The FTC's Study and Advocacy Authority in Its Second Century: A Look Ahead

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Abstract

The Federal Trade Commission's ("FTC" or "the Commission") authority extends beyond antitrust law enforcement to include unique tools for industry study and competition advocacy that allow it to construct a broader competition policy program. These non-enforcement tools are especially important during times of change, when technology and other developments can trigger significant disruptions in the business environment. With respect to industries affected by such developments, it is essential that the agency uses these tools to continually upgrade its knowledge and performance capabilities and to give voice to the interests of consumers. This Essay discusses two specific tools: prospective study and competition advocacy in heavily regulated industries. It argues that these tools will become increasingly important in the FTC's second century and will provide unique benefits to the agency, consumers, and the business community.

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Introduction

From its inception and by design, the United States Federal Trade Commission ("FTC") was intended to be more than just a second federal antitrust enforcement agency.[1] In addition to its broader enforce-

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1 On the history and policy of the FTC, see generally J. Howard Beales III & Timothy J. Muris, *FTC Consumer Protection at 100: 1972 Redux or Protecting Markets to Protect Consumers?*, 83 Geo. Wash. L. Rev. 2157 (2015); Daniel A. Crane, *Debunking* Humphrey's Executor, 83 Geo. Wash. L. Rev. 1835 (2015); Jeffrey A. Eisenach & Ilene Knable Gotts, *Looking Ahead: The FTC's Role in Information Technology Markets*, 83 Geo. Wash. L. Rev. 1876 (2015); Rich-

ment mandate,[2] it was imbued with study authority, which includes the power to issue compulsory process.[3] The Commission thus was charged to examine industry and industry practices and make public

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ard J. Gilbert & Hillary Greene, *Merging Innovation into Antitrust Agency Enforcement of the Clayton Act*, 83 GEO. WASH. L. REV. 1919 (2015); Woodrow Hartzog & Daniel J. Solove, *The Scope and Potential of FTC Data Protection*, 83 GEO. WASH. L. REV. 2230 (2015); David A. Hyman & William E. Kovacic, *Can't Anyone Here Play This Game? Judging the FTC's Critics*, 83 GEO. WASH. L. REV. 1948 (2015); Jeffrey S. Lubbers, *It's Time to Remove the "Mossified" Procedures for FTC Rulemaking*, 83 GEO. WASH. L. REV. 1979 (2015); Maureen K. Ohlhausen, *Weigh the Label, Not the Tractor: What Goes on the Scale in an FTC Unfairness Cost-Benefit Analysis?*, 83 GEO. WASH. L. REV. 1999 (2015); Richard J. Pierce, Jr. *The Rocky Relationship Between the Federal Trade Commission and Administrative Law*, 83 GEO. WASH. L. REV. 2026 (2015); Edith Ramirez, *The FTC: A Framework for Promoting Competition and Protecting Consumers*, 83 GEO. WASH. L. REV. 2049 (2015); D. Daniel Sokol, *Analyzing Robinson-Patman*, 83 GEO. WASH. L. REV. 2064 (2015); David C. Vladeck, *Charting the Course: The Federal Trade Commission's Second Hundred Years*, 83 GEO. WASH. L. REV. 2101 (2015); Joshua Wright & John Yun, *Stop Chug-a-lug-a-lugin 5 Miles an Hour on Your International Harvester: How Modern Economics Brings the FTC's Unfairness Analysis Up to Speed with Digital Platforms*, 83 GEO. WASH. L. REV. 2130 (2015).

2 Section 5 of the FTC Act prohibits both "unfair or deceptive acts or practices" and "unfair methods of competition." 15 U.S.C. § 45(a)(1) (2012). "Unfair methods of competition" is understood to encompass all Sherman Act violations but is not confined to them. *See* 2 PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW ¶¶ 302c, 302h, at 16, 29–32 (4th ed. 2014); *see also* William E. Kovacic & Marc Winerman, *Competition Policy and the Application of Section 5 of the Federal Trade Commission Act*, 76 ANTITRUST L.J. 929, 930–39 (2010 ("Congress intended Section 5 . . . to reach behavior not necessarily proscribed by the [Sherman Act].").

3 With some enumerated exceptions, Section 6(a) of the FTC Act authorizes the Commission "[t]o gather and compile information concerning, and to investigate from time to time the organization, business, conduct, practices, and management of any person, partnership, or corporation engaged in or whose business affects commerce . . . ." 15 U.S.C. § 46(a). Section 6(b) adds the power of compulsory process, permitting the Commission "[t]o require, by general or special orders, persons, partnerships, and corporations, engaged in or whose business affects commerce . . . to file [in writing] with the Commission in such form as the Commission may prescribe annual or special, or both annual and special, reports or answers in writing to specific questions . . . ." *Id.* § 46(b). As former FTC Chairman William E. Kovacic has explained:

> The FTC has a mandate to undertake certain forms of research based on Section 6 of the FTC Act and the historical report-writing activity of its predecessor entity, the Bureau of Corporations. That mandate differentiates the FTC from most other antitrust or consumer protection agencies in the world in that it enables the agency to use compulsory process to gather data in a context other than law enforcement. From its inception, the FTC carried on a general investigative function that complemented its law enforcement activities. The results of the investigations were compiled in reports that were intended to shed light on various questionable business practices of the day. That activity was the precursor of what is now thought of as research and policy R&D at the FTC.

WILLIAM E. KOVACIC, THE FEDERAL TRADE COMMISSION AT 100: INTO OUR 2ND CENTURY, 92–93 (2009) (footnote omitted), https://www.ftc.gov/sites/default/files/documents/public_statements/federal-trade-commission-100-our-second-century/ftc100rpt.pdf. For an examination of the historical evolution of the FTC's study authority, see Marc Winerman, *The Origins of the FTC: Concentration, Cooperation, Control, and Competition*, 71 ANTITRUST L.J. 1, 59–62 (2003); see also Arnold C. Celnicker, *The Federal Trade Commission's Competition and Consumer Ad-*

its findings.[4] Such study also promoted development of the agency's expertise over time and helped to inform the government's competition policy choices.[5]

In the agency's first 100 years, the FTC has implemented its charge through a variety of nonenforcement policy tools, both formal and informal.[6] The FTC has used its compulsory process authority under Section 6(b) to undertake respected studies of industries and specific industry practices.[7] In addition, it has promoted the thoughtful evolution of the law through public workshops, guidelines, internal analyses, and public reports.[8] It has also conducted retrospective reviews of its own enforcement decisions and policies, later building on those studies to promote further evolution of the law, and sound enforcement policy.[9] Furthermore, the FTC has used its accumulated competition and consumer protection expertise to advocate for con-

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vocacy Program, 33 ST. LOUIS U. L.J. 379, 380–81 (1989) (describing legislative history and providing early examples of the exercise of the FTC's study authority).

4 *See* 15 U.S.C. § 46(f).

5 Some also viewed the FTC's study authority as a source of guidance for courts and the business community. *See, e.g.*, AREEDA & HOVENKAMP, *supra* note 2, ¶ 302a, at 13–14; Winerman, *supra* note 2, at 52–53, 93.

6 *See* AREEDA & HOVENKAMP, *supra* note 2, ¶¶ 302d, 302g, at 18, 28–29.

7 For an account of the FTC's formal study and report-writing function through 1980, see FED. TRADE COMM'N, OFFICE OF POLICY PLANNING, HISTORY OF SECTION 6 REPORT-WRITING AT THE FEDERAL TRADE COMMISSION (1981), https://www.ftc.gov/sites/default/files/documents/reports/history-section-6-report-writing-federal-trade-commission/231984.pdf.

8 *See Commission Actions*, FED. TRADE COMM'N, https://www.ftc.gov/news-events/commission-actions (last visited Nov. 2, 2015); *Competition Policy Guidance*, FED. TRADE COMM'N, https://www.ftc.gov/tips-advice/competition-guidance (last visited Nov. 2, 2015); *Reports*, FED. TRADE COMM'N, https://www.ftc.gov/policy/reports (last visited Nov. 2, 2015).

9 One such prominent and oft-cited example was the Commission's retrospective study of hospital mergers. The study followed a string of FTC losses in challenges to hospital mergers and helped cause a significant turnaround in its success owing to a refinement in its understanding of the competitive effects analysis of hospital mergers. *See* DEBORAH HAAS-WILSON & CHRISTOPHER GARMON, TWO HOSPITAL MERGERS ON CHICAGO'S NORTH SHORE: A RETROSPECTIVE STUDY (2009), https://www.ftc.gov/sites/default/files/documents/reports/two-hospital-mergers-chicago's-north-shore-retrospective-study/wp294_0.pdf. The Commission also recently invited public comment on a study that will examine the effectiveness of divestiture and other remedies in its merger decisions from 2006 through 2012. *See* Press Release, Fed. Trade Comm'n, *FTC Proposes to Study Merger Remedies* (Jan. 9, 2015), http://www.ftc.gov/news-events/press-releases/2015/01/ftc-proposes-study-merger-remedies; s*ee also* Press Release, Fed. Trade Comm'n, *FTC Announces Second Federal Register Notice for its Merger Remedy Study; OMB Clearance Requested* (June 10, 2015), https://www.ftc.gov/news-events/press-releases/2015/06/ftc-announces-second-federal-register-notice-its-merger-remedy. The study will build on an earlier, similar analysis, which the Bureau of Competition completed in 1999. FED. TRADE COMM'N, BUREAU OF COMPETITION, A STUDY OF THE COMMISSION'S DIVESTITURE PROCESS, http://www.ftc.gov/sites/default/files/documents/reports/study-commissions-divestiture-process/divestiture_0.pdf.

sumer interests before federal, state, and local regulatory and legislative authorities.[10]

This Essay focuses on two of the FTC's nonenforcement tools, both of which will be increasingly important to its mission to promote competition and the interests of consumers, especially during periods of economic transformation: (1) its ability to use prospective study to examine trends and changes in the marketplace and (2) competition advocacy directed at legislative and regulatory bodies that are responding to changing market conditions. These kinds of changes can take the form of entirely new industries, novel products or services, evolving industry structures and new industry practices, and innovative business models facilitated by new technologies.

The current and seemingly rapid pace of change seems likely to continue, if not accelerate. As a result, prospective study and thoughtful advocacy to promote regulatory flexibility in the face of changed market conditions will become even more essential to competition in the FTC's next 100 years. Prospective study will be needed to inform and thereby better prepare the agency for both advocacy and law enforcement. And when changes arise in regulated industries, the FTC will be called upon to give voice to the interests of consumers when regulators and incumbents respond to those changes by seeking to use the regulatory process to stifle the emergence of new companies and business models. Aligning these two tools will be especially important. If done well, strategic coordination of prospective study and competition advocacy may provide the biggest "bang for the buck" in the agency's nonenforcement tool bag.

I. Prospective Study

Agency self-examination and reflection is now widely regarded as a valuable and desirable practice.[11] For a modern competition agency to be institutionally sound and effective, it must have some means to assess its performance which will typically require an established process for reviewing agency actions to gauge success and failure and to glean insights that can inform future policy choices.[12] To be effective, self-reflection requires that an agency define its mission, establish and

10 *See generally Advocacy Filings*, Fed. Trade. Comm'n, https://www.ftc.gov/policy/advocacy/advocacy-filings (last visited Nov. 2, 2015) (providing an index of the FTC's advocacy filings).

11 *See* Andrew I. Gavil, *The Next Step in the Development of* Ex Post *Evaluation of Merger Review Procedures: Defining the State of the Art with Staged Options for Implementation*, Concurrences, December 2011, at 1, 1–2, http://ssrn.com/abstract=1977516.

12 *See id.*

regularly apply measures of its effectiveness in light of its objectives, and evaluate its resources—financial and human.[13] Many have endorsed this kind of systematic self-reflection as an integral component of responsible competition agency practice.[14] It does not come, however, without costs and can present political, resource, and other sorts of challenges.[15] Therefore, for many—if not most—agencies, self-reflection will remain an aspirational goal at least to some degree.[16]

There are many dimensions to self-reflection, and therefore, it can take many forms. One prominent example is retrospective or "ex post" study of particular enforcement actions, a practice that many agencies and international competition organizations have embraced.[17] Such evaluations have been most fully developed with respect to merger enforcement, where agencies have utilized them to revisit and assess previous decisions, especially in close cases.[18] Academics have also undertaken the sometimes challenging task of reviewing past merger decisions, a recognition that the effort is critical to the process of refinement of merger policy.[19] A consensus has emerged that retrospective study of merger enforcement is such a valuable undertaking that international competition organizations have

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13 *See id.* at 2.

14 *See, e.g.*, William E. Kovacic, *Rating the Competition Agencies: What Constitutes Good Performance?*, 16 GEO. MASON L. REV. 903, 904–05 (2009). The Organisation for Economic Cooperation and Development's ("OECD") Guiding Principles for Regulatory Quality and Performance include a direction that members "[r]eview and strengthen where necessary the scope, effectiveness and enforcement of competition policy." OECD, OECD GUIDING PRINCIPLES FOR REGULATORY QUALITY AND PERFORMANCE 5 (2005), http://www.oecd.org/fr/reformereg/34976533.pdf; *see also* OECD, RECOMMENDATION OF THE OECD COUNCIL ON COMPETITION ASSESSMENT 2–3 (2009), http://www.oecd.org/daf/competition/OECDCoucilRecommendationCompetitionAssessment.pdf. *See generally* William E. Kovacic, *Evaluating Antitrust Experiments: Using Ex Post Assessments of Government Enforcement Decisions to Inform Competition Policy*, 9 GEO. MASON L. REV. 843, 843–44 (2001) (arguing in favor of ex post competition agency performance evaluations); William E. Kovacic, *Using Ex Post Evaluations to Improve the Performance of Competition Policy Authorities*, 31 J. CORP. L. 503, 506–13 (2006) (discussing agency outputs and agency internal processes as two metrics to evaluate quality of competition agency performance).

15 *See* Gavil, *supra* note 11, at 2.

16 *See id.*

17 *See id.* at 1.

18 *See, e.g.*, Dennis W. Carlton, *The Need to Measure the Effect of Merger Policy and How to Do It*, ANTITRUST, Summer 2008, at 39, 39–40. For a review of selected U.S. merger retrospective studies, see Orley Ashenfelter & Daniel Hosken, *The Effect of Mergers on Consumer Prices: Evidence from Five Mergers on the Enforcement Margin*, 53 J.L. & ECON. 417 (2010); Graeme Hunter et al., *Merger Retrospective Studies: A Review*, ANTITRUST, Fall 2008, at 34, 34.

19 *See, e.g.*, JOHN KWOKA ET AL., MERGERS, MERGER CONTROL, AND REMEDIES: A RETROSPECTIVE ANALYSIS OF U.S. POLICY 4 (2014).

promoted it, and it has become an important priority for many competition agencies around the globe.[20]

Retrospective study, however, may be uniquely unrevealing in industries undergoing rapid development.[21] Changes in an industry may not only complicate the process of ex post assessment but may even lead an agency to draw incorrect lessons from its previous decisions.[22] Moreover, retrospective analysis, especially formal, in-depth review of a particular transaction, can be resource-intensive and require a significant commitment of agency staff time.[23] It can be argued, therefore, that retrospective study in an industry that is rapidly evolving may be a poor choice of agency priority. All agencies, even the most established ones, need to make thoughtful choices about how best to allocate their limited resources. Although retrospective study may yield some valuable data—even in changing industries—under some circumstances it may be difficult to justify as the most reasonable agency priority.[24]

"Prospective" study provides an alternative. Industries in transition present unique challenges for competition agencies.[25] Agencies can fall behind the times in a variety of ways. They can be caught unaware of new industry trends and practices that impact competition as well as new academic and economic learning and analytical methods. This may mean lost opportunities for competition advocacy and continued reliance on antiquated thinking long after it has become obsolete. Prospective study can foster creativity, stimulating agency staff to consider new facts, methods, and business practices and inviting the academic community to do the same.[26] Agencies can take the

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20 *See* OECD, POLICY ROUNDTABLES: IMPACT EVALUATION OF MERGER DECISIONS 13–16 (2011), http://www.oecd.org/daf/competition/Impactevaluationofmergerdecisions2011.pdf; Gavil, *supra* note 11, at 2–3 (arguing that agencies with limited resources may need to identify creative ways to undertake less-resource demanding kinds of retrospective study).

21 *See* Gavil, *supra* note 11, at 1–2.

22 One of the goals of retrospective study of mergers is to revisit and evaluate the predictions made about the future course of the market in which a transaction is permitted to proceed. *See id.* In that sense, retrospective study might also be valuable in changing markets, if only to illuminate and assess the reliability of the predictive tools and assumptions the agency uses to reach its decisions.

23 *See id.* at 2.

24 *See id.*

25 *See* Edith Ramirez, Fed. Trade Comm'n, *Opening Remarks in* EXAMINING HEALTH CARE COMPETITION 6 (2014), http://www.ftc.gov/system/files/documents/public_events/200361/transcriptmar20.pdf (transcript of March 20, 2014 Workshop).

26 *See id.*

lead, for example, in framing current issues and inspiring new empirical and theoretical research.[27]

The FTC has long been active in such prospective study, especially regarding industries undergoing significant change due to new technologies. In 1995, for example, the FTC convened in-depth hearings on Global Innovation and Competition.[28] In announcing the hearings, then FTC Chairman Robert Pitofsky explained that they were intended to "address the [FTC's] responsibility of ensuring that the competition and consumer protection policies we enforce continue to be relevant in the modern economy" and to "restore the tradition of linking law enforcement with a continuing review of economic conditions to ensure that the laws make sense in light of contemporary conditions."[29] The Commission staff thereafter produced a comprehensive and insightful two-volume report of its findings.[30] Similarly, following a public workshop in 2000, the agency staff issued a report on the then-emerging phenomenon of the "business-to-business" or "B2B" marketplace.[31] Two years later, under the leadership of then Chairman Timothy Muris, the agency formed an Internet Task Force that convened a three-day workshop to examine regulatory and other impediments to the emergence of e-commerce in a variety of industries.[32] The workshop led to reports on wine[33] and contact lenses.[34] In

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27 *See, e.g.*, FED. TRADE COMM'N, ANTICIPATING THE 21ST CENTURY: COMPETITION AND CONSUMER PROTECTION POLICY IN THE NEW HIGH-TECH, GLOBAL MARKETPLACE (1996) [hereinafter ANTICIPATING THE 21ST CENTURY], http://www.ftc.gov/reports/anticipating-21st-century-competition-consumer-protection-policy-new-high-tech-global.

28 *See* Hearings on FTC Policy in Relation to the Changing Nature of Competition, 60 Fed. Reg. 37,449 (July 20, 1995).

29 Press Release, Fed. Trade Comm'n, *Federal Trade Commission's Hearings on Global and Innovation-Based Competition* (Oct. 12, 1995), http://www.ftc.gov/news-events/press-releases/1995/10/federal-trade-commissions-hearings-global-and-innovation-based,.

30 *See* ANTICIPATING THE 21ST CENTURY, *supra* note 27.

31 *See* Press Release, Fed Trade Comm'n, *FTC Staff Issues Report on Competition Policy and the World of B2B Electronic Marketplaces* (Oct. 26, 2000), http://www.ftc.gov/news-events/press-releases/2000/10/ftc-staff-issues-report-competition-policy-world-b2b-electronic. A follow-up workshop was held in 2001. *See* Press Release, Fed. Trade Comm'n, *FTC to Host Workshop on Emerging Issues for Competition Policy in the E-Commerce Environment* (Mar. 30, 2001), http://www.ftc.gov/news-events/press-releases/2001/03/ftc-host-workshop-emerging-issues-competition-policy-e-commerce. For a transcript of the workshop, see *Emerging Issues for Competition Policy in the World of E-Commerce*, FED. TRADE COMM'N (May 8, 2001), http://www.ftc.gov/news-events/events-calendar/2001/05/emerging-issues-competition-policy-world-e-commerce.

32 Press Release, Fed. Trade Comm'n, *FTC to Host Public Workshop to Explore Possible Anticompetitive Efforts to Restrict Competition on the Internet* (July 17, 2002), http://www.ftc.gov/news-events/press-releases/2002/07/ftc-host-public-workshop-explore-possible-anticompetitive-efforts.

33 *See* Press Release, Fed. Trade Comm'n, *FTC: E-commerce Lowers Prices, Increases*

2005, agency staff issued a report on "peer-to-peer" or "P2P" file sharing.[35] This long-standing tradition of "looking forward" to learn and prepare for changing markets and market practices is today an integral part of the FTC's mission.[36]

A recent case in point is the U.S. health care industry, which has long been a focus of the FTC's attention given its breadth and importance to the national economy.[37] Today, it is an industry in transition.[38] New payer and provider models are emerging, as are new methods of delivering services.[39] In addition, payers and providers are deploying new payment and risk allocation models in response to the

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Choices in Wine Market (July 3, 2003), http://www.ftc.gov/news-events/press-releases/2003/07/ftc-e-commerce-lowers-prices-increases-choices-wine-market.

34 Press Release, Fed. Trade Comm'n, *FTC: E-commerce Increases Choice and Convenience for Contact Lens Wearers* (Mar. 29, 2004), http://www.ftc.gov/news-events/press-releases/2004/03/ftc-e-commerce-increases-choice-and-convenience-contact-lens. For an account of the FTC's workshop and its two reports on Internet-based competition for wine and contact lens, see Maureen K. Ohlhausen, Fed. Trade Comm'n, *Competition Advocacy: The Impact of FTC Staff Reports on Barriers to E-Commerce in Contact Lenses and Wine*, http://www.ftc.gov/sites/default/files/documents/public_events/FTC%2090th%20Anniversary%20Symposium/ohlhausen.pdf (last visited Nov. 2, 2015).

35 Press Release, Fed. Trade Comm'n, *FTC Issues Report on Peer-to-Peer File Sharing* (June 23, 2005), http://www.ftc.gov/news-events/press-releases/2005/06/ftc-issues-report-peer-peer-file-sharing. The report is available at https://www.ftc.gov/sites/default/files/documents/reports/peer-peer-file-sharing-technology-consumer-protection-and-competition-issues/050623p2prpt.pdf.

36 For example, a decade ago, the FTC and Department of Justice Antitrust Division issued an extensive study of the state of competition in the health care industry. The report consisted of findings from a workshop, independent research, and over twenty-seven days of hearings conducted in 2003. *See* FED. TRADE COMM'N & DEP'T OF JUSTICE, IMPROVING HEALTH CARE: A DOSE OF COMPETITION (2004) [hereinafter IMPROVING HEALTH CARE], https://www.ftc.gov/sites/default/files/documents/reports/improving-health-care-dose-competition-report-federal-trade-commission-and-department-justice/040723healthcarerpt.pdf; *see also* FED. TRADE COMM'N, EMERGING HEALTH CARE ISSUES: FOLLOW-ON BIOLOGIC DRUG COMPETITION (2009), https://www.ftc.gov/sites/default/files/documents/reports/emerging-health-care-issues-follow-biologic-drug-competition-federal-trade-commission-report/p083901biologicsreport.pdf.

37 *See* IMPROVING HEALTH CARE, supra note 36, at 1.

38 *See, e.g.*, Micky Tripathi, *Advancements in Healthcare Technology in* EXAMINING HEALTH CARE COMPETITION, *supra* note 25, at 137.

39 In March 2014, the Commission authorized staff to issue a policy paper on the scope of practice limitations that could impede the use of Advanced Practice Registered Nurses ("APRNs") to provide a range of health care services for which they are qualified by education and training but that state laws may restrict. *See* FED. TRADE COMM'N, POLICY PERSPECTIVES: COMPETITION AND THE REGULATION OF ADVANCED PRACTICE NURSES (2014) [hereinafter POLICY PERSPECTIVES], https://www.ftc.gov/system/files/documents/reports/policy-perspectives-competition-regulation-advanced-practice-nurses/140307aprnpolicypaper.pdf; *see also* Press Release, Fed. Trade Comm'n, *FTC Staff Urges Dental Accreditation Commission to Adopt Dental Therapy Accreditation Standards* (Dec. 1, 2014), http://www.ftc.gov/news-events/press-releases/2014/12/ftc-staff-urges-dental-accreditation-commission-adopt-dental (urging American Dental

pronounced national need for better value in the health care system—cost-effective, high quality, and more accessible health care.[40] Technology has become an important part of this change, not just in the equipment and devices used to deliver health care services, but also in the computerized systems for storing, sharing, and analyzing patient and clinical data.[41]

To keep pace with so many still-evolving trends in health care, the FTC continues to use its authority to undertake "prospective" study. As Chairwoman Edith Ramirez noted at the FTC's March 2014 workshop on health care trends:

I believe that looking back on our previous enforcement activities can help to better inform our current and future priorities, but, in an industry such as health care, which is undergoing significant and rapid evolution, we must also invest our resources to understand and anticipate change. Workshops like this one help us to maintain our cutting-edge knowledge of the industry, and they also educate us about important developments that may impact the competitiveness of health care markets in the near and long term. Given the importance of these markets to our economy and to American consumers, it's essential that we understand not just today's markets but tomorrow's as well.[42]

Such prospective study, whether in the health care field or in other areas of the economy, will be increasingly important as the

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Association's Commission on Dental Accreditation to adopt standards that would facilitate the development of education programs for dental therapists).

40 Ramirez, *supra* note 25, at 7.

41 *See, e.g.*, Tara Isa Koslov et al., *Promoting Healthy Competition in Health IT Markets*, FED. TRADE COMM'N: COMPETITION MATTERS BLOG (Oct. 7, 2014, 10:30 AM), http://www.ftc.gov/news-events/blogs/competition-matters/2014/10/promoting-healthy-competition-health-it-markets; *see also* MAUREEN K. OHLHAUSEN, FED. TRADE COMM'N, HEALTH CARE, TECHNOLOGY, AND HEALTH CARE TECHNOLOGY: PROMOTING COMPETITION AND PROTECTING INNOVATION (2014), http://www.ftc.gov/system/files/documents/public_statements/203081/140226healthcaretechnology_0.pdf (remarks before The Connecticut Bar Association Antitrust & Trade Regulation and Consumer Law Sections).

42 Ramirez, *supra* note 25, at 6; *see also* OHLHAUSEN, *supra* note 41, at 3 ("These types of research and education projects play an especially important role in dynamic industries, where it is important for the Commission to be apprised of facts on the ground in a changing landscape and to spot competition and consumer protection issues as they arise—and not just in hindsight."). The Commission has since conducted a second workshop, organized jointly with the Department of Justice Antitrust Division, which focused on health care provider and payment models. *See Examining Health Care Competition*, FED. TRADE COMM'N, http://www.ftc.gov/news-events/events-calendar/2015/02/examining-health-care-competition (last visited Nov. 2, 2015).

agency prepares to make informed and sophisticated enforcement and advocacy decisions in the future.[43]

II. Responding to Anticompetitive Regulation in Times of Change

Competition advocacy has also been a long-standing staple of the FTC's nonenforcement tool bag. Whether through informal agency-to-agency consultation, amicus briefs, or comments provided to legislators and regulators, the Commission and its staff consistently urge decisionmakers to integrate consideration of competition values and effects into their deliberations.[44]

Competition advocacy can be especially important in regulated industries. Industry participants are likely to be well organized, informed, funded, and focused on promoting regulation that will serve their self-interests. On the other hand, the impact of regulation on consumers can be diffuse but substantial in the aggregate, leaving them vulnerable to harm and less likely to have the information and incentives necessary to engage in advocacy themselves. The result can be what has been labeled "regulatory capture."[45] Regulation can

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43 Most recently, the FTC held a workshop on what some have labeled the "sharing economy," which serves as another illustration of its use of prospective study. *See The "Sharing" Economy: Issues Facing Platforms, Participants, and Regulators*, Fed. Trade Comm'n, https://www.ftc.gov/news-events/events-calendar/2015/06/sharing-economy-issues-facing-platforms-participants-regulators (last visited Nov. 2, 2015).

44 *See, e.g.*, Tara Isa Koslov, Fed. Trade Comm'n, *Competition Advocacy at the Federal Trade Commission: Recent Developments Build on Past Successes*, CPI Antitrust Chron. Aug. 2012, at 3 ("Whatever the format and [whoever] the audience, all of our competition advocacy efforts share a common goal: to provide a framework for thinking about public policy issues from a competition perspective."). For an account of the agency's advocacy work from 1980 to 2004, see James C. Cooper et al., *Theory and Practice of Competition Advocacy at the FTC*, 72 Antitrust L.J. 1091, 1093 (2005).

45 For an explanation of capture theory and citations to some of the foundation literature, see Dennis W. Carlton & Jeffrey M. Perloff, Modern Industrial Organization 687–91 (4th ed. 2004). As the authors explain, under a generalized conception of capture theory "various interest groups are affected differently by regulation and compete to influence legislation. Those that are the best organized and most affected by regulation spend the most money attempting to promote their own interest through legislation and sympathetic regulators." *Id.* at 687; *see also* Ernesto Dal Bó, *Regulatory Capture: A Review*, 22 Oxford Rev. Econ. Pol'y 203, 203–04 (2006). For a discussion of the theory in the context of the FTC's advocacy program, see Cooper et al., *supra* note 44, at 1102–04. The authors observe:

> [B]ecause consumers will be relatively ineffective at representing their interests in the political system, political outcomes may tend to restrict competition more than they otherwise would. Tasking a public entity with the responsibility of representing dispersed consumers by promoting the principle of competition in the political process is a way to correct this political market failure.

Id. at 1102.

serve the regulated. For these and additional reasons, regulated trades and professions,[46] especially those regulated at the state or local level, can pose distinct challenges to the competitive process.[47]

The interdependence of regulators and the regulated can provide fertile ground for incumbent firms, which may attempt to secure protectionist policies that limit the scope and nature of competition.[48] More indirectly, because regulations tend to reflect the features of the business models of a specific time period, they can favor incumbent firms over challengers by entrenching a particular business method and insulating the firms that use it from new sources of competition.[49] Existing regulations, or newly proposed ones that fortify such a regulatory regime, may significantly impede the competitive process, which would otherwise referee the confrontation between old and new, imposing hurdles for innovation and innovative business models.[50] This phenomenon, which could be described as "regulatory capture through design," can be especially stifling for competition—what has sometimes been labeled "disruptive" competition—that challenges existing products, services, and business models.[51]

Today, such disruption is occurring in many industries. In some instances, new technology, such as 3D printing or "additive manufacturing," is itself the disruption.[52] In others, new technologies such as

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46 Carlton and Perloff cite occupational licensing as a "prime example of this self-interest theory." CARLTON & PERLOFF, *supra* note 45, at 687. For a recent examination of the expanding role of occupational licensing and its implications for competition, see Aaron Edlin & Rebecca Haw, *Cartels by Another Name: Should Licensed Occupations Face Antitrust Scrutiny?*, 162 U. PA. L. REV. 1093 (2014); see also Morris M. Kleiner, *Reforming Occupational Licensing Policies*, THE HAMILTON PROJECT (2015), http://www.hamiltonproject.org/files/downloads_and_links/reform_occupational_licensing_policies_kleiner_v4.pdf (arguing for reform of state occupational licensing systems in part on the ground that they impede competition).

47 The challenge can be especially acute when states confer regulatory authority on nominally "state" boards that are constituted of private, self-interested members of the regulated profession. As the Supreme Court recently observed in delimiting the scope of state action immunity for purposes of antitrust:

> Limits on state-action immunity are most essential when the State seeks to delegate its regulatory power to active market participants, for established ethical standards may blend with private anticompetitive motives in a way difficult even for market participants to discern. Dual allegiances are not always apparent to an actor. In consequence, active market participants cannot be allowed to regulate their own markets free from antitrust accountability.

N.C. State Bd. of Dental Examiners v. FTC, 135 S. Ct. 1101, 1111 (2015).

48 *See* Edlin & Haw, *supra* note 46, at 1096–97.

49 *See id.* at 1107.

50 *See id.*

51 *See id.*

52 *See, e.g.*, *Additive Manufacturing: Heavy Metal*, ECONOMIST, May 3, 2014, at 56.

software platform applications for smartphones, other mobile devices, and computers are facilitating the creation of products and services as well as entirely new business models.[53] New technologies can also require new methods of distribution that are better suited to the product and to a manufacturer's promotional strategy.[54] Finally, even apart from new technologies, changed market conditions can spur the development of creative and new methods to deliver services that may be more responsive to consumer needs and demands for cost-effectiveness. Again, examples can be found in the health care field, where new models of service delivery that promise expanded competition and better access to basic health care have faced regulatory barriers, often imposed at the behest of incumbent providers set on using the government to insulate themselves from competition.[55]

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53 *See, e.g.*, FTC Staff Comment to the Honorable Brendan Reilly Concerning Chicago Proposed Ordinance O2014-1367 Regarding Transportation Network Providers 1–2 (Apr. 15, 2014) [hereinafter Reilly Letter], https://www.ftc.gov/system/files/documents/advocacy_documents/ftc-staff-comment-honorable-brendan-reilly-concerning-chicago-proposed-ordinance-o2014-1367/140421chicagoridesharing.pdf (discussing proposed Chicago ordinance regarding transportation network providers); FTC Staff Comment Before the District of Columbia Taxicab Commission Concerning Proposed Rulemakings on Passenger Motor Vehicle Transportation Services (June 7, 2013), https://www.ftc.gov/sites/default/files/documents/advocacy_documents/ftc-staff-comments-district-columbia-taxicab-commission-concerning-proposed-rulemakings-passenger/130612dctaxicab.pdf (discussing proposed rulemaking on passenger motor vehicle transportation services). Some have described the phenomenon as the "sharing" or "peer-to-peer" economy. *See, e.g.*, *The Power of Connection: Peer-to-Peer Businesses: Hearing Before the H. Comm. on Small Bus.*, 113th Cong. 20–29 (2014) [hereinafter *The Power of Connection Hearing*] (statement of Arun Sundarajan, Professor and NEC Faculty Fellow, New York University Stern School of Business); Edith Ramirez, Chairwoman, Fed. Trade Comm'n, Keynote Remarks at the 42nd Annual Conference on International Antitrust Law and Policy (Oct. 2, 2015), https://www.ftc.gov/system/files/documents/public_statements/810851/151002fordhamremarks.pdf.

54 This has been occurring in the automobile industry, where new manufacturers seek to distribute their vehicles directly to consumers rather than through independent dealers. *See, e.g.*, Press Release, Fed. Trade Comm'n, *FTC Staff Urges Michigan Legislature to Repeal Ban on Direct-to-Consumer Sale of Motor Vehicles by Auto Manufacturers* (May 11, 2015), https://www.ftc.gov/news-events/press-releases/2015/05/ftc-staff-urges-michigan-legislature-repeal-ban-direct-consumer; Press Release, Fed. Trade Comm'n, *FTC Staff: Missouri and New Jersey Should Repeal Their Prohibitions on Direct-to-Consumer Auto Sales by Manufacturers* (May 16, 2014), https://www.ftc.gov/news-events/press-releases/2014/05/ftc-staff-missouri-new-jersey-should-repeal-their-prohibitions.

55 *See, e.g.*, FTC Staff Comment Before the Commission on Dental Accreditation Concerning Proposed Accreditation Standards for Dental Therapy Education Programs (Nov. 21, 2014) [hereinafter Dr. Tooks Letter (Nov. 2014)], https://www.ftc.gov/system/files/documents/advocacy_documents/ftc-staff-comment-commission-dental-accreditation-concerning-proposed-accreditation-standards-dental/141201codacomment.pdf (discussing proposed accreditation standards for dental therapy education programs); *see also* FTC Staff Comment Before the Commission on Dental Accreditation Concerning Proposed Accreditation Standards for Dental Therapy Education Programs (Dec. 2, 2013) [hereinafter Dr. Tooks Letter (Dec. 2013)], https://www.ftc.gov/sites/default/files/documents/advocacy_documents/ftc-staff-comment-commission-

Disruptive, new business models that emerge in regulated industries can provoke tensions due to regulatory incompatibility.[56] In some cases, new business models can differ so much from previous approaches that they lay outside of the existing regulatory system.[57] Even when a case can be made that they fall within the letter of current regulations, however, they can differ enough that there is a mismatch between the particular features of the business model and the regulatory scheme.[58] These kinds of regulatory incompatibilities can generate conflict between incumbents and would-be new entrants, posing challenges for regulators.[59] Although such changes in the marketplace can encourage forward-looking legislators and regulators to embrace change by revising existing regulations to facilitate the emergence of new business models, incumbent firms faced with competition associated with disruptive new entry may try instead to persuade regulators to slow the rate of progress.[60] The firms may even seek to prevent change through restrictive regulations.[61] In doing so, they can render markets less responsive to the interplay of supply and demand, diminishing the role of consumer preferences.[62] Market evolution under these circumstances can be especially complicated when the regulations exist in multiple jurisdictions at both state and local levels.[63] In that event, these regulations can impose especially significant costs of entry on firms that seek to compete in more than one locality; indeed, cross-jurisdictional operation may be one of the disruptive competition's defining and novel features.[64] Even when such firms are focused locally, their strategy may be to move from a local to a state, national, or international service model.[65]

In this clash between incumbents and challengers, consumer interests can all too easily go under- or unrepresented, even when con-

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dental-accreditation-concerning-proposed-accreditation-standards-dental/131204codacomment.pdf (interpreting Commission on Dental Accreditation's standards for dental therapy education programs).

56 *See* Reilly Letter, *supra* note 53, at 4.

57 *Id.*

58 *See The Power of Connection Hearing*, *supra* note 53, at 13–14 (remarks of Professor Philip Auerswald, Associate Professor, George Mason University).

59 *See, e.g.*, *id.* at 9 (prepared statement of Professor Philip Auerswald).

60 *See, e.g.*, Dr. Tooks Letter (Nov. 2014), *supra* note 55, at 1.

61 *Id.*

62 Dr. Tooks Letter (Dec. 2013), *supra* note 55, at 5.

63 *See* POLICY PERSPECTIVES, *supra* note 39, at 33 & n.127.

64 *See, e.g.*, *id.*

65 Examples include transportation and professional services. *See, e.g.*, JP Mangalindan, *The Trials of Uber*, FORTUNE (Feb. 2, 2012, 6:35 PM), http://tech.fortune.cnn.com/2012/02/02/the-trials-of-uber (providing an example of a company moving from a local to international model).

sumer demand for what is new is pronounced.[66] Under these circumstances, the FTC is especially well positioned to provide a reasoned voice for consumers. It is uniquely situated to understand and promote not just competition generally but, more specifically, the competition that flows from innovation. Informed by its competition expertise, and removed from the more focused lobbying pressures and other characteristics that often beset sector-specific regulators, the FTC may often be the only dispassionate voice for consumer interests when they are threatened by regulatory or legislative action that protects competitors at the expense of the competitive process.[67] Although the agency has repeatedly acknowledged that some regulation may be appropriate to address genuine health and safety concerns, those apprehensions can be easily exaggerated and regulatory solutions can be broader than necessary to address legitimate concerns.[68] The FTC can be especially effective in researching, deconstructing, and responding to public interest arguments invoked to support restrictive regulations when they are pretextual or exaggerated.[69] When there appears to be a genuine consumer protection concern that warrants some degree of regulation, the FTC can encourage regulators to adopt regulations that are no greater than necessary to address that concern.[70]

The role of the FTC in such cases is not to "take sides" as between the new and the old firms, but to encourage regulators to place their confidence in the competitive process—i.e., to resist the temptation to tilt the playing field in favor of one or another business model.[71] Especially in regulated industries that are undergoing significant upheaval, the public interest will be best served by regulations and regulatory conditions that are flexible and adaptable enough to address genuine public policy concerns without erecting unnecessary hurdles to new and often innovative products, services, and business models.[72] Confronted with a round peg, regulators can be encouraged

66 *See* Koslov, *supra* note 44, at 1–3.

67 As one commentator has observed, "the Commission can serve as the voice of competition and consumers, articulating a viewpoint that otherwise might not be heard." *Id.* at 4.

68 *See* POLICY PERSPECTIVES, *supra* note 39, at 16–17.

69 *See* Koslov, *supra* note 44, at 6.

70 For one exposition of these principles, see POLICY PERSPECTIVES, *supra* note 39, at 16–17.

71 *See id.* at 17.

72 It is not the primary role of the agency to insist that competition must always be the sole or even paramount policy concern for regulators. The agency can be most effective as an advocate for competition when it focuses on its comparative institutional advantage and competition expertise, and understands that, as a practical matter, a single-minded focus on competition is

to carefully consider "shape-shifting," modifying the square regulatory hole, rather than seeking to pound the peg until it fits the existing shape of regulation.

The challenge of "pushing back" against efforts to use regulation as an impediment to innovative forms of competition cannot be understated, and it will continue to grow in importance for the FTC. In addition to the factors propelling a technology-induced transformation in the economy that appears unlikely to abate, two trends in the United States illustrate why the problem is likely to grow, one regulatory and the other legal.

First, as has been documented by a number of scholars, states are increasingly turning to various kinds of licensing schemes for trades and "professions," loosely defined.[73] Although licensure and its variants can serve useful public purposes, it can also create unwarranted impediments to entry.[74] As the Supreme Court recently held in the context of delimiting the scope of antitrust "state action" doctrine, the damage done can be amplified by the creation of supervisory boards populated by financially self-interested market participants who are members of the profession to be regulated.[75] The damage can also be great when it bars entirely new classes of service providers and new service-delivery models.[76]

Second, the state action doctrine and immunity for some government petitioning activity have complicated enforcement action directed at such anticompetitive conduct. Although the Supreme Court forcefully reiterated its support for reasonable limits on the scope of the state action doctrine in *North Carolina State Board of Dental Examiners v. FTC*,[77] the state action doctrine will continue to impose some limits on the agency's ability to use its enforcement authority to

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unlikely to be an effective advocacy strategy. Such an approach could be perceived as an overreach by the agency, risks political backlash, and demonstrates a lack of sensitivity to the many circumstances in which Congress, state legislatures, or regulators might conclude that competition values must give way to other important public policy purposes. The more nuanced goal of competition advocacy is to enable decisionmakers to make informed choices when they weigh competitive effects against other public policy concerns.

73 *See* Edlin & Haw, *supra* note 46, at 1102–03.

74 *See id.* at 1109–10; *see also Barriers to Entrepreneurship: Examining the Antitrust Implications of Occupational Licensing Hearing Before the H. Comm. on Small Bus.*, 113th Cong. 2, 18–19 (2014) (prepared statement of FTC).

75 *See* N.C. State Bd. of Dental Examiners v. FTC, 135 S. Ct. 1101, 1114 (2015).

76 *See* POLICY PERSPECTIVES, *supra* note 39; *see also supra* note 55 and accompanying text.

77 *N.C. State Bd. of Dental Examiners*, 135 S. Ct. at 1110 (2015) (noting that state action immunity is "disfavored" (quoting FTC v. Phoebe Putney Health System, Inc., 133 S. Ct. 1003, 1010 (2013))).

stop anticompetitive regulation. The "second shoe" is the *Noerr-Pennington* doctrine, which has been read somewhat expansively to protect efforts to lobby for and secure anticompetitive laws and regulations.[78] As a result, private parties' efforts to secure even patently anticompetitive actions from various branches of government may remain beyond the reach of the law in some circumstances.[79]

The combined impact of the state action and *Noerr-Pennington* doctrines, therefore, is to partially insulate anticompetitive regulation and attempts to secure it from antitrust scrutiny. That creates a potential gap in competition policy, one that in at least some instances can be filled only through competition advocacy. When all of the requirements for state action or *Noerr-Pennington* can be established, competition advocacy is likely to be the best, and sometimes sole, means of promoting consumer interests.[80] This is particularly true in the face of organized efforts to insulate incumbents from competition through the regulatory process.[81]

Conclusion

The FTC's enduring mission is comprehensive, encompassing consumer protection and competition, enforcement, study, education, and advocacy—a tall order for a relatively small agency in a large and vibrant economy. In its second century, the agency likely will face the challenge of increasingly rapid and often disruptive changes in the business environment that will require it to adapt quickly if it is to be effective in its mission. As FTC Chairwoman Edith Ramirez observed on behalf of the Commission: "The FTC has worked to keep pace with the vast changes of the past 100 years, including those resulting from technological advances and our increasingly global economy. The agency must remain nimble to anticipate and respond to future marketplace changes and other challenges."[82] Prospective study and effective competition advocacy, especially when they are coordinated

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78 *See* Marina Lao, *Reforming the* Noerr-Pennington *Antitrust Immunity Doctrine*, 55 Rutgers L. Rev. 965, 969–71 (2003).

79 *See* 1 Phillip Areeda & Herbert Hovenkamp, Antitrust Law ¶¶ 203a–203j, at 193–244 (4th ed. 2013).

80 *See* Cooper et al., *supra* note 44, at 1110–11 (arguing that competition advocacy can be more efficient than enforcement, in part because of the state action and *Noerr-Pennington* doctrines).

81 *See id.*

82 *The FTC at 100: Where Do We Go From Here?: Hearing Before the Subcomm. on Commerce, Mfg., and Trade of the H. Comm. on Energy and Commerce*, 113th Cong. 17 (2013) (statement of FTC).

to complement each other, will help the FTC remain "nimble" and are likely to be two of the agency's essential means for achieving its goals.