slip. I also believe our antitrust enforcement has shown due regard for the appropriate role of antitrust in the larger economy in protecting consumer welfare while forgoing the temptation to pursue non-competition goals. I sincerely hope that these efforts will provide a firm foundation for future successes in the administration.

Thank you for your time.

¹⁵ FTC Press Release, "FTC Charges that Shire ViroPharma Inc. Abused Gov't Processes Through Serial, Sham Petitioning to Delay Generics and Maintain its Monopoly over Vancocin HCl Capsules," (Feb. 7, 2017), <https://www.ftc.gov/news-events/press-releases/2017/02/ftc-charges-shire-viopharma-inc-abused-government-processes>.