

# The FTC: A Framework for Promoting Competition and Protecting Consumers

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concluded that, while “[s]tates have the right to regulate competition in the public interest . . . they cannot blindly outsource that responsibility to professionals who stand to benefit from such restrictions.”<sup>3</sup> The *J &* credited the FTC with being on “the right side” and urged the Supreme Court “to pull the dentists’ rules against competition.”<sup>4</sup> Ultimately, the Supreme Court also sided with the FTC, noting that, without neutral supervision, there is always a risk that market participants serving on state licensing boards will confuse their own interests with the policy goals of the state.<sup>5</sup>

The two newspapers also endorsed the FTC’s decision in 2012 not to challenge Express Script, Inc.’s acquisition of Medco Health Solutions, a transaction that combined two of the country’s largest pharmacy benefit managers.<sup>6</sup> The *J &* hailed the FTC’s approval of the deal as “a win for competition and consumer choice,”<sup>7</sup> while the *J &* declared that it was “persuaded that the commissioners made the right choice.”

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I. CORE FTC STRENGTHS

A. I & D

The FTC was the product of a distinct moment in our nation’s history. At the turn of the twentieth century, the United States was struggling to overcome major financial shocks and the impact of rapid industrialization.<sup>9</sup> The public was losing faith in government’s ability to respond to the economic and social challenges of the time.

By 1914, however, Progressive movement leaders had begun to develop and put in place a public policy framework based on the dispassionate decisions of experts in the new social sciences.<sup>10</sup> The FTC’s founders, very much a part of this movement, sought to create an independent agency that could rise above the political fray by applying its expertise to economic markets to ensure they worked for the benefit of consumers.<sup>11</sup> As Justice Sutherland wrote in *H& E &*,<sup>12</sup> the aim was for the FTC to “exercise the trained judgment of a body of experts” when “dealing with these special questions concerning industry that comes from experience.”<sup>13</sup>

To do this, the FTC was vested with both administrative and prosecutorial functions. President Wilson, Justice Brandeis, and Congress shared a vision of an expert administrative agency capable of both investigating and analyzing markets, and adjudicating cases in order to shape antitrust doctrine and policy.<sup>14</sup> At the same time, however, they sought to imbue the product of the agency’s administrative process with the credibility and precedential effect of judicial oversight by the federal appellate courts.<sup>15</sup>

Judicial supervision cabins the FTC’s lawmaking and policymaking within the bounds of our common-law tradition. But it also leaves room for the FTC to bring its expertise to bear on novel issues of antitrust and consumer protection law. The sheer number of FTC cases taken up by the Supreme Court over the last twenty-five years, including three in the last three terms alone, shows that the agency regularly addresses significant and often unsettled questions of law

9 , . . . , RICHARD HOFSTADTER, THE PROGRESSIVE MOVEMENT: 1900-1915 2 (1963).

10 C. WALTER LIPPMANN, DRIFT AND MASTERY: AN ATTEMPT TO DIAGNOSE THE CURRENT UNREST 42, 62 (1914).

11 Marc Winerman, F C: C , C , C , C , C , C , 71 ANTITRUST L. J. 1, 1-6 (2003).

12 *Humphrey’s Ex’r v. United States*, 295 U.S. 602 (1935).

13 *I.* at 624 (quoting *Ill. Cent. R.R. v. Interstate Commerce Comm’n.*, 206 U.S. 441, 454 (1907); S. REP. NO. 63-597, at 10-11 (1914)).

14 . . . Winerman, & note 11, at 32-92.

15 . . . at 90-91.



policy. Significant social science research today supports the view that collective decisionmaking has certain important benefits, especially when it comes to resolving complex matters requiring predictive analysis.<sup>24</sup>

Five independent decisionmakers, with a diversity of views and

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cated to carrying out this mission. In 2014, for instance, the agency brought 130 consumer protection and 25 competition enforcement actions.<sup>33</sup>

But while they may garner fewer headlines, the FTC's other tools also play a crucial role in cementing the agency's continuing relevance and impact on the daily lives of consumers. The agency's research efforts include more formal studies facilitated by its ability to compel the production of information under Section 6(b) of the FTC Act as well as workshops.<sup>34</sup> These efforts help ensure that the Commission has the data and information needed to track market developments and chart future priorities. They also allow the agency to play an active role in the development of relevant legal standards and policies.

To give a recent example, in 2014, the FTC conducted a workshop examining emerging competition issues involving the introduction of biosimilars and interchangeable biologic drugs.<sup>35</sup> We convened relevant experts and interested parties, including consumer groups, academics, pharmacists, health insurers, and biosimilar and biologics companies, to explore various issues, among them how naming conventions may affect the development of biosimilar competition.<sup>36</sup> Based in part on the information obtained through this workshop, the FTC has urged the development of policies that protect patient health and safety, but without unnecessarily chilling competition and deterring investment in follow-on biologics.<sup>37</sup>

Another example is the FTC's 2003 report on balancing competition policy and patent law and policy.<sup>38</sup> This report resulted from a

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<sup>33</sup> *U.S. v. Microsoft Corp.*, 2014, FED. TRADE COMM'N, <https://www.ftc.gov/annual-highlights-2014/stats-data-2014> (last visited Oct. 6, 2015).

<sup>34</sup> 15 U.S.C. § 46(b) (2012).

<sup>35</sup> Press Release, Fed. Trade Comm'n, *F C H C I* (Nov. 8, 2013), <https://www.ftc.gov/news-events/press-releases/2013/11/ftc-host-workshop-competitive-impacts-state-regulations-naming>.

<sup>36</sup> F

series of hearings that the agency held in 2002 and 2003 to study patent quality and its impact on competition in our knowledge-based economy.<sup>39</sup> Although the report's recommendations focused on suggested changes to patent law, rather than antitrust law,<sup>40</sup> it has been widely influential.<sup>41</sup> More recently, in 2011, the FTC issued a report examining patent notice and remedies.<sup>42</sup>

Research has also improved the agency's own performance. In 1999, the FTC conducted a remedy study to evaluate the effectiveness of Commission-ordered divestitures and understand why certain divestitures had not achieved their remedial objectives.<sup>43</sup> Drawing on information gathered during the study, the FTC adopted a number of changes to its divestiture policies that have proven effective in maintaining competition in affected markets.<sup>44</sup> The agency is currently engaged in a follow-up and more expanded remedy study.<sup>45</sup>

Another example of the role of research in improving agency outcomes is the FTC's hospital merger retrospective project, announced in 2002,<sup>46</sup> which made significant contributions to the agency's enforcement efforts in healthcare provider markets. Those efforts, which included retrospective studies of several hospital mergers as well as a series of workshops focusing on healthcare markets, led to a shift in the FTC's litigation approach to hospital mergers.<sup>47</sup> The new approach led to a winning streak that now includes four successfully litigated merger challenges<sup>48</sup> and a growing number of transactions









competition.<sup>66</sup> It would be hard to overstate the impact of the FTC's empirical findings and the recommendations contained in the resulting report. Perhaps most significantly, Congress adopted reforms to the Hatch-Waxman framework in 2003 with the Medicare Modernization Act based on FTC recommendations.

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ent deals.<sup>82</sup> In addition, FTC economists examined a range of data and calculated that these payments led to billions of dollars a year in higher prescription drug costs.<sup>83</sup>

The FTC also identified other relevant agreements for investigation and potential enforcement action. In 2008, the FTC filed a federal lawsuit against Cephalon alleging that it had entered into agreements to prevent generic competition to its leading product, Provigil.<sup>84</sup> In 2009, the FTC challenged two patent settlements involving the testosterone replacement drug AndroGel in the federal district court lawsuit that eventually went up to the Supreme Court.<sup>85</sup>

Finally, the FTC turned to advocacy. It publicized its findings about the extent of the pay-for-delay problem.

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*A & L*.<sup>89</sup> That ruling, which interestingly involved the same agreements that the Commission had unsuccessfully challenged in 2001 in *Upsher-Smith Labs, Inc. v. La. Wholesale Drug Co.*,<sup>90</sup> set the stage for Supreme Court review and eventual FTC victory in *A & L*.

Despite the success in *A & L*, the FTC's effort to combat illegal reverse payments is not over. The agency continues to litigate on multiple fronts. In fact, the Commission filed its most recent pay-for-delay case in September 2014.<sup>90</sup> But this long-term effort highlights how the agency can use its expertise and unique authority effectively, sometimes over the course of decades, in an effort to stop anticompetitive conduct that causes substantial consumer harm. It is an important example to revisit as one examines the agency's accomplishments and the role it can play in the future.

#### CONCLUSION

The FTC's founders wisely designed an agency that would operate in accordance with principles of bipartisan consensus, rational analysis, careful research, and thoughtful enforcement and advocacy. The FTC has adhered to those principles, remaining useful and relevant for 100 years—even as the U.S. economy has undergone successive and dramatic transformations. I believe continued adherence to these principles will keep the FTC useful and relevant in its next century.

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<sup>89</sup> *I K-Dur Antitrust Litig.*, 686 F.3d 197, 218 (3d Cir. 2012), *Upsher-Smith Labs, Inc. v. La. Wholesale Drug Co.*, 133 S. Ct. 2849 (2013) (mem.) (remanded for further consideration in light of *A & L*).

<sup>90</sup> Complaint, *FTC v. AbbVie, Inc.*, No. 14-5151, (E.D. Pa. Sept. 16, 2014), 2015 WL 2114380.