Before the
FEDERAL TRADE COMMISSION
Washington, D.C. 20580

Hearing #1 on Competition and Consumer Protection in the 21st Century	)))))))	Docket ID FTC-2018-0074

COMMENT OF
FEDERAL TRADE COMMISSIONER
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Introduction*

Open, competitive markets are a foundation of economic liberty. But markets that suffer from a lack of competition can result in a host of harms. In uncompetitive markets, firms with market power can raise prices for consumers, depress wages for workers, and choke off new entrants and other upstarts.

Given these far-reaching effects, the Federal Trade Commission's mandate to promote competition is critical. Our upcoming hearings provide an important opportunity for the Commission to reflect on ways to increase the effectiveness of our enforcement of the antitrust laws. This is especially important as these hearings come against the backdrop of concerns about increasing concentration and declining competition across sectors of the U.S. economy.

When establishing the Federal Trade Commission over a century ago, Congress sought to harness the value of an expert, administrative agency to collect market data, analyze it rigorously, and use this analysis to inform enforcement and policymaking. As the FTC engages in this period of introspection into how the agency advances its competition policy and enforcement goals, a key aim of this exercise should be to examine our full set of tools and authorities – not only those that we have traditionally relied upon.

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* This comment reflects my views alone and not those of the Commission. I want to thank Lina M. Khan, Legal Fellow in my office, for providing invaluable assistance in

We should approach this inquiry with three goals in mind:

(1) Reduce ambiguity around what the law is, enhancing predictability;
(2) Reduce the burdens of litigation and enforcement, enhancing efficiency; and
(3) Reduce opacity and certain undemocratic features of the current approach, enhancing transparency and participation.

Below, I first explain how the status quo suffers from ambiguity, resource burden, and a deficit of democratic participation. Second, I explore how the FTC can bolster antitrust enforcement through participatory rulemaking. Third, I identify two factors to guide when participatory rulemaking might be especially apt. Finally, I conclude with a set of key questions to advance the discussion as the hearings proceed.

I. The Status Quo: Ambiguous, Burdensome, and Undemocratic?

Two key features define antitrust today. First, antitrust law is developed exclusively through adjudication. And second, antitrust litigation and enforcement is protracted and expensive, requiring extensive discovery and costly expert analysis. Theoretically, this leads to nuanced analysis of liability and well-tailored remedies. But in practice, the reliance on case-by-case adjudication may yield a system of enforcement that creates ambiguity, drains resources, and deprives individuals and firms of any real opportunity to democratically participate in the process.

Today, courts frequently analyze conduct under the "rule of reason" standard. The "rule of reason" applies a broad and open-ended inquiry into the overall competitive effects of particular conduct and asks judges to weigh all of the circumstances of a case to decide whether the practice at issue violates the antitrust laws. Balancing short-term losses against future predicted gains calls for "speculative, possibly labyrinthine, and unnecessary" analysis and appears to exceed the abilities of even the most capable institutional actors.[1] Generalist judges struggle to identify anticompetitive behavior[2] and to apply complex economic criteria in consistent ways.[3] Indeed, judges themselves have criticized antitrust standards for being highly difficult to administer.[4] And if a standard isn't administrable, it won't yield predictable results. It will only create uncertainty for market participants. The dearth of clear standards and rules in antitrust means that market actors cannot internalize those norms into their business decisions.[5]

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Ambiguity also deprives market participants and the public of notice about what the law is, undermining due process, a fundamental principle in our legal system.[6]

Decades ago, former Commissioner Philip Elman observed that case-by-case adjudication may "simply be too slow and cumbersome to produce specific and clear standards adequate to the needs of businessmen, the private bar, and the government agencies."[7] Relying solely on case-by-case adjudication means that businesses and the public must attempt to extract legal rules from a patchwork of individual court opinions. Since antitrust plaintiffs bring cases in dozens of different courts with hundreds of different generalist judges and juries, simply understanding

financial information. The Commission used this data to identify uncompetitive areas of the economy and to guide industry-wide investigations into potential antitrust violations.[24] More recently, the FTC has used

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so fast that it surprises market participants. Establishing a rule through participatory rulemaking can often be far more efficient. This is particularly important in the context of declining government enforcement relative to economic activity, as documented by the American Bar Association.[34]

And third, rulemaking would enable the Commission to establish rules through a transparent and participatory process, ensuring that everyone who may be affected by a new rule has the opportunity to weigh in on it. APA procedures require that an agency provide the public with meaningful opportunity to comment on the rule's content through the submission of written "data, views, or arguments."[35] The agency must then consider and address all submitted comments before issuing the final rule. If an agency adopts a rule without observing these procedures, a court may strike

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normatively desirable is neither clear nor persuasive. Indeed, relying *solely* on adjudication has

Investigations of anticompetitive conduct yield significant quantitative and qualitative insights about how firms employ certain practices. In certain situations, these data, supplemented by other data collected through a public participation process, might inform the criteria whereby a specific practice should be deemed anticompetitive.

For example, the FTC published a significant study in 2002 that assessed pay-for-delay settlements that impeded generic drug entry.[45] The agency conducted additional analyses and has pursued a number of cases that were ultimately successful. At the same time, these settlements have evolved in ways that do not replicate the fact patterns previously condemned by courts. This has led the FTC to continue to expend significant resources to confront these practices in protracted litigation.

Given the extensive enforcement and factual record developed by the agency, it is fair to consider whether the FTC might have been more effective in targeting pay-for-delay settlements through both adjudication and rulemaking, which would have established for courts the standards by which to evaluate these agreements.[46] For an agency with scarce resources, it will be important to carefully analyze whether an investment of time and effort into a rulemaking might be more palatable to taxpayers and the marketplace than many years of intense and expensive litigation.

Areas where private litigation is unlikely to discipline anticompetitive conduct. Relying on adjudication as a primary way of developing legal rules and standards is most sensible when there is a rich body of disputes. When conduct has anticompetitive implications, but is unlikely to be challenged by private litigants, adjudication is not a reliable means of targeting the anticompetitive practice. Here, rulemaky also be ausre-4 (f)3 (ul)-2 (t)-2 (oul)-2 .( )]TJ-27.86 0 Td ( )Tj EMC

In short, by reducing the set of employment options available to workers, employers can suppress wages.

In theory, workers could bring a lawsuit alleging that certain noncompete clauses are anticompetitive under the Sherman Act. In practice, however, private litigation in this area is effectively nonexistent. Employers now frequently include in employment contracts forced arbitration clauses and class action waivers, provisions that prevent workers from banding together to bring a case in court.[48] Any challenges must be pursued in isolation and through a private arbitrator, whose proceedings lie entirely outside the common law system.

Given the paucity of private litigation challenging noncompete agreements as antitrust violations, the FTC might consider engaging in rulemaking on this issue. A rule could

APPENDIX: The Federal Trade Commission's Authority to Define Unfair Methods of Competition Through Rulemaking

Rulemaking under "unfair methods of competition" is governed by the Administrative Procedure Act and is eligible for *Chevron* deference. Given the misunderstanding on this issue, it is worth tracing the legal developments around the FTC's rulemaking authority and understanding how this authority fits with the institutional role that Congress intended for the Commission to play.

By passing the Sherman Act, Congress tasked the Justice Department with targeting anti-competitive conduct through punishing bad acts. Enforcement was to proceed through litigation in federal courts, and courts, in turn, soon began offering their own interpretations of the law, a trend that troubled Congress. A key inflection point was *Standard Oil Co. v. United States*, where the Supreme Court replaced the absolute prohibition on restraints of trade with a prohibition on only those restraints found to be "unreasonable" in the context of a particular a -