competent to deal with [complex antitrust matters] by reason of information, experience, and careful study of the business and economic conditions of the industry affected.[2]

In my view, that description fits today's FTC like a Gibson Girl's shirtwaist dress.

I. The FTC Today

Oscar Wilde's famous take on fashion is that one "can never be overdressed or overeducated," and with at least the latter part of that analysis, the FTC is in complete agreement. The Commission could not tackle modern antitrust investigation, which routinely involves millions of pages of documents and a myriad of facts and figures, without the backing of our economic research and policy arms. Both are direct legacies of the Bureau of Corporations that was folded into the FTC upon its founding. In addition to working on investigations with our very capable attorneys in the Bureau of Competition, the FTC's Bureau of Economics staff also routinely engages in policy-oriented economic research. Our Office of Policy and Planning similarly devotes itself to antitrust policy issues. This evening, I would like to highlight how we have used our research and policy functions in two areas: mergers and high-tech matters involving intellectual property.

II. Mergers

As antitrust enforcers, we routinely forecast how mergers or challenged conduct will impact future competition. The predictions and assumptions underlying our actions must be sound, and one way to ensure that is to engage in retrospective analysis of past enforcement decisions. Mastery of this history is particularly important when the Commission is struggling with whether to bring an enforcement action in a complex and close case. Two such studies make my point: the FTC's hospital retrospective project in the early 2000s and the merger remedy study in the 1990s.

A. Hospital Retrospectives

The reinvigoration of the FTC's hospital merger enforcement efforts, due in large part to the hospital retrospective project, represents one of the best comeback stories since, well, 1914, when ankle boots – last seen on soldiers at the end of the 19th century – began to reappear below women's slowing rising hemlines.

Throughout the 1980s and early 1990s, the FTC and Department of Justice successfully challenged a number of hospital mergers, and courts were receptive to the agencies' arguments that such mergers were harmful to consumers.[6] Beginning in 1994, however, antitrust agencies suffered seven consecutive hospital merger losses.[7]

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[6] *See, e.g., FTC v. Univ. Health, Inc.*, 938 F.2d 1206 (11th Cir. 1991); *United States v. Rockford Mem'l*, 717 F.Supp. 1251, *aff'd*, 898 F.2d 1278 (7th Cir. 1990).

[7] *See FTC v. Tenet Healthcare Corp.*, 186 F.3d 1045 (8th Cir. 1999); *United States v. Long Island Jewish Med. Ctr.,* 983 F. Supp. 121 (E.D.N.Y. 1997); *FTC v. Butterworth Health Corp.*, 946 F. Supp. 1285 (W.D. Mich. 1996), *aff'd mem.*, 121 F.3d 708 (6th Cir. 1997); *United States v. Mercy Health Servs.*, 902 F. Supp. 968 (N.D. Iowa 1995), *vacated as moot*, 107 F.3d 632 (8th Cir. 1997); *FTC v. Freeman Hosp.,* 911 F. Supp. 1213(W.D. Mo. 1995), *aff'd*, 69 F.3d 260 (8th Cir. 1995); *FTC v. Hosp. Bd. of Directors of Lee Cty.*, 1994-1 Trade Cas. (CCH) ¶ 70,593 (M.D. Fla.), *aff'd*, 38 F.3d 1184 (11th Cir. 1994);

In 2002, the FTC decided to examine why the hospital merger program had fallen so hopelessly out of style. The Bureaus of Economics and Competition undertook a retrospective study of the effects on pricing and quality of care resulting from a handful of consummated hospital mergers.[8] This project was supplemented by a series of health care hearings convened jointly with DOJ.[9]

BE s empirical studies revealed that many hospital mergers were, as the agencies had contended, anticompetitive.[10] BE showed that hospital competition was highly localized. Even mergers in metropolitan areas with a large number of hospitals could cause competitive harm because patients demand the inclusion of certain institutions in their insurance networks.[11] The studies also showed that quality of care does not necessarily improve with consolidation.[12]

Armed with this information as well as the findings from the workshops, the Commission revamped its approach to litigating hospital cases. To show competitive harm, the FTC now emphasizes how a merger can leave an insurer with few alternatives to include in its network, increasing the bargaining leverage of the combined hospital and leading to higher prices.[13] We have also used retrospectives, which provide real-world backup for our arguments, to bolster judges confidence in our predictions of price effects.

California v. Sutter Health Sys., 84 F. Supp. 2d 1057 (N.D. Cal.) (denying preliminary injunction in hospital merger challenge by the California Attorney General), *aff'd mem.*, 217 F.3d 846 (9th Cir. 2000).

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Our new approach sparked a winning streak, starting with the *Evanston* case in 2007,[14] that includes three successfully-litigated merger challenges[15] and a growing tally of hospital deals abandoned after the FTC threatened a challenge.[16] These victories are a perfect fit for consumers already burdened with staggering health care costs. And they came about because we tailored our approach on a pattern created by our Progressive Era predecessors sophisticated economic analysis and a nuanced understanding of hospital markets.

B.

only the divestiture of the relevant IP to a buyer of the seller s choosing.[21] The FTC has replaced those modest orders with more robust requirements[22] requirements that our informal follow-up studies have shown overwhelmingly achieved the desired results.

While I recognize that merger retrospectives can be hard to conduct and may not answer every difficult question,[23] I believe they are both useful and necessary. I also recognize that one of the biggest obstacles to this type of analysis is a lack of post-merger data.[24] To address that, it

III. IP Studies

Intellectual property in the high-tech sector is another area where we weave research into our enforcement efforts. For well over a decade, the Commission has studied the role that patents play in high-tech industry. Our work on this is too extensive to summarize in a short speech, but let me touch on a few highlights.

In 2002, the FTC and DOJ held a series of hearings that resulted in a 2003 FTC report focused largely on patent quality.[27]

refuses to agree to licensing terms set by a neutral third party.[38]

Now, while I may disagree with such criticisms, these questions are all legitimate ones. But, in my view, others are not. Some have claimed, without basis, that the Commission yielded to pressure from Google, the White House, Congress, or all three. You will not be surprised to hear that I take issue with those accusations. As in all of our cases, our decision in this investigation was based on our independent assessment of the facts and our interpretation of the law, nothing more and nothing less.

V. Conclusion

Coco Chanel once said: Fashion changes, but style endures. The FTC is fortunate to have inherited from our Progressive Era founders a style that has allowed us to endure as an effective, consensus-driven agency able to respond to each successive year s economic challenges. While the markets of today may bear little resemblance to the markets of tomorrow, the process of studying scientifically, rigorously, apolitically the causes and effects of our past actions and the markets we regulate will keep the FTC grounded, useful, and relevant into the uncertain future.