A History of the FTC's Bureau of Economics

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Abstract

The Bureau of Economics in the Federal Trade Commission has a three-part role in the Agency and the strength of its functions changed over time depending on the preferences and ideology of the FTC's leaders, developments in the field of economics, and the tenor of the times. The over-riding current role is to provide well considered, unbiased economic advice regarding antitrust and consumer protection law enforcement cases to the legal staff and the Commission. The second role, which long ago was primary, is to provide reports on investigations of various industries to the public and public officials. This role was more recently called research or "policy R&D". A third role is to advocate for competition and markets both domestically and internationally. As a practical matter, the provision of economic advice to the FTC and to the legal staff has required that the economists wear "two hats," helping the legal staff investigate cases and provide evidence for support law enforcement cases while also providing advice to the legal bureaus and to the Commission on which cases to pursue (thus providing "a second set of eyes" to evaluate cases). There is sometimes a tension in those functions because one can help the attorney staff build a case that they want to pursue, but at the same time consider that case to be a poor choice for enforcement. Economists and the Bureau of Economics have provided such services to the FTC for over 100 years proving that a sub-organization can survive while playing roles that sometimes conflict. Such a life is not, however, always easy or fun.

Key Words: Bureau of Economics, FTC, history, organization theory, antitrust, consumer protection

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Preface and Acknowledgements

This manuscript provides a depiction of the Bureau of Economics (BE) as it currently exists and provides a descriptive history of how it got there.[1] The history is taken from written records to the extent possible, from discussions with current and former staff members, and from personal recollection. Much of the paper is purely descriptive and almost surely accurate. Some of the "facts," such as the older data, are guesstimates culled from messy data in budget books and Bureau records. In each case, attempts were made to use "actual" data measured after the fact, rather than "planned" data, but that was not always possible. Telephone books, FTC Annual Reports, and Congressional Hearings were also used. I believe the budget and personnel numbers data are as accurate as can be obtained without a much more extensive and likely fruitless search of archives.

The decisions about which studies, advocacy filings, etc., to mention (and which to ignore) are based largely upon the author's opinion and are heavily weighted toward post-1970s work. This description and history does not provide much detail about the substantive economic issues in antitrust or consumer protection that were hot topics at any particular time. There is a massive literature on those issues (with several industrial organization, law & economics, antitrust, and marketing journals devoted to them) and BE economists have contributed to that literature, but for the most part, this history focuses on activity specifically by BE economists - that is a much narrower focus.

Some of the history describing the impact of BE actions (e.g., the impact of early economic reports) is taken from secondary historical sources and may not be strictly true. Because BE is a relatively small subgroup of a small government agency, little is written specifically about the organization. Thus, the history draws on articles focused on the FTC or on economics more generally.

In certain sections, I discuss the influence of the organization within the FTC. This has to do with preferences of decision-makers, information flows up and down the decision-making chain, and how those preferences and flows were modified over time. This discussion requires reading between the lines at times and is, therefore, subject to significant uncertainty. I tried to avoid fiction or stories based only upon one source, but an observer can seldom be sure what "really" happened and can almost never know why it happened, even if he was fairly directly involved in a situation. I apologize in advance to anyone who was slighted or whose views or actions have been mischaracterized.

This history places more emphasis on the report writing and advocacy functions than it should, in part, because the author was involved in these functions for many years and because they form the "visible tip of the BE iceberg."[2] The work on antitrust and consumer protection investigations, litigations, and rules, that has formed the vast bulk of the iceberg over the past 60 years, goes unseen by the outside world, and most of it also goes unseen by the FTC's Commissioners. This manuscript

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[1]By "descriptive history," I mean that, for the most part, I do not explicitly try to explain why the Bureau of Economics developed as it did; rather, I describe how it developed. Some of the description of the Bureau and its subcomponents or various BE functions has been lifted from previous documents whose original authors are unknown. Failure to credit the authors is acknowledged. Many current and former colleagues provided inputs into this document, some via recollections, and others through direct provision of lists, data, or comments.

[2]Letter from John L. Peterman, Director, Bureau of Economics to Professor Ken Elzinga (representative of an American Bar Association panel reviewing the FTC in 1989), February 17, 1989, p. 3.

also provides much more detail about how BE functioned since 1980 than for earlier periods, not because that recent period was necessarily more interesting, but because more detailed records and memories of that period were still available. Fortunately, the September 4, 2003 BE History Roundtable, initiated by Timothy Muris and Bill Kovacic, and organized by Denis Breen, greatly supplemented the written record regarding life in the Bureau of Economics from the 1950s through the 1970s.[3] A record of that 2003 Roundtable (painstakingly edited by Alan Fisher) is available at https://www.ftc.gov/sites/default/files/documents/public_events/roundtable-former-directors-bureau-economics/directorstablegood.pdf

Most of this manuscript was written on nights and weekends during 2000, so I have to thank my wife, Beth, for putting up with the lost time and my endless references to "the history," comments that she fairly quickly learned to (almost) completely ignore when they did not cause exasperation. Of course, much of the information was compiled while at work (for which I thank Jeremy Bulow, who allowed the activity) and additional drafting was done in conjunction with the FTC's Bureau of Economics History Roundtable, held in September 2003. Follow-up drafting of the manuscript occurred intermittently in the 2000s, mainly around "the Holidays."

This manuscript was improved greatly due to the help of numerous colleagues. Bob Brogan provided data for the mid-1930s and 1950s from Congressional Hearings and additional information on BE Director Francis Walker's lineage. Denis Breen provided information on antitrust investigations from the late 1980s and 1990s, details regarding the process of the GM/Toyota joint venture, and input on economist work in advocacy and international outreach areas. That latter information was more recently provided by Dave Schmidt. Pauline Ippolito, Bob Brogan, and Lou Silversin provided helpful comments on previous drafts.

Thanks are also due to Mae Schwarz and her administrative staff for putting up with my review of their budget files and for compiling data in 2000. Many FTC colleagues contributed useful insights and information in various discussions and phone conversations. That group includes, among others, Keith Anderson, Ron Bond, Bob Brogan, Jerry Butters, Bob Easton, Pat DeGraba, Joe Farrell, Alan Fisher, Mack Folsom, Luke Froeb, Dan Hosken, John Hilke, Pauline Ippolito, Phil Jaynes, Jim Lacko, Jim Langenfeld, Mike Lynch, Joe Mulholland, Dennis Murphy, Philip Nelson, Steve Nelson, John Peterman, Dan O'Brien, Bill Rosano, and Lou Silversin.

Thanks are also due to one of the FTC's former attorneys and resident historian, Marc Winerman, for various historical tidbits about the early years of the Agency, the Kramer/Graham reference, as well as a review of an earlier draft to avoid confidentiality problems. Marc's boss at the time, John Graubert, also helped with the General Counsel (GC) review. More recently, Bill Golden handled that review task for the GC.

In addition, I must thank the BE ex-Directors who attended the 2003 History Roundtable for the information they provided and for the comments they gave me on a July 2003 draft that was circulated prior to the History Roundtable. In particular, Mike Scherer and Fritz Mueller provided extensive

[3]After review by the General Counsel's Office, a July 21, 2003 draft of this history was provided to all the ex-BE Directors as a memory jog, and several ex-Directors provided helpful comments on the draft. The 2003 event provided corroboration for some facts (and stories) and it also provided completely new insights in other cases.

comments and new information about the 1960s and 1970s. They have also published work about that (and earlier) periods. In addition, Jonathan Baker and Jim Miller provided additional information regarding the 1980s and 1990s.

Finally, I want to thank BE research assistants Sara Harkavy, Kata Mihaly, Marie Tansioco, and Scott Syms for their work on the charts and tables. Around 2000, Sara took the first crack at the figures (including my favorite - the drawing of the BE's organization over the past 100 years), and Kata, now an economist at RAND, handled the updates after Sara moved on to graduate school at Columbia. Marie provided the update in 2005, and Scott updated the tables and figures again in 2010 and 2013. None of the individuals named above are responsible for the outcome.

The author was an economist and manager at the FTC's Bureau of Economics from May 1978 to January 2014; through 17 different Bureau Directors and 12 Chairpersons.

Certain material from this history has appeared in Cooper et al. (2005), Froeb et al. (2009), Farrell et al. (2009), and Pautler (2014). Some segments of this history have appeared in modified form in Pautler, Paul A. (2015) "A Brief History of the FTC's Bureau of Economics: Reports, Mergers, and Information Regulation," Joseph Farrell ed., Special Issue for the 100th Anniversary of the FTC, *Review of Industrial Organization*, 46(1), February 2015, 59-94. Springer publishing kindly allowed reuse of that material.

I. The Beginnings of the FTC and the Bureau of Economics

Before delving directly into the early days of the Bureau of Economics (BE), a few words are necessary about the Federal Trade Commission (FTC or Agency) as a whole to put the Bureau into context. The work of economists at the Agency is very largely determined by trends that affect the entire Agency, so the history of the FTC is, in large part, the history of BE. The FTC began as a continuation and significant expansion of the Bureau of Corporations, an investigative organization in the Department of Commerce and Labor.[4]

President Woodrow Wilson originally conceived of the Agency as a body of experts that would interpret facts gathered from extensive investigations of industry and make recommendations to Congress, the President, the Attorney General, or the Courts for needed changes.[5] Wilson did not, at first, intend to create a law enforcement agency, and the original version of the FTC Act passed by the House of Representatives limited the FTC to fact gathering and presentation of the facts and recommendations to the public or to decision-makers.[6] What ultimately emerged from the Congress, however, was a more expansive bill that added law enforcement and quasi-judicial functions to the investigative-reporting function.[7] The expanded powers would allow the FTC to define the newly instituted concept of "unfairness," to provide an alternative, or supplement, to the Department of Justice's antitrust case selection, and to deter "unfair" trade practices by the corporate trusts or incipient trusts of the time.

As the law enforcement powers of the new Agency were gradually defined and exercised, the FTC became a judicial/law enforcement agency focusing upon various antitrust and false advertising cases. By the mid-1920s, these law enforcement efforts came to dominate the reporting and publicity functions of the agency.[8]

The Federal Trade Commission has been organized in a number of different ways over the years reflecting different functions, law enforcement priorities, and different perceptions about what

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[4]The FTC Act was signed by President Woodrow Wilson in September 1914; the doors opened for business on March 16, 1915. The predecessor agency of the FTC (and most particularly, the Bureau of Economics) was the Bureau of Corporations, which was an investigative report-writing organization. That organization was initiated by law on February 14, 1903 and opened its doors on February 25, 1903. For an extensive discussion of the Progressive era origins of the FTC, see Winerman (2003).

[5]In an address to a joint session of the Congress, President Wilson envisioned the Commission as "an indispensable instrument of information and publicity ... as a clearing house for the facts by which both the public mind and the managers of great business undertakings should be guided." (January 20, 1914) See FTC Annual Report (1954, p. 1) for a repetition of the idea that the FTC should be an "expert body."

[6]H.R. Rep. No. 533, 63rd Cong. 2nd session, 2 (1914). See Averitt (1980, p. 234) for the argument that relatively limited powers were originally envisioned for the FTC. Also see Handler's (1928) discussion of the early FTC and its function of publicizing corporate activities.

[7]The expanded powers allowed the FTC to attack "unfair methods of competition" which, at that time, was an even more elastic concept than it is today. See Handler (1928, pp. 720-721), Scherer (1990, pp. 462-67), MacIntyre & Volhard (1970, pp. 724-26), and Averitt (1980). Kovacic (1982, p. 605) credits George Rublee and future Supreme Court Justice Louis Brandeis with influencing President Wilson to expand the powers of the FTC.

[8]The investigations of firms or industries remained a key task at the FTC, but over time the investigations took on a different character with the focus being placed on finding specific violations of law rather than on describing and documenting the more general workings of a targeted firm or industry.

Congress wanted the FTC to do.[9] The FTC's functions have changed as Congress passed new laws and as social trends changed. The passage of the Robinson-Patman anti-discrimination law in 1936, an explicit anti-deception law in 1938 (Wheeler-Lea amendments), the Celler-Kefauver anti-merger law in 1950, various labeling acts from 1939 to the 1960s, and the Magnuson-Moss rulemaking law in 1975 (to name just a few) greatly influenced the Agency's functions and resource allocation decisions. The growth of social regulation in the 1960s and 1970s, the trend toward greater use of "rule-of-reason" analysis on the antitrust front (especially since the *Sylvania* antitrust decision regarding product distribution restraints in 1975), and economic deregulatory trends of the late1970s and early 1980s also affected the Agency.

In the first fifty years of the Agency's work, one tension was consistently evident in the conduct of the FTC's duties -- the FTC has been viewed as both a regulator of business practices and a partner and guide for business. In the 1920s and 1930s, in particular, the idea that the government should help business prosper was a major theme running throughout much of the federal government.[10] This theme became less evident over time, although the idea that the government should be an aid to small business remains. The FTC today faces the same kinds of choices in deciding where to draw lines between the tasks of regulating business, encouraging self-regulation, and actively encouraging various business practices. For the most part, the Agency keeps its eye on consumer welfare rather than business welfare with the thought that what is good for consumers should ultimately drive policy. Obtaining a consensus on which set of antitrust and consumer policies is actually the best choice for consumers - the course that results in the best mix of low prices, high output, extensive choice, sufficient information, and continual innovation - has not, however, been easy.

The Bureau of Economics began as the Economic Division of the FTC in 1915. During the first two decades of the FTC's existence, the economic reporting activity, which was a continuation of the role of the Bureau of Corporations, was of prime importance and the Economic Division was a relatively large part of the Agency, comprising over 25 percent of the FTC in the 1920s. The work of the Division was mainly, but not exclusively, economic investigation and report-writing until 1936. At that point, the functions of the Bureau expanded to include Robinson-Patman case support (primarily done by accountants) and data collection in the late 1930s. The Bureau's functions spread further to include more activity in merger review, antitrust analysis, and case support in the 1950s. Consumer protection work was added to the mix in the mid to late 1970s, with competition advocacy becoming a subsidiary function in the mid to late 1970s and 1980s. This paper provides some description of each

[9]For many years (particularly 1945 to 1969) the leaders of the Agency struggled with the problem of organizing the Commission around either its "missions" (competition or anti-monopoly, consumer protection or anti-deception, and economic reporting) or around the type of work it does (legal investigation, litigation, economic reports). In 1969 the Agency was re-organized around its missions (as it had been in the early 1950s), and it has remained with that organizational form ever since, although since 1991 an explicit economic reporting mission as a function separate from the competition and consumer protection missions no longer exists.

[10]Even as late as the mid-1950s, the agency had a Bureau of Consultation and a Bureau of Investigation reflecting the two goals. Although the anti-monopoly and anti-deceptive practices missions were discussed in the 1950s, it was not until 1969 that the Agency became more directly organized around (and focused upon) two missions: competition and consumer protection. At that point, consumer welfare, and not government/business cooperation, was said to be the focus of the FTC's mission. See the 1970 FTC Annual Report. At that time, financial reporting and the production of economic studies was still considered a mission of the Agency (for accounting purposes it was called the "Economic Activities" mission), but that category was abandoned in 1991.

of the major functions, beginning with the report-writing function, because that was the inaugural function of the Bureau and because it was the most visible activity of the Bureau over the past 100 years. For the most part, data regarding the size of the Bureau relative to that of the FTC and other descriptive information are deferred until the section providing a graphical depiction of the Bureau and the appendix describing the organization of the Bureau.

II. General Investigations and Research at the FTC[11]

A. The General Investigation Period: Growth (1915-40) and Decline (1940-60)

The production of reports has a long tradition at the Federal Trade Commission. Congress specifically directed that economic reporting be one of the primary functions of the new agency.[12] The rationale for economic reporting was that gathering and publicizing information about the workings of industry would be an effective means of solving the "trust problem," because publicity would shine the light of public scrutiny on firms and help cause those industries to improve their performance and behavior.[13] In the early years, the reports also provided the basis for legislation aimed at resolving problems with business activity.[14]

The economic reporting function has gone through various phases over the years. The earliest period (1916 to 1938) was characterized by Congressional requests for investigative reports of various industries. The requests dwindled after Congress passed the Independent Office Appropriations bill in 1933 making unilateral requests for research by one house of Congress more difficult. As a result,

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[11]For reviews focused on the economic reporting and data collection functions of the FTC and BE, see Scherer (1990), Office of Policy Planning, FTC, Section 6 Report Writing Working Group, Appendix F (1981), Boyle (1964), Stevens (1940), and Stevens (1925). Also see the description of general investigations and economic reports in the 1940 *George Washington Law Review* (1940, pp. 708-730), and the 1951 FTC Annual Report, pp. 16-33. The 1968 FTC Annual Report provides the last comprehensive listing of FTC reports from 1915 to 1968 (Annual Reports thereafter only list recent reports or none at all.) For lists of the FTC economic reports since 1977, see the economic research section of the FTC website at https://www.ftc.gov/policy/reports/policy-reports/economics-research/economic-reports (as of mid-2015). A list of all FTC reports since about 1998 from all sub-organizations is available at https://www.ftc.gov/policy/reports.

[12]Indeed, investigative economic reporting was the essential function of the FTC's predecessor agency, the Bureau of Corporations. Reports by that agency had occasionally provided the basis for major regulatory changes in industry. For example, the May 1906 report on The Transportation of Petroleum was a key factor in passage of the Hepburn Act regulating rail and pipeline transportation of oil and served as a basis for the government's 1911 monopolization case against Standard Oil. Prior to that time, oil pipelines were privately owned and were not common carriers. (Lynch, 9-22-03 communication citing to historian Arthur Menzies Johnson, *The Development of American Petroleum Pipelines: A Study in Private Enterprise and Public Policy, 1862-1906*, Cornell (1956, p. 221); and BE History Roundtable, September 4, 2003, pp. 173-180). For a longer list of legislation that was influenced by FTC reports, see 1981 Working Group on Section 6 Report Writing, Appendices E and F.

[13]See Boyle (1964, p. 491) citing W.H.S. Stevens, 1914; Stevens (1925, pp. 628, 643-49); Stevens (1940, p. 559); Scherer (1990) citing Louis Brandeis from 1913; and economist, Jeremiah Jenks, from 1900. Also see Walker (Appendix A herein); Davis (1938); Handler (1928, p. 713); and FTC Annual Report (1951, pp. 29-30) citing four 1920s-vintage FTC reports that arguably led to substantial price reductions via publicity. In 1933, the FTC's Chief Counsel, Judge Robert E. Healy, called the economic division "a virtual standing investigation committee for the Congress." (Hearings on H.R. 14458, Subcommittee of the Committee on Appropriations, U.S. Senate, 72nd Congress, Second Session, February 10, 1933, p. 42).

[14]The Office of Policy Planning (1981) recounts the impact of early FTC reports and Appendix E in that report lists over a dozen legislative acts that were influenced by FTC reports.

from 1940 to 1962 investigative economic reporting slowed, but data collection on industrial financial performance and market concentration blossomed. The reporting function was rejuvenated in 1962 and the analytical content of the reports improved. The reporting function remained fairly vibrant through the late 1980s, and then cycled through periods of relative vigor and decline.

The early emphasis on general economic investigations and report writing is reflected in several sections of the Federal Trade Commission Act in which the Congress specifically addressed the concerns of the Commissioner of the Bureau of Corporations regarding his Agency's inability to conduct adequate research because of a lack of authority to gain direct access to business records. Section 6(a) of the Act empowers the agency to "gather and compile information concerning, and to investigate from time to time the organization, business, conduct, practices, and management of any corporation engaged in commerce, ... and its relation to other corporations and to individuals, associations and partnerships." Section 6(b) allows the FTC to require firms to provide information about a broad range of business issues in a form specified by the Commission. Section 6(f) of the Act further directs the agency to "make annual and special reports to the Congress, ... and to provide for the publication of its reports and decisions in such form and manner as may be best adapted for public information and use."

Lest one get the wrong idea, the pre-1960s reporting done by the Bureau of Corporations and later by the FTC did not take the form of economic reports as current day Ph.D. economists would think of them. Reports did not state and empirically test any particular hypothesis, nor were they analytical evaluations of some particular economic phenomenon that was common to several industries. Rather, they were more akin to the scholarship of the day, which meant they were typically painstakingly detailed descriptions of the structure and business practices of a particular firm or industry. The reports, particularly some of those done in the early years, appeared to be undertaken to examine and expose particular perceived abuses. The reports were based upon interviews, depositions, and financial and marketing documents obtained under subpoena power. They often contained a wealth of descriptive accounting information on ownership patterns, costs, prices, production, and profits.

One of the most detailed reports, the 95-volume *Utility Corporations* report, compiled from 1927 to 1935, contained extensive accounting data about the financial performance of many dozens of natural gas and electrical utilities (and holding companies), as well as internal corporate documents, transcripts of testimony by FTC investigators, and testimony by utility executives under questioning by senior FTC attorneys.[15] Thus, some of the reports resembled compilations from a legal/economic investigation with key documents, testimony, and financial data laid out in detail. Other, more

[15]Stevens (1940, p. 552, 563) indicated that as of 1933 almost the entire staff of the Economic Division (which at the time would have been more than 84 people) had been immersed in the Utility report or the Chain Store report for several years. While the Utility report has similarities to a modern day legal document, Stevens clearly indicates that it was very largely the work of the Economic Division (p. 563, note 43) and that was confirmed by the Economic Division's Chief Economist, Francis Walker, in congressional testimony (Hearings on H.R. 14458, Subcommittee of the Committee on Appropriations, U.S. Senate, 72nd Congress, Second Session, February 10, 1933, p. 6). Many of the 1950s vintage Bureau of Economics reports also were written by many authors and often utilized the Bureau's full staff. This was apparently true of the 1958 report on Antibiotics Manufacture and the 1960 Food Marketing report, although at that point the full Bureau contained only about twelve economists. The post-1975 BE reports, on the other hand, tended to be less detailed, more analytical, and were produced in a shorter time by one or two authors rather than dozens.

standard, reports recited less testimony and were more focused on describing an industry's performance through accounting documents and description of contracting practices. The reports were often rich in description, but rather thin on analysis.[16]

In the early years most of the reports produced by the Commission were prepared at the request of Congress or the President.[17] The reports covered a range of industries and issues, with a distinct focus on agriculture - food manufacturing (e.g., flour milling, dairy, meat packing), food retailing (e.g., chain grocery stores), agricultural inputs (e.g., farm machinery and fertilizer), and energy (e.g., coal, electricity, petroleum, and petroleum products). Significant studies outside the agricultural and energy areas focused on cement and steel, particularly the pricing systems used for those products. The major reports were one of the most important outputs of the early Commission, providing Congress with a basis for legislation. The largest of the studies were very expensive by current day standards. In 2013 dollars, the Utilities report cost about $22 million through 1933, and the Chain Stores study

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16The focus on descriptive material also made perfect sense given the staff that performed much of the work. At that point, the FTC had relatively few attorneys and very few Ph.D.-level economists. In addition, even academic economic research in the pre-1940 period would have been much more descriptive and less analytical than would be true of economic research in more recent years, so the FTC work was not unusual for its time. A review of a certain pre-WWII reports indicates that a few (but clearly not most) of the reports had an anti-big business tone that was not fully consistent with the avowed goal of simply presenting the "facts." As one example, the Temporary National Economic Committee (TNEC) monograph No. 13, "Relative Efficiency of Large, Medium-Sized, and Small Business," (1940, pp. 101-139) presents a vast amount of cost and rate of return data, but it displays an unmistakable large business animus in several sections when the text goes beyond recitation of the data. Perhaps this characteristic of Economic Division reports is what led Jesse Markham, a former Bureau of Economics Director, to note that, "If on occasion, the Commission's economists are overzealous in their conclusions regarding the power of big business, the rising and unchecked tide of monopoly, and the pending doom of small-scale competitive enterprise, the discerning analyst capable of shifting fact from fancy will regard such zeal as a small price to pay for the productivity it inspires." (Markham (1964, p. 413)). Markham might have seen much of BE as overzealous. He appeared to be the least "interventionist" of the top BE managers from the 1940s through the 1960s. (For some details involving the Markham's view of the 1953-1960 Pillsbury Mills merger case, see the antitrust section discussion).

17The FTC could initiate investigations on its own, but it did not tend to do so in the early years. Between the years 1914 and 1939, 80 percent of the economic investigations formally released by the FTC were requested by Congress, the President, or other Federal agencies. This changed in later periods. Of the studies published from the end of WWII to 1964, only 4 were requested by others and 29 were initiated by Commission action. See Boyle (1964, p. 500); MacIntyre & Volhard (1970, pp. 754-756); Stevens (1940, pp. 553-54); and Kovacic (1982, p. 625, notes 195, 197.) The sources of FTC reports was a contentious issue in the mid-1920s. There was even a dispute within the Commission about the ability of the Commission to undertake investigations on its own initiative. FTC Chairman Humphrey argued that such self-initiated studies were illegal, while Commissioner Myers fervently disagreed. See Stevens (1940, p. 547) and memorandum from Commissioner Abram F. Myers, December 12, 1927, re "Investigations undertaken by the FTC on its own initiative relating to (1) the practice of retail price maintenance, (2) bases on which prices are made (e.g., basing-point pricing), (3) blue-sky operations (securities), and (4) intercorporate relations between DuPont, US Steel, and General Motors Companies."18 pp. Myers (pp. 6-7) listed over two dozen inquiries that the FTC had initiated between 1915 and 1926. Most of these inquiries were assigned to the Economic Division and many resulted in informal reports rather than published volumes. The "internal" Commission debate about the initiation of studies was largely settled when Myers, a Democrat, and the "insurgent" Republican Commissioners voted unanimously, while Chairman Humphrey was out of town, to initiate several studies. Myers later wrote to President Coolidge that requests for studies by Congress led the Economic Division to waste its time and that Commission-initiated projects would be more useful and relevant to the FTC's law enforcement mission. See letter upon the occasion of his resignation from Abram F. Myers, FTC Commissioner, to President Calvin Coolidge, January 2, 1929, p. 3. [Thanks to Marc Winerman for pointing out this incident.]

cost $12 million through 1933.[18]

The first of the Commission inquiries to result in legislative proposals was its *Report on Cooperation in American Export Trade,* published in 1916. The report concluded that individual U.S. exporters were forced to compete with cartels in many foreign countries, and that many of these cartels were sponsored or subsidized by foreign governments. As a result of this work, Congress passed "The Webb-Pomerene Export Trade Act" on April 10, 1918. The Act provided that associations conforming to the provisions of the Act (called Webb-Pomerene associations) would be exempt from prosecution under the antitrust laws.

Soon thereafter, the Commission released the *Meat-Packing Industry* report in 1918. Its six volumes examined all aspects of the meat-packing industry of the early 1900s, focusing on the alleged collusive or predatory actions of the "five great packers," Swift, Armour, Morris, Cudahy, and Wilson. The report compiled output, price, and profit data, and numerous documents regarding pricing or market division agreements among the firms.[19] After reviewing the information and the responses of the companies, the Commission recommended government ownership and control of the vertical levels just above and below the meat-packers (feedlots and rail transportation) in the hopes of encouraging more competition at the meatpacker level.[20] The recommendation met with hostility in some quarters,[21] and the report led to a subsequent FTC consent decree, and still later, to the Packers and Stockyards Act of 1921 which put the packers under the supervision of the Agriculture Department, rather than under FTC surveillance.

Other FTC economic reports contributing to the passage of major legislation included the previously mentioned *Utility Corporations* report, which contributed to the passage of the Public Utility Holding Company Act of 1935, the Natural Gas Act of 1938, the Securities Act of 1933, the Securities and Exchange Act of 1934, and in the enlargement of the powers of the Federal Power Commission

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[18]Conversion was done using the CPI-U price index for 1933 (17) and 2013 (234). In 1933 dollars those studies cost $1.6 million and $867,000, respectively. (The annual budget for the entire FTC during this period was in the $900,000 to $1.5 million range). In 1933, Congress earmarked twenty-five percent of the FTC budget for the Utilities report. In contrast, the smaller, one-volume radio industry cross-licensing and patent study reportedly cost only $25,000 in current-day dollars. (For a listing of pre-1933 studies and their costs, see Hearings on Independent Offices Appropriation Bill for 1934, Subcommittee of the House Committee on Appropriations, U.S. Senate, 73rd Congress, First Session, April 21, 1933, pp. 79-87; see p. 60 for the statement that the Utility report accounted for 25 percent of the FTC budget appropriated for 1934).

[19]Collusion via the mechanism of the "general man" was apparently contemplated by the meat-packers (pt. 2, pp. 108-09).

[20]Letter to the President from the Federal Trade Commission, William B. Colver, Chairman, July 3, 1918 (contained in the meat-packing report). During this period, the Economic Division reports apparently advocated government control of assets as a remedy for the behavior found to be disfavored (e.g., grain marketing, meat packing). The Division's reports also recommended state milk regulation. See Stevens (1940, pp. 564-66).

[21]The U.S. Chamber of Commerce attacked the Commission and a New York Times editorialist appeared to agree, arguing on September 3, 1918 that to be useful the FTC "should be cured of its present bolshevist and propagandist tendencies." Later, on October 20, 1919, Senator Watson of Indiana called for an investigation of the FTC focusing upon the FTC's Chicago Office, which he characterized as "a center of radicalism, a nesting place for socialists, a spawning ground for sovietism." (Presumably the Chicago Office played a major role in the investigation and report, but the report itself, does not mention organizations within the FTC, although it does mention more than 20 persons who worked on the project). According to Kovacic (1982, pp. 623-625), the Chicago staff were cleared of wrongdoing, but were fired anyway, perhaps to smooth the ruffled feathers of various politicians.

through passage of the Federal Power Act of 1935. Perhaps more ignominiously, given scholarly assessments, the four-year (1931 to 1934) 33-volume *Chain Stores* report is credited with leading to the passage of the Robinson-Patman Anti-Price Discrimination Act.[22]

In addition to providing the basis for legislative initiatives, economic reports by the FTC have provided information on a range of national issues. For example, in 1923 Congress directed the FTC to prepare a report on national wealth and income. In 1926, the FTC submitted to Congress a report on national income for the years 1918 through 1923. This study represented the first comprehensive effort to estimate national wealth and income, and provided new insight into the factors affecting the creation of wealth. Between 1938 and 1941, the FTC staff produced several economic reports for the Temporary National Economic Committee (TNEC) which was undertaking a sweeping investigation of American industry. The most important of these monographs (TNEC monograph #13) examined the relative efficiency of large, medium, and small firms based on accounting cost data.[23]

During World War II, the renamed Division of Accounts, Statistics and Economics of the FTC devoted almost all of its staff resources to preparing reports requested by agencies directly involved in the war effort. The Commission completed a total of forty-five economic reports between 1941 and 1945, many of them focusing upon compliance with the resource allocation and resource conservation commands of the War Powers Board. Industries studied during that period included food, steel, machine tools, paperboard, and many more. As with the reports produced during WWI, these studies had a heavy accounting component, often consisting of tabulations of prices, costs, and profits.[24]

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[22]Stevens (1940, p. 564), Boyle (1964, pp. 496-97), Markham (1964, p. 408, n 17), FTC Annual Reports (1951, p. 29; 1968, p. 77), and Office of Policy Planning (1981) Appendix E. Stevens, in particular, gives a great deal of the credit for passage of the Robinson-Patman Act to the information provided by the Economic Division of the FTC. Adelman (pp. 151-153) might be less willing to give the FTC credit for instigating the law because, he argues, there was a widespread misimpression that the FTC report showed that systematic discrimination was common, when it actually showed that the vast majority of price differences were consistent with cost differences. See Adelman, M. A. (1966) *A&P: A Study in Price-Cost Behavior and Public Policy*, Harvard University Press, Cambridge. Perhaps the desire to take credit for fathering the Act reflects the fact that as of 1940, scholarly criticism of the law had not been fully formed. Since the early 1940s, few economic or legal scholars have had good things to say about the Act, which deters price differences in the sale of intermediate goods in commerce. See the 1969 American Bar Association report criticizing the FTC for spending so much time enforcing the statute. Also see Adleman (1966) for a stinging critique of the law in general. As described later, in the 1970s, the Bureau would have a role in the discontinuation of Federal enforcement of the Act. For a more "recent" analysis of Robinson-Patman issues connected to FTC cases, see Peterman's (1995, Research in Law & Econ., 21, 2004) work on the Morton and International Salt cases that covered events from 1936 to about 1944. Peterman argues that the existence of salt price differences was most likely due to cost differences and not to any dominant purchasing position of the largest buyers

[23]Boyle (1964, p. 498). The monograph showed a wide dispersion in costs and rates of return across firms or plants. Combining all the tests conducted, the medium-sized firms/plants most often appeared to be the most efficient (Monograph, p. 14). It did not, however, indicate that the smallest firms were the most efficient, as Boyle claimed, unless a particular subset of the tests were considered.

[24]Shortly after the establishment of the Commission, the beginning of World War I helped define this "cost-finding" role for the FTC. Seventy-one studies were conducted during WWI for the War Industries Board, forty were written for the War Department, thirty-nine were prepared for the Navy Department, and several others were written for various other agencies. Accounting functions were paramount in these reports, as the FTC prepared cost accounting reports concerning several industries as part of the war-time price determination process (FTC Annual Report 1951, p. 18). One recurrent theme from the early days of the Commission was the argument that businessmen did not really know what their costs were and the FTC cost accounting efforts would, therefore, be a boon to business in setting a standard for

Interest in the extent of corporate mergers rose following WWII, and the FTC was, perhaps, a cause of the interest. Three reports produced in the late 1940s, documented the magnitude of merger activity leading to the passage of the Celler-Kefauver Act of 1950, an amendment to the Clayton Act.[25] By current day standards, the merger activity levels of the 1940s may seem tame, but they were sufficiently troubling to leaders of the time that new anti-merger legislation was passed.[26]

The general benefits from the Economic Division reports published in the 1920s and 1930s were noted by the 1949 Hoover Commission Task Force Report on Independent Regulatory Commissions, which indicated that "[O]f all its activities, the Commission's investigations have probably had the most substantial impact and enduring value."[27] Despite this positive evaluation of the early FTC efforts, the reporting function had already begun to decline and it would be not soon make a comeback. The types of reports also began to change. First, due to a substantial reduction in Congressional requests for economic reports, the agency initiated most of the studies.[28] The reduction

industry to follow. See Stevens (1940, p. 572). During these early years, certain industries reportedly asked the FTC to prepare accounting systems for them. Perhaps in response to these requests, the FTC published pamphlets describing a system of accounts for manufacturing in 1916 and an accounting system for retail merchants in 1920. See Scherer (1990, p. 469) for a description of the FTC's early accounting efforts. Some of those accounting efforts were undertaken in conjunction with a group of experts from the American Association of Public Accountants. See FTC Annual Report (1916, p. 16).

[25]This new law plugged a loophole that existed in Section 7 of the Clayton Act, making stock sales, as well as asset transfers, subject to the law's restrictions. This deficiency had previously made the Clayton Act ineffective as a merger deterrent. For over 25 years, the FTC continuously sought to have the law amended to close the loophole. Boyle (1964, pp. 499-500, 502-504) and many FTC Annual Reports from 1925-1950.

[26]From 1940 to 1947, 2,450 manufacturing and mining firms disappeared; those firms had owned 5.5% of industrial assets (less than 1 percent disappearance per year). Scherer (1990, p. 470) indicates that the FTC data likely misled Congress into thinking a merger problem existed when it did not. By way of comparison, U.S. merger activity in 1999 alone involved nearly 10,000 transactions, with a value of about $1.8 trillion or 19% of U.S. GDP. (Mergers and Acquisitions Report, Thomson Media). Maksimovic and Phillips indicate that from 1986 through 1988, 6.2 percent of plants were reallocated each year. In the latter 1990s, the percentage was probably higher, since merger activity was much greater than it was even in the mid-1980s. See Maksimovic, Vojislav, and Gordon Phillips (2001).

[27]Auerbach (1964, p. 397) citing the First Hoover Commission Task Force Report, 123 (1949).

[28]Although Congress requested relatively few economic reports after 1938, there were still occasional requests from various Congressional sources. For example, in 1950 the House published an FTC report on interlocking directorates examining the relationships among the directors of the 1,000 largest manufacturing corporations. In 1952, at the request of the Senate Select Committee on Small Business, the FTC studied the effects of certain monopolistic practices on small business. The same Committee requested reports on food marketing in 1958 (Senator Humphrey, Hearings before the Senate Subcommittee of the Select Committee on Small Business, June 22, 1960, p. 1). During the 1970s, Congress requested economic studies of various concentrated industries. This request may have been the genesis for a series of market studies begun by BE Director Michael Mann in the early 1970s that tried to move beyond market structure and examine particular market institutions or characteristics. Those reports appeared in the 1970s and early 1980s. Congress also passed laws requiring studies of energy markets in the 1970s and several such studies were undertaken. Much later, in 1985, Congressional concern over the insurance industry resulted in requests for studies which led to the publication of three reports by the FTC's Bureau of Economics. Congresspersons also requested studies or investigations of the Japanese keiretsu system as it operated in the automobile industry in 1990 (see FTC Annual Report 1991, pp. 17-18), and the financial effects of the proposed tobacco industry settlement in 1997. In Summer 1999, the President and certain members of Congress requested an FTC report on the marketing of violent material to youth by the motion picture, music, and video game industries. That report, which was produced under the leadership of attorneys in the FTC's Bureau of Consumer Protection, was released in September 2000. Even more recently, Congresspersons requested studies of pharmaceutical firm practices regarding patents, electricity retailing, grocery retailing slotting allowances, and

in Congressional requests may have occurred because Congress had acquired its own staff to perform the studies function,[29] or because the mandatory initiation of a study by an individual house of Congress had become impossible. Whatever the cause, there was a reduced demand for investigative economic reports generally.[30] Second, a systematic data collection program focused on corporate income and balance sheet information (known as the Quarterly Financial Report, QFR) was developed across industries to help evaluate the overall structure of American industry and to provide corporate income components for estimates of Gross National Product.[31] This effort was consistent with the TNEC emphasis on continuing general surveillance of the industrial economy. Finally, more studies regarding industrial merger activity and concentration were produced.[32] These changes were not necessarily bad, but they led to general industrial data reports that were not aimed at a Congressional "target" industry. This meant that the reports almost necessarily had to be of less interest to congress.

The increase in data-related reports did not offset the decline in the demand for other reports, resulting in a net decline in report-writing activity in the Bureau. This decline in general economic reporting continued through the 1950s and early 1960s. Only a relatively limited number of reports appeared in this period, including studies of the international petroleum cartel, antibiotics, coffee,[33] frozen and

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marketing of certain alcoholic products to minors. Each of these studies was led by attorneys, with economic inputs. In addition, Congress and the President requested various reports on oil industry issues and credit industry topics in the 2000's. During the past 30 years, the FTC received numerous other requests for information from Congresspersons, but most requests were typically handled with response letters rather than by extensive investigations or reports.

[29]Boyle (1964, pp. 498-500) also noted that if Congressmen had their own staffs produce the reports, they could more readily control the scope and direction of the studies. Boylan (1998) documents the exponential growth of Congressional staff from 1940 to 1980 even relative to the growth of government in general. In addition, after WWII Congresspersons might have been able to call upon the resources of the General Accounting Office (since mid-2004 the Government Accountability Office), which improved its ability to provide analytical research around that time. Currently, the Congressional Research Service might also fulfill a Congressional research role, but it did not upgrade its capacity to perform studies until about 1970. The other major Congressional study organization, the Congressional Budget Office, was not formed until 1974. See the brief histories of each agency on their Web sites http://www.gao.gov/about/history/ http://www.loc.gov/crsinfo/about/history.html and http://www.cbo.gov/about/founding. For a discussion about why a decreasing number of FTC economic studies were requested by Congress, see BE History Roundtable, September 4, 2003, Lynch and Mueller, pp. 171-180. Lynch favored a theory of competition among alternative report-writing agencies as a reason for the reduction in report requests, while Mueller favored a theory based on the power of big business to deter unfavorable reports.

[30]The War effort and the reduced demand from Congress for reports resulted in a slowdown in general investigations and report writing that was noted by the 1949 Hoover Commission Task Force Report on Independent Regulatory Commissions, which indicated that "The Commission's economic work - instead of being the backbone of its activities - has been largely allowed to dwindle to almost none." U.S. Commission on the Organization of the Executive Branch, Report 125, (1949) ("Hoover Commission") quoted in Blair (1964, p. 525). For other discussion of the de-emphasis of the investigation/reporting function in the 1940s and 1950s, see Auerbach (1964, pp. 397-398).

[31]This data collection work was carried on independently from the day-to-day activities of the rest of the Bureau.

[32]Boyle (1964, pp. 500-01) notes that the FTC produced four reports regarding generalized or specific industrial concentration between 1949 and 1957. Congress, however, in 1963 explicitly stated that no funds could be spent for the study of intercorporate relationships among the 1,000 largest U.S. corporations (e.g., interlocking directorates and joint venture activity).

[33]Markham (BE History Roundtable, September 4, 2003, pp. 20-22) indicated that the coffee report was initiated when the price of coffee rose markedly making a ten-cent cup of coffee an oddity (the price of a unit of green beans rose from 58 to 96 cents over a period of five months ending in April 1954.) To complete the study, two economists moved to New York to study coffee futures and the Coffee and Sugar Exchange. The resulting report was nominated for an American Marketing Association prize. For some description of the study, see the 1954 FTC Annual Report, pp. 68-71.

canned foods, and food marketing. Although the number of reports produced during this period was low, the impact of some of the reports may have been significant. Scherer (1990) indicated that the 1958 report on *Antibiotics Manufacture* was masterful work leading to antitrust legal actions.[34] In addition, the 1952 *International Petroleum Cartel* study (the 8th post-war study of international cartels in various industries) described the industry and detailed the agreements among the various oil producers and nations from the mid-1920s to 1949. This information had previously never been collected in one place and much of it had never been revealed at all.[35]

The period of general investigations from 1915 to 1960 was hectic for the economic division in the early years; but even near the end, when activity was relatively low, the political sensitivity of the petroleum report kept things interesting. The reports produced during this period were mainly descriptive, with a heavy accounting component, and were often intended to inform potential legal actions. Such studies sometimes had a significant policy impact. The more analytical type of reports produced by Ph.D. level economists (those more akin to modern day economic scholarship) were to come later beginning in the late 1960s.

B. Resurgence of Economic Reporting (1965-2012)

Economic research activity revived in the first half of the 1960s, after Willard Mueller took over the reins of the Bureau of Economics in July 1961, as the new Chief Economist.[36] The pace of reporting accelerated and analytical industrial economics reports began to supplement the quarterly and annual

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[34]Scherer (1990, p. 470, note 45; and BE History Roundtable, September 4, 2003, Mueller, pp. 183-185). That report used two separate 6(b) requests to gather information from all producers and distributors of antibiotics. It was mainly descriptive, providing a wealth of information about the industry history, patents, cross-licenses, pricing, and profitability. It also detailed some suspicious price patterns in a few bidding situations, which later proved to be a basis for FTC lawsuits. Mueller (Roundtable, p. 183) noted that the attorney staff attempted to have the study rewritten to make it more useful for litigation. The Bureau Director at the time, Simon Whitney, resisted those efforts, although a new conclusion was penned for the report.

[35]The investigation resulted in a 900-page report and was perhaps touched with international intrigue - a key investigator was found dead of mysterious causes and the publication of the report was held up for a year by the Truman White House at the behest of the State Department. The release of an expurgated version (378 pages) of the report in August 1952 by the Senate Select Committee on Small Business led to an attack on the FTC by the petroleum industry. (Office of Policy Planning, Section 6 Working Group, April 9, 1981, p. 7 and Appendix F, pp. 41-45). (There were dueling claims of authorship by economists Roy Prewitt and John Blair. Sampson (1975, p. 123) credits Blair, "a radical economist," as the author, but Mack Folsom (BE History Roundtable, September 4, 2003, pp. 180-182) indicated that Prewitt was surely the main author, in part, because his widow retained a copy of the full-length original report. Mueller (2009, p. 42) also credits Prewitt as the lead author. This was one of the many economic reports that failed to list the human authors, a common practice prior to Willard Mueller's tenure as Bureau Director beginning in 1961.) The petroleum cartel report was used as the blueprint for a follow-on Department of Justice antitrust case targeting the industry. See Blair (1978, pp. 71-73).

[36]Boyle (1964, pp. 503-05). According to most accounts, the whole Commission was considered moribund from 1950 to 1969, see Kovacic (1982) for his rendition of the January 1969 Nader law student critique and the American Bar Association critique of the FTC which was released soon thereafter. Mueller (2009, p. 79-89), on the other hand, argues that the FTC of the 1960s was "aggressive and innovative," although it did focus perhaps too much on some classes of trivial cases and fell victim at times to excessive internal dissension. He argues that the Nader report and the ABA report were inappropriately negative regarding the FTC. Kovacic (2013, p. 165) also notes that, regardless of the level of general activity, the 1960s saw some very important FTC actions, including the beginnings of a cigarette disclosure rule and the Tetracycline collusion case.

financial data reports. By the end of the 1960s, Mueller opined that the Bureau of Economics had once again become a source of objective and relevant economic analysis for the Congress.[37] Issues of particular interest during that period were concentration in the food manufacturing industry, mergers in food retailing, dairy mergers, and drug industry profitability. These topics are reflected in BE reports of the period and in a compilation of speeches, testimony, or presentations by Director Mueller over the 1966 to 1969 period.[38] In addition, one BE report was perhaps the first study to test empirically the relationship between individual firm market share and profits (as opposed to simply concentration).[39]

Another topic of substantial interest in the 1960s was conglomerate mergers. The concern with "information loss" from business conglomerations was a major rationale for the budding line-of-business data collection program,[40] and this information loss was emphasized in the FTC's first report on corporate mergers in 1969 (reporting data for 1947 to 1968). Soon thereafter, a detailed examination of a subset of nine large conglomerate firms culminated in the 1972 publication of a major Bureau report.[41]

As the sixties ended, oil and natural gas markets were in flux. Congress enacted specific legislation directing the FTC to report on the structure, conduct, and performance of America's energy markets. Substantial resources in the Bureau of Economics were devoted to that effort, and several major energy-related reports were issued over the next decade, including descriptive studies in the petroleum, natural gas, coal, and uranium supply industries and an analytical examination of federal price and allocation regulations for the oil industry.[42] In addition, in the wake of the Mobil/Marathon oil merger, Congress requested research on mergers in the petroleum industry, which was issued by the Commission in 1982.[43] This political interest in oil and gasoline has been robust over the decades

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[37]Mueller (2009, p. 131).

[38]These presentations were bound and released as a report entitled "Economic Papers 1966 to 1969." Mueller gives credit to the staff who helped him write the speeches. Available in FTC library collection at HD2778.U5F62.

[39]Kelley, William, Economic Report on the Influence of Market Structure on the Profit Performance of Food Manufacturing Companies, USGPO, September 1969. Kelley was one of Willard Mueller's students at the University of Maryland, where Mueller taught a seminar while he was BE Director (Mueller letter August 7, 2003, p. 2; and Mueller, 2009, pp. 121-122).

[40]Indeed, this conglomerate information loss problem drove studies of profits from the very early days of the FTC. If only businessmen could know profits in various industries or lines of business, then they would tend to enter those with high profits, reducing the need for any government antitrust action at all. This was a rationale for information and publicity from the beginning of the agency. See Kovacic (1982, p. 624, note 186) on the early history. The final paper in Mueller's 1966-1969 Economic Papers collection discusses the policy implications of conglomerate mergers and warns of peril if action is not taken to stem their prevalence. Also see Boyle (1964, pp. 507-508) on the need for more and better data to track the industrial economy.

[41]Boyle, Stanley E. and Phillip W. Jaynes, *Conglomerate Merger Performance: An Empirical Analysis of Nine Corporations*, BE, FTC, 1972.

[42]Work on oil industry issues during the 1970s and 1980s included reports or working papers on California crude oil markets, offshore oil leasing, Alaskan oil export bans, and oil import tariffs as a source of government revenue. Economists also played a major role in producing the FTC's 1999 report on Midwest gasoline pricing. Work on energy-related studies continued through the 2000s and much of that work was done in conjunction with the Bureau of Competition attorney staff. See, for example, *The Federal Trade Commission Investigation of Gasoline Price Manipulation and Post-Katrina Gasoline Price Increases: A Commission Report to Congress* (Spring 2006).

[43]An updated version of this Oil Merger Report, adding three more years of data, was completed in May 1989, and a further update was released in August 2004.

other than the 1930s and 40s. Congress or the President requested four oil industry reports from 2004 to 2007. Indeed, the oil industry has been the subject of more than twenty FTC reports from 1906 to 2013.

In addition to energy industry work, the Bureau of Economics undertook a series of reports that used publicly available data to describe various industries.[44] Reports were produced on steel, brewing, sulfuric acid, electric lamps, cigarettes, and semiconductors, among others. By the late-1970s the Commission also began to place more emphasis on regulated industries, international trade restraints, and competition issues in the health care industries.[45] BE studies reflected these priorities.

During the late 1970s through 2012, most of the research reports done by the Bureau of Economics could be placed in one of three broad (but not mutually exclusive) categories of competition, consumer protection, or regulation and international trade restraints.

1. Competition Studies

On the competition front, the drug industry has been a perennial topic of interest. The Bureau's 1977 report on promotion of prescription drugs was one of the initial descriptions in the economics literature of the "first-mover advantage" in heavily advertised consumer product markets.[46] Following that work, the Bureau staff produced a 1985 report focusing on generic drug substitution,[47] and in 1999 provided a review of marketing practices in the pharmaceutical industry generally.[48] More recently, a March 2002 BE Working Paper involved the effects of a particular competitive strategy of patent-holder firms that use their first-mover advantage to be the first generic in the market following patent expiration.[49] Following up on that research, in January 2011, the Bureau produced a report describing and analyzing the market effects of the entry of authorized generic drugs by the innovator firms – a strategy that was calculated to deter entry by rival generic drug producers into certain smaller drug markets.

Closely related to the concerns with the drug industry was the Commission's interest in health care competition generally. The FTC sponsored one of the first health care competition conferences in

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[44]Scherer (1990, pp. 471-72).

[45]Food, energy, and health care were identified as FTC competition targets in the mid-1970s. See Kovacic (1982, p. 645).

[46]See Bond, Ronald S. and David F. Lean, *Sales, Promotion, and Product Differentiation in Two Prescription Drug Markets*, BE, FTC, February 1977. See the discussion of this paper in BE History Roundtable, September 4, 2003, Scherer, pp. 185-186. Recall that the patented drug area was first examined by the FTC in a BE report in 1958 concerning antibiotics.

[47]Alison Masson and Robert L. Steiner, *Generic Substitution and Prescription Drug Prices: Economic Effects of State Drug Product Selection Laws*, BE, FTC, October 1985.

[48]Roy Levy, *The Pharmaceutical Industry: A Discussion of Competitive and Antitrust Issues in an Environment of Change*, BE, FTC, March 1999.

[49]David Reiffen and Michael R. Ward, "Generic Drug Industry Dynamics," BE Working Paper #248, February 2002. The FTC also released a pharmaceutical study in July 2002 describing pharmaceutical industry behavior that may tend to deter generic drug production via patent suits and the settlement of such suits (known as "pay-for-delay"). An economist had some role in the production of that report, but it was mainly produced by attorneys from the General Counsel's office.

1977, when the field of health economics was in its infancy.[50] The idea that competition might make health care markets perform more appropriately was a common theme of the FTC's work in the health care arena. This theme was continued through studies of physician control of Blue Shield insurance plans, studies of hospital competition and certificate-of-need laws, hospital mergers, and horizontal restraints by medical sub-specialties.[51] Continuing interest in the area was indicated by a 1999 working paper econometrically examining the after-effects of a hospital merger that (due to its small absolute size) was not challenged by the FTC in 1990.[52] That paper later served as a model for more detailed work on several other hospital mergers that were part of a large project initiated by Chairman Timothy Muris in 2002.

The concentration-profits relationship is another area in which BE research from the 1980s provided new and valuable information. Having access to the best data available on profits and concentration, the economists associated with the line-of-business program were able to examine the relationship in more detail than had previously been possible.[53] They found that the traditional positive relationship between concentration and profits, that had seemed so robust in studies from the 1960 s and 1970s, did not appear robust when the better line-of-business data were analyzed. Rather, analysis of those data implied that, if any relationship existed between profit and concentration, it was not due to an enhanced probability of collusion, but rather due to some other market feature such as large firm efficiency or market dominance.[54]

On the merger and takeover front, several mid-1980s papers by Ravenscraft and Scherer formed the basis for the 1987 Brookings Institution book, *Mergers, Sell-offs, & Economic Efficiency*, which may forever remain the most complete assessment of pre-1985 mergers based upon accounting data.[55] Research on takeovers continued with the 1987 review of New York State's antitakeover law using stock market data to determine the likely effects of a law that applied to a broad set of firms.[56] In

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[50] *Competition in the Health Care Sector: Past, Present, and Future*, Warren Greenberg, ed., 1978 (Proceedings of a conference conducted by the Bureau of Economics, June 1-2, 1977. Includes papers on competition in selected sectors, insurance and alternative delivery systems, and regulation.)

[51] Kass, David I. and Paul A. Pautler, *Physician Control of Blue Shield Plans*, BE, FTC, 1978; Monica Noether, *Competition Among Hospitals*, BE, FTC, 1987; Daniel Sherman, *The Effect of State Certificate of Need Laws on Hospital Costs*, BE, FTC, 1988; to name three. Between 1977 and 1999, the economics staff produced over a dozen published reports or academic papers regarding hospital mergers, hospital rate regulation, and horizontal restraints in medical settings.

[52] Vita, Michael G. and Seth Sacher, "The Competitive Effects of Not-for-Profit Hospital Mergers: A Case Study," May 1999, (Working Paper # 226) (later published in *Journal of Industrial Economics*, 49, 2001).

[53] Kwoka, John E. and David J. Ravenscraft, "Cooperation Versus Rivalry: Price-Cost Margins by Line of Business," Bureau of Economics, Working Paper #127, June 1985 and Ravenscraft, David J. "Structure-Profit Relationships at the Line of Business and Industry Levels," 1982. For a review of this and other related research compiled to inform the FTC's effort to rewrite the Merger Guidelines, see Pautler, Paul A., "The Economic Basis for Broad-Based Horizontal Merger Policy," Working Paper #64, June 1982, later published in the *Antitrust Bulletin*, Fall 1983.

[54] One ex-BE Bureau Director, Fritz Mueller, might challenge this interpretation of the LB results. See the Line of Business segment below.

[55] See Ravenscraft, David J. and F. M. Scherer, "Mergers and Financial Performance," July 1985 (FTC/BE miscellaneous paper); "Mergers and Managerial Performance," September 1985 (FTC/BE miscellaneous paper); "The Profitability of Mergers," January 1986 (Working Paper #136); and "Life After Takeover," March 1986 (Working Paper #139).

[56] Schumann, Laurence, *State Antitakeover Laws and Shareholder Wealth*, BE, FTC, April 1987. This study assessed the shareholder consequences of a 1985 New York state statute that substantially increased the costs of a takeover of New York corporations. Far from benefitting shareholders as proponents of the law predicted, the equity value of New York firms fell by an average of nearly 1 percent or $1.2 billion in total immediately following the passage of the law. The

1992, the Bureau released a study that used econometric techniques to examine the after-effects of three "close-call" mergers that ultimately were not challenged by the antitrust agencies.[57] The three case studies involved mergers in the titanium dioxide, cement, and corrugated paper industries. More recently, in 1999, the economics staff completed a review of consolidations covering a ten-year period in the soft drink bottling industry.[58] The publicly released research completed prior to 2002 is recounted in Pautler (2003).[59]

This work on mergers was supplemented with a series of empirical studies that examined the aftermath of mergers in several industries, with a particular focus on oil industry markets and hospital markets. A qualitative study of the efficiencies associated with a rail merger was also completed as were certain retrospective looks at consumer goods mergers. The oil and hospital retrospective studies appeared as BE Working Papers between 2000 and 2013. Much of that work was summarized in annual BE essays in the fall issues of the *Review of Industrial Organization* in 2004 and 2009. The hospital analyses themselves, focusing on hospital pricing and quality changes that occurred as a result of mergers, were published (along with other retrospective studies and critiques of those studies) in a special hospital merger retrospective issue of *International Journal of the Economics of Business*, 18(1), April 2011. That issue, edited by Vita and Haas-Wilson, included post-merger analyses of hospital combinations in Evanston, Illinois, Chicago, the East Bay of San Francisco, and Wilmington, North Carolina. The Bureau's merger retrospective work across all of the markets it has examined has produced a fairly wide range of results, from no effect in some oil industry mergers, to 5% to 10% price increases in certain consumer product mergers, and larger effects in certain hospital mergers. Work by others outside of BE has found similar diverse effects, but overall there seems to be a price increasing effect from "close call" mergers.[60] The hope is that the compendium of results will ultimately aid the Commission in its examination of future mergers or at the very least, allow economists to use the results to judge how effective merger simulation techniques might be by providing the "after" photo of the markets as the simulators try to model the "before" period.

Research on mergers also took another tack. Did efficiencies really seem to matter in FTC case investigations? Did the staff examine them seriously? The 2009 Coate-Heimert report on the process of merger efficiencies analysis at the FTC tried to address these questions. The work began in

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results of the study have also provided a basis for a number of FTC staff consumer advocacy filings to state authorities.

[57] Schumann, Laurence, Robert P. Rogers, and James D. Reitzes, *Case Studies of the Price Effects of Horizontal Mergers*, BE, FTC, April 1992. The report presented three case studies examining the effects of horizontal mergers on product prices. It found no effect in the Hawaiian cement market, a salubrious effect in the market for corrugating medium due to vertical efficiencies, and a large adverse impact from a merger in the titanium dioxide market. This study had its genesis in a challenge by FTC Chairman Daniel Oliver in an August 2, 1988 op-ed in the Washington Post to identify mergers that were allowed that had a detrimental effect on consumers. Schumann, Rogers, and Reitzes may have found one such merger in this study. An even earlier merger retrospective study had been done to examine the effects of a microfilm merger. See David M. Barton and Roger Sherman, "The Price and Profit Effects of Horizontal Merger: A Case Study," BE/FTC WP# 98, August 1983.

[58] Harold Saltzman, Roy Levy, and John C. Hilke, *Transformation and Continuity: The U.S. Carbonated Soft Drink Bottling Industry and Antitrust Policy Since 1980*, (BE/FTC, November 1999).

[59] Pautler (2003). Also see Froeb, Hosken, and Pappalardo (2004), pp. 363-366; and Farrell, Pautler, and Vita (2009), 369-385.

[60] For a recent review of the results from mergers and horizontal entanglements arguing that antitrust policy is likely too lax, see former-FTC economist, John E. Kwoka, Jr. (2013), "Does Merger Control Work? A Retrospective on U.S. Enforcement Actions and Merger Outcomes," *Antitrust Law Journal* 78, 619-650.

September 2001, and was released in February 2009. The authors examined all the major merger investigations from 1997 to 2007. They found that the staff examined a wide range of efficiencies arguments, but often did not reach firm conclusions regarding their importance. BE was somewhat more willing to give credence to efficiency arguments than was the legal bureau staff. The authors found that analyzing merger efficiencies was taken seriously by the staff, but it is still unclear whether such analysis was the deciding factor in the outcome of many, if any, merger reviews. The study was not designed to reach that issue.

Research on competition issues went well beyond mergers. For example, the 1981 conference on predation and exclusivity restraints and subsequent papers developing the theory of raising rival's costs provided what many considered a new and important way to think about problems of unilateral market power by firms.[61]

Vertical mergers and vertical distribution restraints were also the subjects of BE research during the past twenty years. Some work was done on mergers, because consideration was given to doing vertical merger guidelines, similar to those in the horizontal merger area.[62] Much more emphasis, however, was placed on empirical evaluation of vertical distribution restraints, particularly resale price maintenance. Some of the research involved evaluating previous actions by the FTC,[63] and other research evaluated large samples of private litigation. One report in the second category provided detailed information on the types of public and private cases that were litigated between 1976 and 1982 under the strict (*i.e., per se*) prohibition against "vertical price fixing" or resale price maintenance (RPM).[64] Vertical restraints were also examined in a study that estimated the price effect of state laws that restrict the ability of oil refining companies to vertically integrate into the retailing of gasoline.[65] Most recently, a set of economists reviewed the empirical literature on vertical restraints generally to

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[61] *Strategy, Predation, and Antitrust Analysis*, Steven C. Salop ed., September 1981; Salop, Steven C. and David T. Scheffman, "Raising Rival's Costs," January 1983, WP#81 (and two related working papers #114 and #146). For the historical importance of this work from the perspective of one of the authors, see Scheffman & Higgins (2003). Also see BE History Roundtable, September 4, 2003, Comanor, pp. 232-34.

[62] Fisher, Alan and Richard Sciacca, "An Economic Analysis of Vertical Merger Enforcement Policy," FTC, March 1982.

[63] Lafferty, Ronald N., Robert H. Lande, and John B. Kirkwood, *Impact Evaluations of Federal Trade Commission's Vertical Restraints Cases*, FTC, August 1984.

[64] Ippolito, Pauline M. *Resale Price Maintenance: Economic Evidence from Litigation*, BE, FTC, April 1988. The study found that 30 percent of the private RPM cases involved maximum not minimum RPM (in which the manufacturer was attempting to hold down the resale price). Moreover, a clear majority of the cases involved the types of products where there were legitimate business explanations for the actions at issue. Also see, Ippolito, Pauline M. and Thomas R. Overstreet, Jr. *Resale Price Maintenance: An Economic Study of the FTC's Case Against Corning Glass Works*, BE, FTC, January 1994. The evidence is found to be broadly consistent with principal-agent theories of the RPM, where the practice is used to expand distribution of the products. This area of inquiry began with Tom Overstreet's BE report, *Resale Price Maintenance: Economic Theories and Empirical Evidence*, November 1983. The movement in economists' views on RPM is evidenced by a group letter signed by many distinguished economists and legal scholars in 1952 (including future BE Director Jesse W. Markham) largely commending the enforcement of RPM and recommending repeal of fair trade laws. By the 1960s, however, these same scholars came to see more clearly that their earlier position in opposition to RPM and other distribution practices had been erroneous, or at least much too strident. (See Overstreet 1983, pp. 7-8.)

[65] Vita, Michael G. "Regulatory Restrictions on Vertical Integration and Control: The Competitive Impact of Gasoline Divorcement Policies," *Journal of Regulatory Economics*, November 2000 (BE Working Paper # 227, August 1999). The study found that the restrictions tend to increase the price of gasoline by a statistically significant 2.6 cents per gallon.

determine whether the legal animus toward vertical restraints was consistent with the economic evidence. They found little if any such evidence, which then sparked a debate in the economics and legal communities about the scientific support for governmental control of product distribution.[66]

Some of the 1980's vertical restraints work may have had some influence in 2007 on the ultimate outcome of a private antitrust suit that overturned a 97-year-old legal precedent declaring RPM per se illegal. Neither BE nor the FTC had any role in this private antitrust case, but BE had a lot to do (over the years) with the evidence and argument that the per se unlawfulness of RPM is likely to be bad policy. On January 22, 2007, the Solicitor General and DOJ/FTC filed a brief with the Supreme Court in the Leegin case (a high-end leather products maker who wanted to control its distribution strategy and pricing) suggesting that RPM should be treated under the rule of reason rather than as per se illegal. BE economists worked on the brief along with the General Counsel's office, which normally handles such appellate matters. On June 28, 2007, after reading briefs from the parties, an amusing filing by a golf club maker (Ping), law enforcers, and many interested academics (including a group of prominent Industrial Organization economists, some of whom were former FTC employees, who argued for narrowing or removing the per se ban on RPM), the Supreme Court in a five to four decision sided with Leegin and overturned the *Dr. Miles* decision that had stood since 1911. Research by current and ex-BE staff was cited by the Court and by the various parties. Overturning a century-old decision that went too far is unusual and thus, a significant accomplishment. Whether the change in federal law will have a substantial impact, however, is unclear because many state laws still restrict manufacturer freedom to choose distribution methods.[67]

2. Consumer Protection Studies

Perhaps the first Bureau foray into the consumer protection reporting area occurred in 1964, in connection with a rulemaking proceeding, when the Bureau of Economics produced a report on the output and advertising of the cigarette industry from 1950 to 1964 (including a 250 page appendix).[68] This report was an isolated effort, however, that did not presage a broader entry by the Bureau into the consumer protection area of the Commission's endeavors. The initial economic report done after the Bureau had seriously entered the consumer protection mission, was, perhaps, as influential as any FTC study in the recent past. In July 1979, the Bureau released a report examining the rates of return

[66]See Cooper, James C., Luke M. Froeb, Daniel P. O'Brien, and Michael G. Vita, "Vertical Antitrust Policy as a Problem of Inference," *International Journal of Industrial Organization* (2005) and a response by William S. Comanor, F. M. Scherer, and Robert L. Steiner, "Vertical Antitrust Policy as a Problem of Inference: The Response of the American Antitrust Institute," AAI Working Paper No. 05-04 (April 19, 2005). Interestingly, all the authors on both sides of the debate have direct connections to the FTC.

[67]For a brief discussion of this episode, see Baye et al. (Section 3, *Review of Industrial Organization*, 2008). For a contemporaneous summary of the arguments between consumer goods manufacturers and would-be discounters (with a remarkably misleading title), see Pereira, Joseph, "Price-Fixing Makes Comeback after Supreme Court Ruling," *Wall Street Journal*, August 18, 2008, A-1.

[68]Boyle (1964, p. 505). This report (which resembled a competition policy report more than a consumer protection report) was part of an FTC rule-making effort that did not result in a rule, but did result in "voluntary" restrictions on cigarette advertising. For discussion of the cigarette rulemaking generally, see Milkis (2005, 911-41). The report preceded what would later become a series of legislatively-required annual reports regarding cigarette company expenditures on the marketing of cigarettes. The legal bureau produced those reports annually from 1967 through 1999 due to the mandate, and after the mandate expired, they continued to produce them voluntarily.

consumers obtain from life insurance.[69] The report found that the savings component of life insurance was not a particularly good deal for consumers, with a rate of return between one and two percent in 1977. The report led several states to rethink their insurance regulations. The study also aroused congressional ire, and the FTC Improvements Act of 1980 restricted the FTC from studying insurance issues unless specifically asked to do so by the House or Senate Commerce Committee.[70]

Because the field of consumer economics was not well-developed, economists devoted considerable effort to building a systematic approach to consumer protection cases and to determining the types of remedies that would be most effective. This work was done both in BE and in the FTC's various policy shops and covered product reliability, certification, product liability rules, advertising and labeling, and warranties. The effort resulted in several reports or working papers that together provided a general approach to consumer protection matters that had been missing in earlier years. The thought that went into these background papers is reflected in the FTC's statements on advertising substantiation, deception, and unfairness produced in the 1980 to 1985 period.[71]

One topic in consumer protection research that retained its relevance throughout the 1980s and 1990s was the issue of health and nutrition claims made for foods. Regulators at the FTC and FDA had been grappling with the problem of devising an appropriate regulatory scheme for food health claims since the 1970s, and economists entered the fray by examining the effects of an "experiment" that occurred when Kellogg's began to make cancer risk-reduction claims for fiber cereals. The Bureau completed the study in 1989.[72] This was the first in a series of studies on the costs and benefits of various types of restrictions on food claims. At about the same time, the Bureau released a policy paper discussing an economic approach to the regulation of health claims that focused on the cost-benefit trade-offs that should be considered in a decision-theoretical approach to advertising regulation policy.[73] Work in that area continued with an examination of the changes in consumption

[69]Lynch, Michael P., et al., *Life Insurance Cost Disclosure*, BE/BCP, FTC, July 1979.

[70]Office of Policy Planning, (Appendix F, April 1981, pp. 70-71). For a discussion of the importance of this report, see BE History Roundtable, September 4, 2003, Bond, pp. 191-192, and Pautler/Lynch, pp. 194-195. The life insurance industry 30 years later was still smarting from the report. In September 2009, the NAIFA Advisor Today publication ran a long "expose'" on the 1979 report. One could argue that the McCarran-Ferguson Act already restricted FTC activity in the state-regulated business of insurance, but the 1980 FTC Improvements Act made that restriction unmistakably clear.

[71]Some of the published papers reflecting the development of consumer protection economics included: Beales, Howard, Richard Craswell, and Steven C. Salop, "Information Remedies for Consumer Protection," WP #36, August 1980 (published JLE, October 1981); the *Consumer Information Remedies Policy Review*, July 1979; the *Economics of Consumer Protection* readings book compiled by Craswell, Richard and Richard Alan Poole, September 1981 (not a BE product, but many BE economists worked on it); Allison Masson and Paul H. Rubin, "Matching Prescription Drugs and Consumers: The Benefits of Direct Advertising," *New England J. Medicine*, August 22, 1985; and "Reply," Feb. 20, 1986, 524; and later the conference volume, Pauline M. Ippolito and David T. Scheffman, eds., *Empirical Approaches to Consumer Protection Economics*, BE, FTC, March 1986.

[72]Ippolito, Pauline M. and Alan D. Mathios, *Health Claims in Advertising and Labeling: A Study of the Cereal Market*, BE, FTC, 1989. The study examined the 1984 introduction of health claims by Kellogg and found that the health claims were associated with a significant increase in the fiber content of cereals. The study was cited often in the Food and Drug Administration's food labeling rule-making process in December 1989, because it provided the only empirical evidence available on the effects of health claims. The report (and follow-on advocacy work) likely had some influence on the FDA's implementation of the 1990 Nutrition Labeling and Education Act.

[73]Calfee John E. and Janis K. Pappalardo, *How Should Health Claims be Regulated: An Economic Perspective*, September 1989. This "economic issues" paper was frequently cited by advocates of a less restrictive approach to food advertising

of differing kinds of foods that occurred after the relaxation of restrictions on health claims in labeling and advertising for foods in the early 1990s.[74] Research in food and drug advertising continued with a 1998 survey of consumer interpretations of various types of health or nutrition claims made in food advertisements,[75] and the development and analysis of a database cataloging health and nutrition-related claims made for foods in magazine advertisements over the past 20 years.[76]

Although general development of consumer protection economics and specific examination of food and drug advertising issues were the primary focus of research in the consumer protection area, other recent research projects in the consumer protection area include: examination of the financial impact of the 1997 proposed tobacco industry settlement, the rent-to-own industry, the relationship between price and quality in local service industries, and the perverse effects of mandating the disclosure of mortgage broker commissions, but not similar lender commissions.[77]

In addition, beginning in 2004, a great deal of effort went into Congressionally-mandated studies of the credit reporting system. The largest studies examined (1) the accuracy and completeness of credit reports using a national sample, and (2) the effects of using credit scores in pricing insurance products.[78] The most recently released of these studies analyzed the accuracy of credit reports. The FTC conducted a nationally representative survey of 1001 consumers who volunteered to examine

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regulation. For discussion of this paper and other BE-related consumer protection research that was ultimately published in a leading marketing and public policy journal, see Sprott and Miyazaki (2002). Sprott and Miyazki find that the FTC was the leading institution in *Journal of Public Policy & Marketing* publication from 1982 through 2001.

[74]Ippolito, Pauline M. and Alan D. Mathios, *Information and Advertising Policy: A Study of Fat and Cholesterol Consumption in the United States, 1977-1990*, Bureau of Economics, FTC, 1996. Also see the FTC-funded research by Janis K. Pappalardo and Debra Ringold, "Regulating Commercial Speech in a Dynamic Environment: Forty Years of Margarine and Oil Advertising Before the NLEA," *J. Public Policy & Marketing*, 19(1), Spring 2000, 74-92.

[75]Murphy, R. Dennis, et al., *Generic Copy Test of Food Health Claims in Advertising*, November 1998 and follow-up work on qualified health claims in food advertising, Working Paper #277, July 2005. This follow-up work was presented by Pauline Ippolito at a November 2005 FDA conference and helped slow the movement of FDA toward further restrictions on health claims. See Katia Fowler, "Qualified Health Claim Testing May Draw on FTC Findings," The Tan Sheet, December 12, 2005, p. 4.

[76]Ippolito, Pauline M. & Janis K. Pappalardo, *Advertising Nutrition & Health: Evidence from Food Advertising 1977-1997*, BE, FTC, September 2002. For a discussion of the importance of this whole line of health claims research, see BE History Roundtable, September 4, 2003, Bond, pp. 192-194; and Gramm, pp. 158-159; and Froeb, Hosken, & Pappalardo (2004), pp. 355-361. This area has been supplemented with a research report indicating that advertising aimed at youth is unlikely to be a significant factor in driving youth obesity. See Debra J. Holt, Pauline M. Ippolito, Debra M. Desrochers, and Christopher R. Kelley, *Children's Exposure to Television Advertising in 1977 and 2004: Information for the Obesity Debate*, (June 2007).

[77]The 2004 study by Lacko and Pappalardo (The Effect of Mortgage Broker Compensation Disclosures on Consumers and Competition) about the mandated disclosure of yield spread premiums was influential in re-orienting the course of various HUD mortgage settlement system "reforms," some of which were off-course. See Paul Muolo and Brian Collins, "HUD's RESPA Reform is Back at Square One," National Mortgage News, 28, no. 27, p. 1, March 29, 2004. The revised forms that eventually emerged from HUD in 2007 and 2008 were much improved, in part, due to the BE efforts.

[78]The first of the mandated credit reporting studies covered 6 different issues related to the credit reporting system, and it was delivered to Congress on December 9, 2004. That report was prepared mainly by BE staff. The study of credit-based insurance scores used in auto insurance underwriting was completed in July 2007 and showed that an adverse effect of credit scores on certain minority groups existed, but that it was largely related to correct risk rating of the minority groups on average. See Barenstein, Matias and Jesse B. Leary, et al., *Credit-Based Insurance Scores: Impacts on Consumers of Automobile Insurance*, July 2007.

their credit reports for errors with the help of expert coaches. If the consumers identified errors, they would file a dispute with the three large credit reporting agencies and the dispute would be handled as it normally would in the standard resolution process. The results showed that about 26 percent of consumers found what they considered an error and filed a dispute with at least one CRA. About 5 percent of the consumers, had errors that might have affected the rates they would pay on, say, auto loans. Whether five percent is a large or small number in this situation was not addressed, because it is a remarkably hard question to answer.

Beyond the mandated studies in the credit area, economists also pursued work on consumer mortgage shopping behavior and the development of improved disclosure documents that would help facilitate such shopping.[79] That work appeared in June 2007 and was influential in the US and abroad.[80] The study presents the results of 36 in-depth interviews with recent mortgage customers, and quantitative consumer testing with over 800 mortgage customers, that examined how consumers search for mortgages, how well consumers understand current mortgage cost disclosures and the terms of their own recently obtained loans (they know surprisingly little about those), and whether better disclosures could improve consumer understanding of mortgage costs. The study shows that current mortgage cost disclosures fail to convey key mortgage costs to many consumers, and disclosures developed during the study significantly improved consumer recognition of those costs. This study received a great deal of initial attention and it served as the basis for several advocacy comments before other credit agencies in 2007 and 2008. There was hope that the study could form the basis for an effort to reformulate and test new mortgage disclosures generally, to replace HUD's current disclosure forms (HUD-1 and GFE) and the Federal Reserve's Truth-in-Lending Act (TILA) forms. Of course, the FTC's sister agencies were likely to object to such a "hostile takeover" of their turf. With the impetus from the BE empirical studies, in November 2013, the Consumer Financial Protection Bureau finally issued consumer-tested consolidated disclosure forms. Implementation of those forms should occur in 2015. Unfortunately, with the advent of the CFPB and its aggressive nature, most of the FTC's activity in financial matters will soon be a thing of the past, which is not a boon to economists at the agency.

3. Studies of Regulation and International Trade Restraints

After 1975, the Bureau produced several studies of regulated industries focusing on health professions (e.g., optometry,[81] physician control of insurance plans), and transportation (e.g., airlines and airports, trucking, taxis, and ocean shipping).[82] These regulation studies done during the 1970s and 1980s were

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79Lacko, James M., and Janis K. Pappalardo, *Improving Consumer Mortgage Disclosures: An Empirical Assessment of Current and Prototype Disclosure Forms*, BE, FTC, June 2007.

80For example see, Australian Productivity Commission "Review of Australia's Consumer Policy Framework," Canberra, 2007, p. 207-209; Rick Brooks and Ruth Simon, "Subprime Debacle Traps Even Very Credit Worthy," Wall Street Journal, December 3, 2007, A-1; and "Disclosure Debate Reheats in Wake of FTC Report," RESPA News Monthly, June 2007.

81Bond, Ronald S. et al., *Effects of Restrictions on Advertising and Commercial Practice in the Professions: The Case of Optometry*, BE, FTC, 1980. The study concludes that prices were lower in areas that permitted advertising and commercial practice, and quality was about the same in both restrictive and non-restrictive markets.

82The airline and trucking regulation areas also produced a number of advocacy filings. BE interest in the airline industry was evidenced by the work of Koran, Donald and Jonathan Ogur, *Airport Access Problems: Lessons from Slot Regulation by the FAA*, BE, FTC, May 1983 who examined the FAA's regulation of landing and take-off slots at airports. This study part of a general program to investigate areas where the government could improve the state of the world by doing its own job better or by avoiding the imposition of unneeded new regulations on the private sector.[83] Telecommunications was examined in the latter 1980s and 1990s.[84] The studies in this category were the most directly useful in the Commission's competition advocacy program.

In an attempt to more quickly and efficiently produce background papers that would be useful in the advocacy program, in the late 1980s the Bureau initiated a new series of Economic Issues reports. These reports were intended to be more policy relevant than previous reports and also be less expensive to produce. The reports summarize and critique existing empirical evidence on important policy issues and provide analytical insights into the nature of current theory and evidence. From 1988 to 1991 this initiative resulted in five economic issues reports on airline deregulation, trucking deregulation, occupational regulation, the effects of concentration in grocery retailing, and health claims in advertising for foods. In 2000, the Economic Issues idea was revived with the release of a paper on economic perspectives on the Internet.[85]

In the early 1990s, BE continued to examine selected regulatory issues, but the number of such efforts decreased.[86] The studies included examinations of effects of state trucking regulations on shipping rates in 1995, and market power of AT&T under price cap regulation in 1995. Later in the early 2000s, following the merger wave of the late 1990s, efforts on the regulation front were rejuvenated as the Office of Policy Planning (OPP) led work on internet-related distribution restraints in sales of wine and contact lenses. Much of that work appeared as BE working papers or OPP reports. The interest in regulatory issues seems to wax and wane at the Commission and the reporting function takes its lead from the desires of the Commissioners and the policy community for studies,[87] and the press of case-related demands.

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formed the basis of several advocacy efforts by the FTC on the issue of efficient pricing of airport access. BE later published a report on the impact of airline deregulation in January 1988, that summarized the evidence on the effects of airline deregulation. The report showed that consumers benefitted by saving over $100 billion and put to flight many myths about the impact of airline deregulation on prices, safety, and service to small communities. This work was cited in subsequent airline advocacy filings. A report on taxicab regulation in 1984 was also used in numerous advocacy opportunities, as was an economic issues paper on occupational regulation in 1989. Frankena, Mark W. and Paul A. Pautler, *An Economic Analysis of Taxicab Regulation*, BE, FTC, 1984; and Cox, Carolyn and Susan Foster, *The Costs and Benefits of Occupational Regulation*, FTC, (1990).

[83]Scherer (1990, p. 471) mentions 3 such studies of petroleum price controls, the licensing of TV repair, and optometry.

[84]The most important of the telecommunications studies was probably the work comparing the performance of markets under innovative price cap regulation versus traditional rate-of-return regulation. See Mathios, Alan D. and Robert P. Rogers, *The Impact of State Price and Entry Regulation on Intra-State Long Distance Telephone Rates*, BE, FTC, November 1988. As an earlier working paper, this analysis had been cited by the Chairman of the FCC, Dennis Patrick, in a January 25, 1998 letter to Congress defending the FCC's move toward rate cap regulation.

[85]This report was also published soon after its FTC release by the Government Printing Office and also in modified form by the Brookings Institution, which gave it more marketing support. More recently, a 2002 report on the effects of international trade restraints, a 2005 report on FTC horizontal merger enforcement, and a 2009 report on the analysis of efficiencies in FTC merger investigations were also released through this series.

[86]The Kirkpatrick II Commission had indicated that BE economists were well-positioned to undertake such studies to "sort out the economic consequences ... of particular regulations." (American Bar Association, 1989, p. S-26).

[87]Although studies of the effects of regulation declined, there will likely continue to be some isolated research done on regulation issues because the topic is of general interest to economists, often relates to the FTC's missions, and data are often available on regulated industries.

Finally, international trade restraints were also a common topic of BE studies with several reports produced in the late 1970s and 1980s on import restraints, import dumping and subsidization, and tariff effects in various industries, including oil.[88] These reports formed the basis for (and were sometimes written in conjunction with) various advocacy efforts by the Commission highlighting the costs to consumers of various U.S. trade restraints policies. The studies, and the advocacy work that was related to them, led to a good deal of criticism of the FTC from those who viewed trade restraints as something beyond the purview of the FTC. After about 20 years of effort in this area, it was largely abandoned in the early 1990s, as FTC staff work on trade restraints fell further out of favor.[89]

C. Bureau of Economics Working Papers (1977-2013)

In addition to producing formal economic reports, the Bureau began a Working Paper series in 1977 at the suggestion of BE's head of Industry Analysis, David Qualls. Since that time, over 325 papers have been released. Some of the papers are spin-offs of Ph.D. dissertations, some are related to antitrust cases, many are general industrial organization economics papers, a few are theoretically oriented, most are empirical, some are literature reviews, and a few are directly policy-oriented.[90]

The working paper series has included some important papers over the years.[91] On the theoretical

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[88]Numerous advocacy comments were filed at the International Trade Commission on various types of import restraints and subsidy issues from 1976 to 1990, and one outlier comment was produced in 1994. Several studies of international trade restraints were also undertaken from 1977 to 1989 beginning with the steel industry competitiveness study in the late 1970s that developed a method for measuring the costs to consumers of trade restraints. Perhaps the most widely cited of the many trade-related studies was Tarr, David G. and Morris E. Morkre, *Aggregate Costs to the United States of Tariffs and Quotas on Imports: General Tariff Cuts and Removal of Quotas on Automobiles, Steel, Sugar, and Textiles*, December 1984 which found that the consumer and producer loses due to trade restraints in those industries was $13 billion annually.

[89]Research on international trade restraints had long been a political lightning rod. Those who favor such restrictions are often vociferous opponents of FTC activity in this area of research and policy, because the FTC work fairly consistently found that the benefits of such restraints seldom exceeded the costs. For some discussion of the effects, or lack thereof, from FTC international trade research, see BE History Roundtable, September 4, 2003, Scherer, 187-188. After 1994, the FTC avoided the political problems by retreating from the field. The one exception to the retreat was the quiet release of an Economic Issues paper on trade restraints in December 2002.

[90]The initiation of the Working Paper series was part of a larger Pertschuk-era effort to disseminate analyses of relevant issues outside the FTC. Edited versions of policy review documents were also made public during this time. See Office of Policy Planning (Appendix F, April 1981, pp. 71-72). It appears that the Working Paper series is the only survivor of the various informal means of getting materials publically released. The other means of public release dwindled during the early 1980s, perhaps because the extensive policy review process that produced many of the papers was discarded. The last policy review report released was in June 1982 and provided a rationale for an expanded competition advocacy program. Beginning in the late 1990s, BE set up a process for release of personal professional research that would not contain any FTC logos. These papers did not go through the Working Paper review process and tended to be smaller and much less time-intensive than most Bureau of Economics' reports. As of 2013, those research papers tend to number about 15-25 each year and many are typically distributed by the authors on the Internet via the Social Science Research Network (SSRN) prior to publication.

[91]In a grouping of over 300 papers, it is difficult to name the best without disappointing some authors and making some egregious mistakes. In any event, a few of the most influential papers are clear. One Working Paper became famous for 15 minutes, not because it was particularly important, but because it was used by a Congressman in 1983 to criticize James Miller's administration of the Commission. The paper was a spin-off from the author's graduate student paper and was entitled "The English Economy Following the Black Death (WP #80)." Congressman John Dingell, used it to imply that economists at the Commission were wasting Commission resources on irrelevant pursuits rather than focusing upon vigorous enforcement of laws restricting vertical restraints and single firm market power. This episode of

front, perhaps the most interesting paper examined the profitability of Cournot mergers, which indicated that mergers were not profitable in that commonly used model.[92] Salop's work on oligopoly coordination and the importance of making credible commitments was also widely read,[93] and subsequent work by Salop and Scheffman on "raising rivals costs" provided an alternative way to think about the anticompetitive effects of various exclusionary practices that is still used today.[94] A series of empirical papers on the profits-concentration relationship found in the line-of-business data by Ravenscraft and Kwoka were clearly important contributions to the series because they helped confirm the argument that concentration was not the driving force behind profit changes in markets.[95] That finding helped alter the way economists think about market dynamics.

On the merger front, one of the first (if not the first) published empirical merger retrospectives was done in a BE working paper looking at a merger of two leading producers of microfilm.[96] In the regulation area, a BE working paper on state regulation of long-distance telephone service was cited by the head of the FCC as the sole empirical evidence that price cap regulation was superior to traditional rate-of-return regulation.[97] Although the production of Working Papers was low in the early to mid-1990s, the output of working papers increased in the late 1990s, in part, because that became a major outlet for work using small amounts of time allocated for research across many members of the Bureau.

Beyond work on merger retrospectives (particularly in hospitals and oil which were continuing as of 2013 as merger enforcement work allowed), perhaps, the most interesting recent research to appear in the series had been a succession of papers on retailing in various industries. That research is an attempt to understand the retailing sector, an area that has for too long been largely ignored by economists. In the realm of policy, a 2003 Working Paper on wine distribution was cited by the US Supreme Court in May 2005 as a major basis for allowing interstate shipment of wine.[98]

Congressional criticism haunted some Bureau of Economics managers in minor ways for decades thereafter, and caused the economist/managers of the Working Paper Series to worry about the almost always non-existent political fallout from release of any economic work if it carried the FTC logo. A complete list of the post-1985 Bureau of Economics Reports and the post-1977 Working Papers is available on the FTC internet Web-site at https://www.ftc.gov/policy/reports/policy-reports/economics-research/working-papers?page=16 An additional set of "miscellaneous papers" were mainly (but not exclusively) an outlet for early drafts of research by outside academics and FTC research staff using the FTC's line-of-business data. Those papers were produced between 1980 and 1993.

[92] Salant, Stephen W., Sheldon Switzer, and Robert Reynolds, "Losses from Merger: The Effects of a Change in Industry Structure on Cournot-Nash Equilibrium," June 1980 (WP # 31).

[93] Salop, Steven C. "Practices that (Credibly) Facilitate Oligopolistic Coordination," August 1982 (WP #73).

[94] Salop, Steven C. and David T. Scheffman, "Raising Rival's Cost," January 1983 (WP # 81, and later related Working Papers #114 and #146). For a discussion of the significance of this work and how it fits into the literature on vertical strategies, see Scheffman and Higgins (2003).

[95] Ravenscraft, David. J. "Structure-Profit Relationships at the Line of Business and Industry Level," March 1982 (WP # 47), and miscellaneous paper, Ravenscraft, David J. and John E. Kwoka, "Collusion, Rivalry, Scale Economies, and Line of Business Profitability," July 1982 (miscellaneous paper).

[96] Barton, David M. and Roger Sherman, "Price and Profit Effects of Horizontal Merger: a Case Study," August 1983 (WP # 98); later published in Journal of Industrial Economics, 33(2), 165-177.

[97] The FCC chief was Dennis Patrick, who cited the paper in his January 25, 1988 letter to Congress. The paper was Mathios, Alan D. and Robert P. Rogers, "The Impact of Alternative Forms of State Regulation of AT&T on Direct Dial Long Distance Telephone Rates," December 1987 (WP #159), later published in 20 *Rand Journal of Economics* 437 (1989).

[98] Wiseman, Alan and Jerry Ellig, "How Many Bottles Makes a Case Against Prohibition? Online Wine and Virginia's Direct Shipment Ban," Working Paper #258, March 2003, (published as "Market and Non-Market Barriers to Internet

D. Bureau of Economics Conferences and Roundtables

In addition to report writing and working papers, in the 1970s and 1980s, BE occasionally sponsored professional conferences on certain antitrust and consumer protection issues in the hopes of enriching the academic literature in areas of interest to the agency. One goal of such events was to induce the production of original policy-relevant scholarly papers. The topics of these conferences included health care economics, predatory behavior and exclusion, consumer protection economics, analysis of market power issues, and the political economy of regulation. Many of these conferences resulted in BE Reports containing the component papers.[99]

In 2001 an activity arose that was a bit different from the prior practice of holding occasional scholarly conferences. The new activity involved the organization and production of Roundtables that would bring together experts for discussions of issues of particular interest to the FTC. The production of new scholarship was not the main goal (although that would be a nice inadvertent outcome); rather, the Roundtables would provide an opportunity for the FTC staff to learn from the experts and "pick their brains" regarding the topic of interest. Several such events were held from 2001 to at least 2011. Among the events were:

(1) a meeting of several empirical IO economist/consultants to discuss empirical projects for the competition agenda, unfortunately held on September 11, 2001 (the day of the terrorist attack on the World Trade Center and the Pentagon);[100] (2) a meeting of scholars and consumer advocates on credit and subprime lending in October 2002; (3) an event featuring economists, financial analysts, attorneys, business consultants, and business executives to discuss merger outcomes and the factors that make mergers succeed or fail in December 2002; (4) a conference featuring academic economists specializing in healthcare competition and quality in April, 2004;[101] (5) a January 2005 multi-scholar review of work by the GAO and the FTC on estimating the effects oil mergers; (6) an October 2005

Wine Sales: The Case of Virginia" in *Business and Politics*, 6(2), article 4, 2004 (work cited as the FTC wine report (Possible Anticompetitive Barriers to E-Commerce: Wine (2003)," in Granholm v Heald, 544 US 460 (May 16, 2005)).

[99]Most of these reports were mentioned or discussed in earlier sections. See, *Competition in the Health Care Sector: Past, Present, and Future*, Warren Greenberg, ed., 1978 (Proceedings of a Bureau of Economics conference, June 1-2, 1977); *Strategy, Predation, and Antitrust Analysis*, Steven C. Salop, ed., September 1981; *The Political Economy of Regulation: Private Interests in the Regulatory Process*, Robert A. Rogowsky and Bruce Yandle, eds., March 1984; *Empirical Approaches to Consumer Protection Economics*, Pauline M. Ippolito and David T. Scheffman, eds., March 1986. One conference organized by David Scheffman and Pablo Spiller on empirical methods in industrial organization resulted in a supplemental issue of the *Journal of Law and Economics*, volume 32, October 1989.

[100] The attacks would have surely ended the conference were it not for the fact that the participants and the audience had no place to go and no way to get there, as transportation and communications became virtually impossible. So the conference continued at the FTC main building under the distractions of sirens and the sounds of low flying military aircraft.

[101]The FTC also partially funded four health care research projects that were performed by academic consultants in 2002-2005. These projects focused on the relationship between competition and health care quality and were undertaken in support of a broader FTC initiative examining a broad range of health care competition and consumer issues. This was an unusual endeavor for BE. In the past, the FTC tended to do research in-house and did relatively little in the way of funding research by others. Some of those funded papers later appeared as BE working papers and some others were published privately by the authors.

conference on the economics of internet auctions; (7) an October 2006 conference on pharmaceutical issues; (8) an April 2007 conference on consumer economics with a particular focus on the burgeoning field of behavioral economics; (9) a May 2007 conference on the evolution of retail distribution as seen through changes in the grocery industry; (10) a May 2008 conference on mortgage disclosures and the role that better information might play in mortgage markets following the start of the global credit crisis on August 9, 2007; (11) a May 2011 conference on drip pricing and partial disclosure of the terms of sale; and (12) the first annual FTC/Northwestern University (Searle Center and the Center for the Study of Industrial Organization) Microeconomics Conference on November 6-7, 2008.[102]

Although these events were hardly kept a secret, some of them were unpublicized and some were open only to the FTC staff and selected invited guests.[103] Rather than being public displays, they were often intended to be learning opportunities.[104]

This type of outreach beyond the walls of the FTC became more common after the mid-1990s for the legal Bureaus and after about 2000 for BE. During this period, the FTC in general became less "insular."[105] More consultants were brought in for various purposes, more conferences were held, and more "outside the box" projects and events were tried. As one memorable example, BE Director Michael Salinger prevailed upon an ex-FTC attorney, financial markets commentator, and comedian, movie/TV personality, Ben Stein (whose father, Herb, was the Chairman of the Council of Economic Advisors in the 1970s) to speak at the FTC. The speech given originally on June 21, 2006 (and repeated in April 2007), was a great success, filling the room to overflowing with economists and younger FTC staff who were there for the unusual "star power." Stein told amusing stories about his FTC experiences as a consumer protection attorney, provided his views about the economic and political issues of the day, and also expressed his apparently heartfelt view that the FTC truly does good work for consumers (not every time of course, but...).

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[102]This annual conference was initiated by BE Director Mike Baye. The first event was run by Chris Adams and Dan O'Brien. Favorable reactions were received to requests for scientific committee membership and the response to the request for papers was very encouraging, resulting in an impressive set of papers. Many of the papers were focused on internet advertising - a clear growth area in academe as economics professors hooked up with online firms. Thanks in large part to Chris Adams, this conference has continued to provide high quality agendas. The seventh annual conference was held in October 2014.

[103]This was true of the September 2001 empirical industrial organization roundtable, the December 2002 merger roundtable, attended only by US and foreign regulators, the April 2004 health care competition roundtable, which was attended by FTC staff and staff from other Washington D.C. health care agencies. Because it covered a politically sensitive topic at the time, the consumer credit roundtable in October 2002 was made open to the public and that openness resulted in a decidedly less "academic" feel to the gathering and led to several policy speeches by attendees who were representing various interest groups.

[104]For an argument that learning from outsiders is valuable for government policy-making organizations, see Kovacic (2005, pp. 866-67 and 2009, *passim*.).

[105]Since at least 1979, when Steve Salop was the coordinator, the Bureau of Economics also sponsored a seminar series featuring academic speakers who presented research in progress. The "Friday Seminar Series" (which was later moved to Thursday) brings in speakers on various topics of interest in microeconomics with a focus on industrial organization, competition, and consumer protection.

E. Decline in Economic Reporting During the 1990s

Most of the Bureau's formal research activities and virtually all of the work focused on regulated industries withered in the 1990s.[106] It is not clear that there was any individual decision that led to the decline of economic reporting at the Commission. Rather, it seemed to be caused by a series of small events, exogenous factors, and policy preferences. Somewhat ironically, a part of the cause might have been the rise in the use of economic analysis in antitrust casework beginning in the 1970s and the growth of empirical methods of merger analysis beginning in the mid-1980s. After that point, Economics Bureau Directors attempted to ensure that more economic resources were devoted toward case and litigation support.

Other factors included: (1) the end of data collection activities in 1981 and the related end of the desire to use the data produced; (2) the general resource reduction as BE moved from 204 to 89 employees over the 1981-1990 time frame;[107] (3) the merger waves of 1986 to 1989 and 1993 through 2000 that created more work than could be readily handled by the existing number of antitrust economists; (4) the reassignment and dispersion of the staff that had previously been dedicated to the research and reporting function;[108] and (5) the absence of a consistent advocate for a general economic reporting function at any decision-making level of the Commission after F. M. Scherer's departure in 1976. Without such advocates at both the Bureau and Commission levels, the pressure to assign staff to cover investigations caused by the merger wave was bound to swamp the economic reporting

[106]In the 1990s, a number of studies written by staff economists, and implicitly or explicitly supported by FTC funding, were released without the FTC logo and were published as books or articles. Examples include: John C. Hilke, *Privatization: Competition in Government Financed Services* (Quorum, 1992); Edward C. Gallick's *Competition in the Natural Gas Pipeline Industry* (Praeger, 1993); Paul Pautler and Michael Vita's Hospital Merger Report (published as three journal articles from 1991 to 1994; including Vita, Langenfeld, Pautler, and Miller, "Economic Analysis in Healthcare Antitrust," 7 *Journal of Contemporary Health Law and Policy*, (1991), 73-115, Pautler and Vita "Hospital Market Structure, Hospital Competition, and Consumer Welfare: What Can the Evidence Tell Us?," 10 *Journal of Contemporary Health Law and Policy*, (Spring 1994), 117-168, and Vita, "Exploring Hospital Production Relationships with Flexible Functional Forms," 9 *Journal of Health Economics*, (1990), 1-21; Vita's Hospital Rate Regulation study (published as an article in *Applied Economics* 1995, 917-923); Metzger, Michael R., et al. *The Regional Welfare Effects of U.S. Import Restraints on Apparel, Petroleum, Steel and Textiles* (Avebury, 1996); Vita's Signal Carriage for Cable TV (published as articles in the *Journal of Regulatory Economics* 1997, 159-172, and the *Supreme Court Economic Review* 1998); and Pappalardo, Janis K. & Debra Ringold, "Regulating Commercial Speech in a Dynamic Environment: Forty Years of Margarine and Oil Advertising Before the NLEA," 19 *J. Public Policy & Marketing*, (Spring 2000), and Vita on "Regulatory Restrictions on Selective Contracting: An Empirical Analysis of Any Willing Provider Regulations," 20, *Journal of Health Economics*, (Nov. 2001), 955-966. As time passed, more and more economist research went through the traditional academic research outlets (*i.e.*, books, journals, and SSRN), rather than the report mechanism. Other research work produced by economist staff that more closely resembled working papers were also "released" through this private publication route, and thus never appeared in any of the Bureau's series of reports or working papers. Such research papers were simply approved by the Bureau Director for private release. This release route was particularly popular in the late 1990s and 2000s.

[107]The resource reduction would have mattered, because economic reports were not quick and easy to produce. As noted previously, production of the multi-volume investigative reports done in the 1920s and 1930s consumed large percentages of the Agency's budget. From 1988 to 2007, production of the "typical" Bureau of Economics report was much lower cost, involving about 4,000 hours of economist and research assistant time (about two workyears), with a wide range from 350 to 17,700 hours (1/6 to almost 9 workyears).

[108]In 1978, many of the economists in the Industry Analysis group, which was BE's traditional "research arm," were transferred to staff the consumer protection mission, and in 1982 a few other staffers were moved to Regulatory Analysis, which later became the Division of Economic Policy Analysis in 1986. The last economist who was essentially a full time researcher stopped that duty in November 1997.

function.[109]

Although a dedicated "research shop" has not existed in the Bureau of Economics since about 1986, time to do individual research was made a higher priority since the late 1990s, in an effort to attract good recruits and to retain skilled economists who would be available to provide near state-of-the-art empirical work for litigation support and to participate in the production of future Commission-directed research. Around this time a system was instituted to provide certain staff economists with "grants" of 10 to 30 percent of their time to allow them to pursue a research topic in the industrial organization or consumer research fields. Managers tried to schedule such time between antitrust or consumer protection case assignments. This dispersed research activity continued to keep BE active in the research function mainly on smaller-scale projects.

As the merger wave abated in early 2001, more research was initiated across the various divisions of the Bureau and the grants of more time for research expanded. Re-examinations of hospital mergers; oil industry mergers; and credit industry issues (sub-prime lending and improved disclosure regulations, and several Congressionally-mandated credit reporting studies) each gained some prominence in the non-case project agenda. Surveys of the extent of consumer problems with identity theft and other types of fraud, and a study of food advertising and youth obesity also came to the fore.

In addition, the Bureau began work on a gasoline price monitoring project intended to help state officials target any pockets of local market power in gasoline retailing.[110] Work on the current crop of mission-related studies are spread across the Bureau's antitrust and consumer protection casework shops, and since January 2008 this flexible economic research process has been more intentionally coordinated via an Assistant Director who was tasked with fostering research. The revival of economic research (from both Congressional requests and internal programs) seems consistent with the latest push for more "policy R&D" from both the attorney staff and from economists at the FTC. This push at the Commission level began in the late 1990s with Chairman Pitofsky (who fostered reports led by attorney managers - see the section on legal organization policy reports) and continued through later Chairmen, each of whom seemed to favor 6(b) reports in their chosen areas of interest.

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[109]Other factors that could have accelerated the reduction in research in the long term were: (1) various parts of reports were sometimes "cited back" at the FTC in litigation (they are public documents and are available to opposing litigators). Thus, some attorneys, and perhaps the Commissioners, saw reports as producing a cost for the agency. This concern was not new. For example, Senator Hubert Humphrey expressed concern that a statement in an FTC Food Marketing report might later be used in an unhelpful way. (See U.S. Senate Subcommittee of the Select Committee on Small Business, Food Marketing Hearing, June 22, 1960, especially pp. 29-30.) The FTC Chairman at the time, Earl Kintner, did not appear very concerned about the potential problem and he later provided a fuller rationale for that view supported by his attorney staff in a letter to Senator Humphrey, July 28, 1960 (appended as pp. 36-37 of the Hearings); and (2) Commissioners occasionally indicated that any reports of value on regulation or advocacy topics would be done by well-heeled private interests or other government agencies and that the FTC, therefore, need not spend resources studying such issues. Essentially, these Commissioners saw regulation research as a step beyond the FTC's functions. This view was consistent with a disinterest in competition advocacy generally after the late 1980s.

[110]This monitoring program, which began in mid-2002, is a bit reminiscent of the 1967 Bakery Industry report that uncovered a local conspiracy in bread baking in Seattle. (See Mueller, 2009, p. 115). The gasoline monitoring report is similarly useful for identifying local outliers in gasoline pricing patterns. That monitoring program was initiated by Chairman Timothy Muris.

F. Use of Compulsory Process for General Investigations

As noted earlier, Section 6 of the FTC Act discusses the FTC's reporting and general investigation functions (15 U.S.C. sec 46(b) and sec 57b-1(c)(1)). More specifically, Section 6(b) empowers the agency to require firms to provide information about a broad range of business issues in a form specified by the Commission. The ability to gather information for economic studies was, however, a contentious issue in the 1920s. Some argued that the FTC could only require that firms provide data if a law violation had been alleged. Others saw the ability to require information for reports to be an obvious and explicit power granted to the FTC to be used at their discretion.[111] The Courts ultimately decided that the FTC had such power and it was used with some frequency over the next forty years to investigate firms or industries and to gather data from a range of firms for special data reports. That authority was used less often, however, from 1970 through the 1990s.[112]

Firms had always raised numerous legal and practical obstacles to the compelled gathering of data for studies, and without a strong commitment to the report-writing function or to the particular subject of a given report, the cost of responding to such objections was often considered inefficient, especially given the on-going fights over the line of business data program. As a result, the agency moved toward voluntary provision of data or toward studies that only used publically available information.[113] Particularly after the demise of the line-of-business reporting program in the early 1980s, use of compulsion to obtain data from firms for general studies (as opposed to law enforcement investigations or studies aimed at a particular practice of interest to Congress) was used sparingly.

After a relatively long hiatus, in June 1999, 6(b) authority was used for a Presidentially-requested study of marketing of violent music, games, and movies to youth, and soon thereafter, for a Congressionally-requested study of the strategies of innovator drug companies in using agreements or patent settlements to systematically delay competition from generic drugs in ways that might not have been anticipated by regulators and legislators.[114] For the drug study, data were obtained from a large

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[111]See Stevens (1940, pp. 547-54).

[112]See Office of Policy Planning & Evaluation, Section 6 Working Group, (Appendices) for a description of public data versus compulsory data from 1971-1981. Public data was used in the majority of studies (26 of 43), but compelled data was used in 17 of the 43 studies from that period (see p. A-23). One successful and significant use of 6(b) authority was connected to the study of the effects of sales and marketing practices in prescription drug markets. As one part of a broad industry studies effort initiated by BE Director Mike Mann, in 1974, a Section 6 survey was sent to 250 pharmaceutical firms to obtain price, sales, and patent and licensing agreements data for certain classes of drugs marketed from 1956 to 1971. The information contained in the marketing documents obtained in that 6(b) request led the authors to alter the focus of the report and resulted in the "discovery" of the first mover advantage. See Bond, Ronald S. and David F. Lean, *Sales, Promotion, and Product Differentiation in Two Prescription Drug Markets*, BE, FTC, February 1977.

[113]Scherer (1990, pp. 471-72). On occasion data were collected, but only from public sources or by purchasing data from consumer survey firms. Such data gathering techniques were used for several post-1970 and 1980s projects, including a steel industry study, optometry research, legal services, consumer views about the risks of low-tar cigarettes, two food health claims reports, and the rent-to-own industry survey. In addition, a 1999 report on consolidations in the carbonated soft drink bottling industry used data that the FTC had obtained in various merger investigations during the 1980s. These data were sufficiently complete that they provided a time series useable in an econometric investigation covering a decade.

[114]Requests for information based on 6(b) authority also occurred in 1991 in connection with a review of the Japanese keiretsu system of business organization. That study, however, was never completed.

number of innovator and generic drug companies regarding the patent litigation, licensing agreements, and general business information regarding R&D and marketing and manufacturing of prescription drugs. The study (headed by attorneys in the Office of Policy Planning and later the General Counsel's Office) was requested by Congressman Waxman and various Senators,[115] and was released in July 2002 as *Generic Drug Entry Prior to Patent Expiration*.

Section 6(b) authority (or other forms of compulsory provision of information) was also used in other investigations of that period. One such study was the 2003 inquiry into the activities of pharmacy benefit managers, which was undertaken to determine whether the ownership of mail order drug firms by these drug managers added value to the health plans offered by employers. In addition, compulsion was used to obtain data for a study led by attorneys in the Office of the General Counsel and initiated in 2005 of generic drug entry by the holder of the expiring patent (called authorized generic entry), and for a 2006 study of the gasoline pricing following hurricane Katrina.

Data for a series of hospital merger retrospective studies in five geographic areas were also obtained under compulsory process (albeit not 6(b) itself because these studies were directly related to potential law enforcement actions). These studies began to be released as working papers in November 2008. In late 2008, data for a Congressionally requested study of the effects of credit-based insurance scoring models on the price and availability of homeowners insurance for minorities was requested via 6(b)s. Other recent 6(b) studies were undertaken with the attorney staff to examine changes in the intensity of advertising of foods to children, to provide a description of the debt buying industry, and to study patent assertion entities (more colloquially known as patent trolls).

Whether the FTC uses 6(b) or other compulsory process authority to obtain data normally depends on the circumstances. For a standard descriptive report on an industry, the agency typically uses publically available data. For a staff-initiated study of a particular research question, publically available data would also be used. Of course, staff would be unlikely to initiate a study that would require subpoenaed data, so there is a "simultaneity bias" in that observation. For a Congressionally-mandated study, a Commission-initiated study, or a study that was somehow connected to a rule or potential law enforcement action, the agency would often use compulsion, if firms did not provide the data voluntarily, or if voluntarily provided data was nonexistent or was considered unreliable. As with most issues at the FTC, the approach depends on the perceived costs and benefits to the Agency, Commissioners, Congresspersons, the firms, and the public.

G. Economic Support for Reports by the FTC Legal Organizations

Although the Economic Division led the production of most of the early FTC economic reports, at least one early attorney-led report resulted in substantive legislation. That was the *Report of the FTC on the Radio Industry,* requested by the House of Representatives and published in December 1923. This report contributed to the passage of the Radio Act of 1927 and the succeeding Federal

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[115]Economists (David Reiffen and Michael Ward) had been undertaking a more academic study of innovator drug company behavior since about 1994. (For one of the outputs from that BE effort, see "Generic Drug Industry Dynamics," BE Working Paper #248, February 2002; later published in *Review of Economics and Statistics*, February 2005, 87(1), 37-49).

Communications Commission Act of 1934. The report was a description (about 340 pages) of the formation of the industry with emphasis on patents and cross-licenses for various radio devices, particularly vacuum tubes, a critical component of radios at the time. It also portrayed various business practices (e.g., refusals to sell apparatus for use in international communications, patent infringement suits, exclusive distribution, full-line forcing, and allegations of resale price maintenance) used in the industry. The report contained no specific recommendations about whether the described activity violated antitrust laws, leaving that question for Congress.[116]

In more recent times, the attorney-led organizations of the FTC have produced reports on various public policy matters related to the FTC's missions.[117] They also occasionally produce evaluations of the impacts of certain FTC activities. In the 1980s, economists played major roles in attorney-led studies of advertising restrictions by professions, as well as in impact evaluations of rules, such as the original Unavailability Rule (concerning product inventories and rain check policies for advertised specials), and consent decrees, such as the decree involving defects in General Motors automobiles. Economists also worked on numerous occasional and periodic reports required by Congress. Recent examples of economic support for reports produced mainly by the Bureau of Consumer Protection include data analysis for reports concerning the accuracy of price scanners in retail stores (1996 and 1998), the accuracy of milk container filling (1997 and 1998), the Cigar Sales and Advertising Report (1999), Self-Regulation in the Alcohol Industry (1999), and the Internet privacy surveys concerning disclosures about the collection and use of consumers' personally identifiable information by web sites (1998, 2000, 2007).

In addition, BE staff played a significant role in production of the data analysis and marketing surveys contained in the FTC's first report on marketing of violent entertainment media to youth (2000).[118] BE played a lesser role in the September 2003 report to Congress focused on the marketing of flavored malt beverages to young adults,[119] and the report on the use of negative options as a marketing device. More recently in 2008, BE played a important supporting role in two descriptive data reports produced by BCP involving the placement of alcohol advertising, and the marketing of food to children and adolescents.[120] Several economists also participated in the 2013 production of a

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116This report was written mainly by the Assistant Chief Examiner and a staff attorney from the legal investigating division (See p. vii of the report). The 1924 FTC Annual Report lists the study as the work of the Legal Division.
117The legal bureaus produce some reports on their own initiative, but many other reports are mandated by particular laws. Congress requires that some reports must be filed annually (certain reports involving credit law enforcement or cigarette marketing fall in this category), other reports are one-time endeavors examining the effect of a law some years after it is implemented. In years past, attorney staff occasionally produced reports that led to subsequent legislation, see for example, the reports on Automobile Warranties, 1968 and 1970. Follow-up hearings eventually led to passage of the Magnuson-Moss Warranty - FTC Improvements Act of 1975 (Pub. L. 93-637, 88 Stat. 2183-2203, January 4, 1975).
118*Marketing Violent Entertainment to Children: A Review of Self-Regulation and Industry Practices in the Motion Picture, Music Recording & Electronic Game Industries*, September 2000. In addition to work by an economist, a marketing academic visiting in BE also worked substantially on the violence report. For a description of the marketer's work and experience at the FTC, see Grier (2001). Over the next several years, many subsequent reports on this subject were produced mainly by the BCP legal staff.
119Alcohol Marketing and Advertising, September 2003.
120One interesting finding in Marketing Food to Children and Adolescents, July 2008 was that the previously used "back of the envelop" calculation regarding the extent of advertising and food marketing to youth was quite high. The true number was near $1.6 BN, while the prior number was $10 BN.

descriptive study of the debt buying industry.[121]

Beyond supporting the Bureau of Consumer Protection's reporting efforts, economists participated in the production of reports from other FTC legal/policy organizations. Economists worked on the Bureau of Competition's (BC) 1999 evaluation of the asset divestiture process for mergers,[122] and work began in early 2001 on a joint report about the extent and effects of fees paid by manufacturers to obtain shelf space in supermarkets (slotting allowances).[123] Economists also worked with the studies section of the Office of the General Counsel (GC) and BC to produce a 2004 tome on Health Care Competition and a 2005 report on Pharmacy Benefit Managers and their role in the provision of mail-order pharmacy services. Even more recently, economists worked on the a study of the effects of entry by the patented drug owner into generic production of that same drug ("authorized generics") that was led by the GC's office.

Several extensive reports have also been produced by the Commission's Policy Planning shop and economists played a role in several of those efforts. A partial list includes the May 1996 Global Competition Policy report, the 2003 report on the interface between competition law and patent law, Congressionally-requested reports focusing on the strategies by innovator pharmaceutical firms,[124] and retail electricity programs in various states.[125] BE also provided input into a 2003 report on the law and policy involved in state-imposed restrictions on competition, and 2004 reports on restrictions on e-commerce in wine and contact lens distribution. Even more recently, BE also helped produce studies of competition in the market for broadband access in 2007, and the "levelness" of the playing field for postal services in 2008. In addition, the various legal Bureaus and policy shops produce certain reports without any input from economists.[126]

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[121] The Structure and Practices of the Debt Buying Industry, Federal Trade Commission, January 2013.

[122] Although economists worked on the 1999 divestiture project, there was substantial and continuing disagreement in 1995 to 1997 about how that study should be done. BC pushed for a relatively narrow review of the merger remedy process that would not raise the question of whether the FTC's remedy improved or stabilized market performance. BE pushed for a broader review of the ultimate market outcomes following the imposition of the remedies. As usual, the larger organization's view prevailed and the project reviewed only the remedial process. A trio of BE economists had been slowly pursuing the broader approach since 1991. Once the narrow project began, the broader effort was largely abandoned. (Reference to this difference of opinion is included in the Bulow memo to the Commission regarding the status of BE, May 15, 2001, p. 2).

[123] This attorney/economist joint product was directed from the policy studies group located in the General Counsel's Office and was released in November 2003. The study had its genesis in the December 2000 FTC budget which included $900,000 earmarked for a study slotting allowances. The Bureau of Competition was explicitly mentioned by the Senate sponsor (Senator Christopher Bond) as the appropriate unit to undertake the study. "Commerce, Justice appropriations bill goes to White House with HSR Changes," FTC Watch, December 18, 2000, pp. 2-3. A prior report on a May 2000 workshop examining grocery slotting allowances was also produced in February 2001 with inputs from Policy Planning, the Bureau of Competition, and the Bureau of Economics.

[124] *Generic Drug Entry Prior to Patent Expiration*, July 2002. This report described the innovator drug firms' use of the government's regulatory apparatus to deter competition from generic drugs.

[125] This report was requested by Congressmen Tauzin and Barton of the House Energy and Commerce Committee on January 18, 2001 and was released in October 2001.

[126] Examples include the December 1997 BCP attorney staff report on Individual Reference Services requested by three members of Congress, a report discussing the proceedings of a workshop/conference held in June 1999 at which interested parties voiced their opinions regarding the laws that ought to govern international sales via the Internet. See, *Consumer Protection in the Global Electronic Marketplace: Looking Ahead*, July 2000. The joint 2007 FTC/DOJ report that attempted to cut through the legal thicket caused by the interaction of antitrust enforcement and intellectual property

As of 2013, the production of reports by the attorney staff and legal policy shops appears to be a fifteen year endeavor that will not soon end.[127] Economists will likely continue to play a role in these efforts, in part, because the reports are becoming more data-intensive.

III. The Rise and Fall of Systematic Data Collection and Reporting of Financial Statistics 1939-1984

The FTC Act can easily be read to call for systematic data collection, rather than just sporadic reporting of information about particular firms or industries. Enthusiasm for more and better systematic data collection was common among Bureau of Economics' leaders prior to 1980. For example, the FTC's first Chief Economist, Francis Walker, speaking before the forty-fifth annual meeting of the Academy of Political Science, recommended that:

> .....the Government should collect, compile, and publish currently, with respect to the basic industries, information regarding production, cost of production, capacity, stocks, sales, prices, orders, and other such related data as may be necessary to show the general conditions of supply and demand in such industries.[128]

Such calls for data collection activity seemed to be driven initially in the 1920s by a desire for general information to shine the bright light of publicity upon various questionable activities of firms. Later, in the 1950s and 1960s, calls for data collection were prompted by a desire to overcome an information loss due to conglomeration among U.S. corporations.

Systematic data collection did not occur at the FTC in the early years of the Agency.[129] The earliest

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law received only a light review from economists. This was a follow-on to the more extensive 2003 report on the same topic.

127As noted earlier, the impetus for the change seemed to come from FTC Chairman Robert Pitofsky, who indicated that he wanted to return the FTC to its tradition as "an agency capable of conducting a thorough and objective investigation of important business and marketing issues." See Robert Pitofsky, "The Influence of Violent Entertainment Material on Kids: What is to be Done?" National Association of Attorneys General, Summer Meeting, June 25, 1999, pp. 4-6. In one sense, this was a return to the 1920s and 1930s style of descriptive reports done at the behest of the President and members of Congress, based on internal company documents, with the potential for subsequent legislation. These more recent reports are, however, devoid of the typical accounting focus of older reports. Soon thereafter, in 2001, Chairman Muris and General Counsel Kovacic promoted the notion of "policy R&D" as an essential element of good government in those agencies where policy is made. See, for example, "Improving the Economic Foundations of Competition Policy," Remarks by Timothy J. Muris Chairman, Federal Trade Commission, George Mason University Law Review's Winter Antitrust Symposium, January 15, 2003, Washington, D.C., the speech by William E. Kovacic "Achieving Better Practices in the Design of Competition Policy Institutions," April 20, 2004, Seoul, South Korea; and Kovacic (2005 and 2009).

128Similar sentiments were voiced by other leaders of the Bureau of Economics over the years. Stevens (1940, pp. 574-80), Boyle (1964), Mueller (1969, p. 285), Scherer 1975 (as reported by Scherer (1990)). Since 1915 the Commission had pressed for the ability to compel business reports on production and inventory, but the funding never materialized (FTC Annual Report 1938, pp. 11-12).

129See Stevens (1925, p. 634). Stevens (1940, pp. 574-79) provides a history of attempts beginning in 1908 to initiate annual industrial data collection by the Bureau of Corporations and later by the FTC. Those efforts had not borne fruit as of 1939. Some systematic information on industries, however, was being collected as early as 1925 by the Commerce multi-industry collections of data by the FTC were planned as one-time efforts. The first of these occurred in the late 1930s comparing the costs and profits of small, medium, and large enterprises for the Temporary National Economic Committee (TNEC).[130] Other one-time, multi-industry data collection projects took place throughout the 1940s and 1950s. For example, in 1947 the FTC produced a report on war-time costs and profits for over 4,000 U.S. manufacturing corporations. Three more special reports on merger activity were conducted between 1947 and 1949.[131] In addition, the FTC produced four reports regarding generalized or specific industrial concentration or product diversification between 1949 and 1957. Congress, however, limited the FTC's freedom to perform another wide-ranging study of the 1,000 largest manufacturing firms when, in the 1964 budget, it forbade funding for any study of intercorporate relationships (i.e., interlocking directorates and joint ventures).[132]

The earliest systematic and long term data collection effort undertaken by the FTC and the Bureau of Economics was the Quarterly Financial Report (QFR) Program. The program began in 1939 to collect income (profit and loss) and balance sheet (assets and liabilities) information on public and nonpublic manufacturing firms. The data were used for the corporate income components for estimates of Gross National Product.[133] The function was transferred to the Office of Price Administration in 1942 during WWII and then returned jointly to the Securities & Exchange Commission and FTC in 1947. The FTC took over sole responsibility for the data collection in 1971 and expanded the coverage beyond manufacturing to include mining and retail & wholesale trade.[134] When the FTC exited the data collection business in the early 1980s, this function was transferred to the Census Bureau in the Department of Commerce in January 1983.[135]

The FTC also undertook special data collection efforts in 1950 and 1972 to produce the Corporate Patterns Report data. This compilation covered the 1,000 largest U.S. manufacturing firms and provided information on value of shipments in each 5-digit product group. This was a special collection performed under confidentiality restrictions. Most of the 1950 data were made public in 1972.[136] The 1972 data may, at some point, also be made public. The collection of the 1950 data were uncontroversial, but by the time the 1972 data was being compiled, the respondent firms opposed the project.[137]

Department.

130 Temporary National Economic Committee, Monograph No. 13, "The Relative Efficiency of Large, Medium-Sized, and Small Business," 1941.

131 Boyle (1964, pp. 500-501), Scherer (1990, pp. 472-73).

132 The FTC had previously produced a report on interlocking directorates in 1950. For a description of the events surrounding the death of the 1962-63 data collection effort, see Mueller 2009, pp. 91-96.

133 The data were occasionally used in BE reports requiring income statement and balance sheet financial information. See BE History Roundtable, September 4, 2003, Scherer, pp. 203-204.

134 Scherer (1990, pp. 472-73) and Boyle (1964, p. 502).

135 Scherer (1990, p. 481.)

136 Federal Trade Commission, *Value of Shipments Data by Product Class for the 1,000 Largest Manufacturing Companies of 1950*, Washington, D.C. 1972.

137 See BE History Roundtable, September 4, 2003, Scherer, p. 206. Scherer argues that business interests began to fear that the FTC would use any firm or industry data to bring legal actions against industry. This fear may have had some basis in fact, because in the late 1960s and early 1970s, the FTC began an antitrust enforcement program that relied very heavily on industry structure (e.g., ready-to-eat cereals and the automobile industry investigation), and a case-targeting project using the LB data existed into the early 1980s. In 1972, the FTC Annual Report (pp. 37-47) explicitly discussed

In addition, the Bureau collected merger statistics from 1969 to 1981.[138] BE statistical clerks, working in a group called the "merger unit," compiled a large merger series and an overall merger series by scouring trade press sources. The early data collection effort included going through historical records to produce information on the number and size of mergers beginning in 1947. These data were first reported in the 1969 FTC *Report on Corporate Mergers*. Due to the care taken to check to see if the mergers reported in the trade press actually occurred, there was a substantial lag in the production process. The data set ultimately provided information on the number and size of most mergers and whether the merger would best be characterized as horizontal, vertical, market extension, product extension, other conglomerate, etc. This data collection function was abandoned in 1982.[139] Due to continuing demand for this type of data from various quarters, including the merger and acquisition industry (investment bankers, private equity firms, attorneys, accounting firms), private firms picked up much of this function and currently the most often cited producers of merger data are Thomson Media and MergerStat, but rivals continue to appear.

Another FTC data collection effort was undertaken not for research, but rather to advance merger law enforcement goals. The FTC had long complained about the lack of notification prior to the consummation of mergers.[140] The Bureau of Economics and the FTC did something about this situation beginning in 1966. BE Director Willard Mueller, working with the Department of Justice's Assistant Attorney General McLaren, formulated reporting thresholds for merging firms. Beginning on May 6, 1969, the FTC required firms above $250 million in asset value to provide prior notification of mergers valued at more than $10 million and to provide certain data under its pre-merger notification program.[141] This program may have covered about 450 industrial firms in 1969.

The pre-merger reporting program was greatly enhanced in 1976 with the passage of the Hart-Scott-Rodino (HSR) Act. Among other things, the Act expanded and formalized the program for non-financial mergers with a value of greater than $15 million. The HSR program is not a data collection and retention effort, but rather an early warning mechanism for merger review, so that the antitrust agencies can evaluate whether a merger violates laws they enforce. HSR data are not retained in a historical database, and so most of the information is lost for research purposes.[142] The agency does, however, retain certain information including the identity of the merging partners, and the product markets in which they compete. An overall monthly count of reported mergers and their annual

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case targeting as a goal of the LB data program.

138Due to the production lag, the final year for which data were collected was 1979.

139One statistical clerk continued to compile the large merger series for about 2 years after the program was ended. Scherer (1990, p. 480) argued that continued collection of the merger series would have been useful because the categorization of each transaction (e.g., horizontal, vertical, market extension, product extension, other conglomerate) was unique to the FTC data set.

140See almost any FTC Annual Report from 1940 onward. Prior to 1969 merger review was done mainly by scanning the trade press for reports of mergers. (BE History Roundtable, September 4, 2003, Markham, pp. 20)

141The pre-merger reporting program had grown out of specialized merger guidelines for various manufacturing industries. See BE History Roundtable, September 4, 2003, Mueller, pp. 33-34, 213-215; and Mueller (2004, pp. 101-103 and 2009, p. 139). The pre-merger notification program is mentioned in the 1969 FTC Annual Report (pp. 23, 52), and subsequent Annual Report volumes (e.g., 1970, p. 47; 1971, pp. 31-32) provide more information about the reports filed under the program.

142For a description of the program, see Scherer (1990, p. 473) and Sims and Herman (1997).

market value exists since October 1978.[143]

The most recent, shortest lived, and most controversial data collection project on industry at the FTC was the Line of Business program. This project was intended to address a long-perceived need for systematic financial data (from accounting categories that would typically appear on a firm's income statement or balance sheet) that was disaggregated below the level of the firm.[144] The program required special accounting for about 260 industry categories by 460 large U.S. manufacturing and distribution firms that collected and reported data on over 4,000 "lines of business." The data were much more disaggregated than those collected at the standard firm or business unit levels. The requirements for special accounting systems, confidentiality needs, and the likely fear that the data would later be used against them in a legal proceeding, made this a very controversial program among the firms. Congress passed specific laws to clear the way for the program.[145]

A staff of FTC accountants, research analysts, and economists devised the rules for collecting the data and provided various quality controls. After a great deal of legal wrangling,[146] the data were ultimately collected for 1974 through 1977. These data were kept strictly confidential, but could be used for academic research by FTC consultants. Early in the program, several academic consulting economists worked with the data (e.g., F. M. Scherer (R&D issues), Anita Benvignati (international trade), and Leonard Weiss (market concentration)) in an active effort to discover the secrets hidden in these new, unique data. In addition, several BE staff economists analyzed the data through the mid-1980s. As time passed, the research effort became less vigorous, but the Bureau provided access and some computing facilities for unpaid academic consultants who wished to use this confidential data set. In the latter 1980s and early 1990s, the list of researchers with access might number about 20 with about 5 or 6 actually using the data actively during any one period. A good bit of research on managerial questions, such as optimal diversification, core skills of firms, and R&D activity continued through the early 1990s, but as the data aged, demand for access to the data withered, perhaps because few know it

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143Beginning in 1989, acquiring firms were required to pay filing fees and these fees were subsequently raised several times. The Agency's funding began to be increasingly derived from the HSR filing fees and during the latter 1990s, the vast bulk of the Agency's funding came from merger filing fees. Congress changed the HSR reporting program significantly starting in February 2001. Three significant changes were made: (1) increase the HSR reporting threshold from $15 to $50 million, (2) define three higher fee levels based on the dollar value of the transaction, and (3) apply a GNP inflation index to that threshold beginning in 2005. Based on the 1998 distribution of mergers, the first alteration would have resulted in a 50 percent reduction in the number of reportable merger transactions, but the new fee structure was devised to avoid any reduction in agency revenues. Such a revenue reduction occurred, however, as overall merger activity fell markedly in early 2001 following the bursting of the "dot com bubble."

144This rationale for line-of-business data is made clear in the FTC's 1972 Conglomerate Merger Performance Report. The conglomerate merger experience of the late 1960s led academics and merger enforcers to desire better data on market level activity that is often hidden in firm-level data. The program also began at a time when the FTC leadership was attempting to increase the relevance of FTC work generally. Caspar Weinberger, FTC Chairman, suggested in his 1969 Congressional testimony that the business line data would be useful. See Kovacic (1982, pp. 635, 645). Earlier calls for line-of-business data collection emanated from Francis Walker, the FTC's first chief economist, and Willard Mueller. (See Appendix regarding Walker's career and Mueller (2004, pp. 97-99; 2009, 99-110) indicating that the line-of- business program was an extension of the Congressionally-opposed intercorporate relations project.)

145A rider attached to the Trans-Alaska oil pipeline bill in 1973 reportedly removed obstacles to collecting the line-of-business data. That rider was repealed in 1980. See Scherer (1990, pp. 477-79).

146For a description of the legal machinations, see Office of Policy Planning (Appendix F, April 1981, p. 62).

exists.[147]

After a switch in Presidential administrations, the data collection function was suspended in 1981 and the Commission formally voted to terminate LB data collection in 1984.[148] Although data collection ceased, work in evaluating the data continued in the Bureau of Economics through the mid-1980s, and consultants are given access to the data up to today. The confidentiality of the data is required by statute, so making the data public is, unfortunately, impossible. The passage of time should have made this, once sensitive, data of interest mainly to historians.

The FTC also collects and retains data from the largest cigarette producers regarding their sales, advertising (by various categories), and tar/nicotine levels of the various brands. Annual reports regarding these data are required by legislation. The Bureau of Economics produced a report on the cigarette industry in 1964,[149] and production of an annual report on cigarette output and marketing report was done by the Bureau of Consumer Protection (BCP) beginning in 1968. In the late 1990s, the FTC also began to collect data for a similar report on cigar advertising and promotion. As with the cigarette report, it is produced mainly by the Consumer Protection attorney staff.

In the 1990s, the FTC (BCP) began systematically collecting data on consumer complaints filed with the FTC's telephone and Internet complaint systems. The FTC enters all the complaints into Consumer Sentinel, a secure online database that combines FTC complaint data with that of other agencies, and is available for use by certain FTC staff and by thousands of law enforcement authorities worldwide.[150] These data are an input into consumer protection case selection and are a means of

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147Research using the LB data within the Bureau continued through the mid-1980s and led to a number of publications in leading journals. As of 2000, three consultants were cleared to see the data, and 2 persons actually accessed the data between 1998 and 2000. As of 2013, the most recent academic requests for the data were in 2009 and about 2000. At this point, the mid-1970s data are likely only of interest for historical purposes.

148The line-of-business program was targeted for re-evaluation by the President Reagan's FTC transition team in 1981. See Miller (1994, p. 10). For a critique of the program focusing on data collection and accounting problems that might make the data of relatively little use, see Breit and Elzinga, Chapter 7, in Clarkson & Muris, eds. (1981). Faced with a challenge to the program, the line-of-business staff, led by the LB program manager, William Long, undertook a voluminous benefit-cost analysis defending the program. The defense focused on potential gains from better investment decisions and from academic research that might result from the data reports. Several academics wrote to the FTC in support of the data collection program. After the fact, Scherer (1990, esp. pp. 473-79, 481-85), a former BE Director who was a staunch ally of the data collection effort, provided a spirited defense of the program. He argued that the data collected by the program provided unique and highly valuable information about firms and markets. A further defense of the LB research was provided by the BE staff in Scherer et al. (1987) and Mueller (2009, pp. 98-110). For a discussion of the program more generally by those who were its key proponents in the 1970s and early 1980s, see the BE History Roundtable, September 4, 2003, pp. 202-221. In that discussion, Scherer argues that compliance with the reporting requirements was not, in fact, very costly for businesses (based on private discussions he had with business friends), but that business interests opposed the program because they feared that the FTC would use the data to bring legal actions.

149Boyle (1964, p. 505). Mueller (2003, p. 13) indicated that the FTC's effort to force disclosure by the cigarette companies was only partially successful.

150These complaint data allow the FTC systematically to use the "mail-bag" approach to case selection that was so heavily criticized in 1969, but which MacIntyre & Volhard (1970, pp. 732-38) defended as a reasonably good index of those things that most bother real businessmen and consumers. While there are several reasons to think that complaints will not be a perfect indicator of consumer problems, perhaps the biggest problem with the early "mail bag" approach to case selection was that the mail bag was full of complaints from firms about their rivals, rather than full of complaints measuring FTC productivity for the Government Performance and Results Act (GPRA). BE plays no role in this data collection effort, although it plays some occasional role in analysis of the complaints received.

Why did the Bureau of Economics (and the FTC) exit the data collection business? The move could have been due to policy preferences that had little to do with substance or efficiency. Some of the actions, on their face, however, seemed to be efficiency-enhancing moves. For instance, moving the Quarterly Financial Reporting program to an agency that specialized in data collection, and defacto privatization of the collection of merger & acquisition data could be defended as reasonable cost-reduction actions. Former FTC Chairman, James C. Miller III (BE History Roundtable, September 4, 2003, pp. 122-123), indicated that the LB program was terminated in large part because it had influential political opponents in Congress (urged on by attorney Ira Millstein, representing the Business Roundtable). In 1981, the FTC was attempting to avoid fights with a hostile Congress on any issue where a fight was not absolutely necessary, and the collection of LB data became was one of those issues. In addition to the political considerations involved, it may have been that by the early 1980s a large contingent of Industrial Organization economists no longer placed much faith in accounting rate of return data, whether collected by line of business or at the firm level.[151] In addition, practitioners in the Industrial Organization field were beginning to move to time-series analysis of prices in comparable markets and away from comparisons of profits or prices in cross-sections of diverse industries. These long-term trends may be one reason that no post-1980 Bureau Director has pushed for new firm-level or LB-level data collection projects.

IV. The Role of Economists in Antitrust at the FTC

Economists are now are involved in most substantive aspects of antitrust investigations. This includes merger case selection (via the BC merger screening committee), data and information requests, investigation interviews and document review, economic theory development, case evaluation, evaluation of potential remedies, and recommendations regarding disposition of the case. Economists often have ongoing discussions with staff attorneys about each of these areas, and on some occasions, they also participate in settlement negotiations. In addition, they analyze studies prepared by the companies' economic consultants, and perform econometric analyses when suitable data are available, which occurred more frequently after about 1998.

Although attorney managers almost always make the final decisions regarding the initiation and course

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from consumers about firms.

[151]For a debate about the value of accounting data in a large data set research context, see Fisher, Franklin and John McGowan "On the Misuse of Accounting Rates of Return to Infer Monopoly Profits," *American Economic Review*, 74 (1983), 82-97 and a "Comment" on that paper by William Long and David J. Ravenscraft in the *American Economic Review*, 74, (1984), 494-500. Although the substantive merits of accounting data were in dispute in the economics profession, the views of the profession may have had less to do with the demise of the program than did the vigorous lobbying against the data collection by the Business Roundtable. (BE History Roundtable, September 4, 2003, Scherer, pp. 205-206.) In an example of undying optimism, Bill Long predicted at the 2003 History Roundtable that the LB program would be resurrected by the Commerce Department's Census Bureau in the not too distant future (BE History Roundtable, September 4, 2003, Long comment, pp. 220.) As of mid-2013, no line-of-business program is listed in BEA's 2014 budget or in Census data sets.

of investigations, economists have an opportunity to provide input at most decision points.[152] Economists play similar roles in the slower moving, nonmerger antitrust investigations (e.g., horizontal restraints, single-firm exclusionary practices, and distributional and marketing arrangements, monopolization). In addition, economists make recommendations to the Commission, and provide litigation support and expert witness services for those cases that are prepared for trial. In interacting with the FTC's attorney staff, the economists try to wear two hats.

First, the economists act as colleagues, advisors, and complements to the attorney staff. The economists also function as independent advisors and case evaluators either to internal decision-making committees or to the Commission itself. Fulfilling this dual role has often been challenging, because the evaluation role can sometimes conflict with the attorney staff's various roles and their policy choices.[153]

Historical records regarding the pre-1960's role of economists in antitrust are scarce. Much of what is written here comes from Annual Reports, a few law journal articles, a 1960-vintage Bureau of the Budget review of the FTC, occasional Congressional testimony, and the memories of a very few "old hands" at the FTC, fortunately supplemented with recollections from the September 2003 Bureau of Economics History Roundtable and communications associated with that event.

Very early in the Commission's history, the legal cases went through a review panel for evaluation. At one point, three economists and three attorneys sat on that panel. By 1925, however, the panel had

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152Auerbach (1964, pp. 408-413) once suggested that economists or businessmen might be able to run a legal shop and that suggestion ran into a buzz-saw of objections. It was not until 2001 that such an event would occur, when an economist (Howard Beales, who had years of FTC legal bureau experience) was chosen to lead the consumer protection bureau. The more viable suggestion would be whether economists could ever obtain a significant role in strategic planning and policy development -- areas in which they might appear to have a comparative advantage via training and a broad conceptual view of antitrust and consumer protection issues. BE may have had such a role in the early 1970s under BE Director H. Michael Mann. Not everyone would applaud an outcome in which economists had much influence in planning, however. Liebeler in Clarkson & Muris (1981, pp. 65-73, 96-97), for example, criticized the role of economists in antitrust planning in the 1970s arguing that economists had an inappropriate affinity for an overly structuralist approach to the analysis of markets, and that they aided and abetted a program aimed at industry-wide problems that Liebeler saw as wrong-headed. Not surprisingly, ex-Director Michael Scherer, among others, did not share Leibeler's view (Scherer letter to Pautler, July 31, 2003, p. 4, 5).

153Through the 1980s, BE managers thought that economists in the Bureau had successfully carried out these somewhat conflicting tasks for many years, through many hundreds of merger investigations. See Letter from John L. Peterman, Director, Bureau of Economics to Professor Ken Elzinga, February 17, 1989, Attachment 3, p. 4. More recently, both the FTC and DOJ have argued that their economists serve a role as a "second pair of eyes" (i.e., quality control) on antitrust matters. See Handbook of Competition Economists, Global Competition Review, 2006 & 2007. To understand the occasional conflict in the case support and evaluation roles, one must distinguish between (1) litigation support, and (2) pushing investigations toward pro-enforcement outcomes. Economists have always worked pretty hard on the first function, but did not always vigorously pursue the latter, depending on the perceived value of the investigation. Failure to push the FTC toward pro-enforcement decisions is a key cause of the tension that often arises between economists and attorneys at the FTC, if the legal staff chooses to pursue a case. It is the reason attorneys sometimes cut economists out of information flows. Outside consulting economists much less frequently face this conundrum, because they are seldom hired to trade-off all the costs and benefits facing a decision-maker and the American taxpayers to reach an optimal policy choice. Rather, they are typically hired to support a client by providing factual, technical, and analytical inputs into the decision process, but they have little if any direct role in public policy choices or (if they are a testifying witness) they long ago tentatively concurred with the hiring attorney's position.

been reduced in size and the economists had been removed.[154] During this early period, economists at least occasionally worked on litigation support, with 17 economist and accounting staff working on cases in 1924.[155] Later on, economist/accountants played a role in Robinson-Patman casework, because those cases often required a good deal of accounting effort to handle the cost-justification defense. In 1936, BE hired a specialist, Willis J. Ballinger, to handle that area.[156]

Economists appeared to be involved in broader antitrust casework since at least the 1940s, providing support to the attorney staff in investigations and trial work.[157] In the early 1950s, the FTC indicated that it was going to examine the economic effects of firm behavior rather than simply applying rules of thumb for enforcement.[158] This alteration, if real, would have required that economists become more involved in developing cases. It also appears from various sources that after the Celler-Kefauver Act was passed,[159] BE, in conjunction with the Bureau of Investigation, had a role in examining mergers and selecting those worthy of enforcement action. This merger screening effort continued throughout the 1960s.[160]

154Stevens (1925, p. 638). Many of the legal cases would have involved what today would be considered consumer protection issues (misrepresentation and false advertising) and resale price maintenance. Cases involving pricing practices of various types, including delivered pricing cases, were a focus of FTC attention. See Winerman and Kovacic (2010).

155FTC Annual Report (1924, p. 3). There do not appear to be records of economist activities generally during this period, rather one sees occasional mentions in various reports. It is clear that economists worked on major studies and reports. The extent of work on case generation, investigations, or litigation is much less clear.

156FTC Annual Report (1938, p. 16). As noted earlier, Ballinger also oversaw production of various FTC reports for the Temporary National Economic Committee.

157The FTC Annual Reports begin to discuss the economists' role in non-Robinson-Patman case and trial work in 1943. See FTC Annual Report 1943, p. 7. Also see FTC Annual Report 1947, p. 5. In discussing the role of the Economic Division of the FTC, Stevens (1940, pp. 568-71) never mentions any day-to-day antitrust casework by the Division, but indicates that information in some of the Division's reports was used in antitrust probes in several industries (petroleum transportation, farm implements, newsprint, furniture, refrigerators, and meat-packing) and the Division may have had some hand in supplementing that information for use in the cases.

158Various documents imply that on the merger front a change toward an examination of actual economic effects occurred in the early 1950s. See, for example, FTC Annual Report 1954, pp. 1-4; and OMB Budget Justification book, FY 1956, pp. 2, 108. Chairman Howrey, in 1953, apparently intended to accomplish this change, but he also clearly wanted it accomplished with economists working under the direction of attorneys. (See Howrey speeches, June 18, 1953, p. 4; June 17, 1954, p. 3; and August 19, 1954, p. 3; and BE History Roundtable, September 4, 2003, Markham pp. 17; 75-77). Jesse Markham (1964), BE's Bureau Director from 1953 to 1955, indicates that the FTC's antitrust enforcement was still based almost completely on rules rather than economic analysis, even after the 1953-1954 attempt to more fully incorporate economic analysis.

159In an interesting indication of the tenor of the times, the 1951 FTC Annual Report (p. 5) indicates that the Celler-Kefauver amendments were passed in December 1950 to "stem the destructive tide of the merger movement among industrial and commercial corporations...."

160Recall that this period predated the 1969 start of the merger pre-notification program. Thus, merger screening would have been a much more difficult activity than in the 1970s and beyond (see BE History Roundtable, September 4, 2003; Markham, p. 19). The FTC Annual Report (1950, pp. 9-10) implies that BE had a role in all phases of investigations. Various FTC annual reports during the period imply an expanded role for economic input in the FTC's cases as the Agency tried (unsuccessfully it seems) to shift away from small cases (e.g., Robinson-Patman) toward larger monopolization cases. See FTC Annual Report (1954, pp. 2-4, 61-62). Also see, letter from FTC Chairman Earl Kintner to Senator Hubert Humphrey, July 28, 1960 (reprinted in hearings before a U.S. Senate Subcommittee of the Select Committee on Small Business, Food Marketing, June 22, 1960, pp. 36-38). Mr. Kintner indicated that from 1950 to 1954 economists had been in charge of choosing merger cases and only one case had been initiated. This story is also recounted in Bureau of the Budget (1960, pp. 119), but it does not appear to be reliable. At least by 1954, the Bureau

In the early 1950s, attorneys and economists were debating the question of whether it was better to use simple rules or a broader rule-of-reason analysis. The FTC attorneys tended to take the position that antitrust law should be enforced as it had been previously, with simple and tightly constraining rules and little discretion. The economists uniformly disagreed with that typical attorney's view, but they also differed strongly among themselves regarding the best policy approach to antitrust enforcement. John Blair and Corwin Edwards (and later Willard Mueller), top-level BE economists, favored an approach that relied heavily (but not exclusively) on structural factors (market share and concentration) to determine when mergers should be blocked. This view was, in part, an out-growth of reliance on cross-sectional empirical work of the pioneering industrial organization economist, Joe Bain. Jesse Markham, on the other hand, favored a more flexible rule-of-reason approach to enforcement, in which many factors would be weighed in deciding whether a merger or non-merger case should be pursued.

The intellectual debates regarding the proper approach occasionally became heated. The Commission's challenge to the Pillsbury Mills merger in 1953 initially followed a limited evidentiary approach and then, after running into judicial impediments (i.e., the judge thought a broader inquiry was needed than that provided by the FTC), the FTC litigators later followed a broader rule-of-reason approach that allowed a wide range of arguments to be put forward by the firm in defense of the milling/baking merger. The case took years to litigate, and it was eventually disposed of in the early 1960s, without a decision. One could argue that the rule-of-reason approach had been too wide-ranging for the administrative litigation process to handle. Alternatively, one could argue that it was badly litigated or should never have been pursued. Whatever the view, it was not the Commission's finest hour and the attorney staff may have felt that the economists had helped lead them to this debacle.[161]

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was in charge of screening mergers via business press reports (FTC Annual Report 1954, pp. 62-63; Congressional Hearings before the House Small Business Committee July 1955, pp. 455). Prior to that time, the Bureau had been tracking merger reports and had uncovered thousands of mergers. Over 600 initial investigations had been started by the Bureau of Investigation as a result (FTC Annual Report 1953, p. 17). By 1955, five large mergers were in administrative litigation. It appears that BE had uncovered many mergers and reported hundreds to the legal Bureau (BE History Roundtable, September 4, 2003, Markham, pp. 19-20.) Of those, few resulted in formal actions. It may be that the newness of the Clayton Act amendments caused the FTC to be somewhat careful in its choice of cases in the early 1950s. From 1950 to 1956, the antitrust agencies brought 29 complaints under amended section 7. See Mueller (unpublished manuscript on the 1950s and 1960s, 8-20-03, p. 4); and also see Mueller e-mail, August 13, 2003 where a former Bureau Director discounts the story of BE reticence to initiate merger cases in the early 1950s. The key economists in BE at the time, Corwin Edwards and John Blair, would have been considered activist anti-merger enforcers by any standard. Blair (later the 1960s Chief Economist for the Senate Antitrust Subcommittee) had been instrumental in drafting the 1950 Celler-Kefauver (anti-merger) Act amendments to the Clayton Act.

[161]Mueller (8-20-03 memoir segment, pp. 2-4; August 13, 2003 e-mail, "re: BE History Questions on 1950–60," and 2009, p. 40); and Markham, BE History Roundtable, pp. 17-18. This "rules versus discretion" debate would be replayed years later in early 1982 when the structural criteria to be included in the Merger Guidelines were debated. BE's John Peterman would argue for a high but binding structural threshold, while BC's Tom Campbell would argue for tighter (or no) thresholds, but more discretion. Memorandum from John L. Peterman to Chairman Miller, February 19, 1982. Indeed, versions of the "rules versus discretion" issue also arose repeatedly during 1995 to 2010 in attempts to coordinate international antitrust policy and enforcement. Some nations were more interested in using easy-to-define rules for competition enforcement than were others.

In 1955, whatever influence economists had on antitrust work, independent from the attorney staff at the Commission, would have likely vanished as, in response to a management consultant's suggestion, the antitrust economists were moved out of BE and were housed in the legal bureau handling antitrust matters.[162] After the antitrust economists were moved into the legal shops, the remainder of BE (which had been devoted to economic reporting), became more heavily devoted to case-related litigation tasks.[163] Because many of the attorneys who headed the component shops of the legal organizations at this time (e.g., general non-merger antitrust) saw little value in economic analysis, the economists worked almost exclusively on merger cases where such anti-economist inclinations did not predominate.[164] This reorganization explains why the FTC Annual Reports from the latter 1950s give the impression that economists on antitrust matters were subordinate to the attorney staff[165] - they worked in the merger shop directly for the attorneys and presumably would have had little, if any, independent voice in matters.

The situation began to change in mid-1961 when the economists were reunited in one Bureau under the direction of Willard Fritz Mueller.[166] That reunion apparently increased the role of economists, although it would do so only slowly, because economists were still effectively shut out of non-merger casework and altering that equilibrium would not occur quickly.[167] In addition, the economics staff

162Auerbach (1964, pp. 396-405 discussing the February 1954 report from Robert Heller & Associates). Also see, letter from FTC Chairman Earl Kintner to Senator Hubert Humphrey, July 28, 1960 describing the organization of economists and attorneys at the Commission from 1954 to 1960 (reprinted in hearings before a U.S. Senate Subcommittee of the Select Committee on Small Business, Food Marketing, June 22, 1960, pp. 36-38). In 1955, the economists who worked mainly on antitrust cases were assigned directly to work in the Bureau of Litigation and the Bureau of Investigation (due to a 1954 FTC-wide reorganization, both antitrust and consumer protection investigation work were done in one legal bureau). At that time, all the Bureaus were overseen by the Executive Director's Office and the movement of economists into the legal Bureaus was said to be a means of improving coordination. As of 1960, a group of at least 10 economists, 2 statisticians, and 4 clerical staff were housed in the Bureau of Investigation and were led by economist, Roy Prewitt. Also see, Bureau of the Budget (1960, pp. 31, 119-120, 145).

163In 1955, over 60 percent of BE's resources were used in trial or pre-trial work. See FTC Annual Report (1955, p. 57). Such resource diversions, were probably one reason that the antibiotics report, that had been started in 1953 took five years to complete. This type of reallocation away from the reporting function continued through 1962, when 37 percent of the budget of the Economic Reports group went to the Economic Evidence group due to casework considerations. See FTC Annual Report (1962, p. 75).

164The use of economists almost exclusively on merger work, rather than nonmerger antitrust, apparently continued throughout the 1960s, perhaps because the attorney who ran the nonmerger antitrust shop (then called General Trade Restraints), Rufus Wilson, apparently saw no value in economic analysis. See Auerbach (1964, pp. 399-402) and Steve Nelson (5-12-00).

165See, for example, the 1957 FTC Annual Report, pp. 66-67. This secondary role for economists is consistent with Steve Nelson's (5-12-00) recollections of discussions with others, but he was not at the agency until 1967. Jesse Markham (1964, pp. 408-11) also indicated that economists in the 1950s had little, if any, influence on FTC matters, particularly those related to enforcement. Perhaps part of the lack of economic influence also stemmed from the fact that antitrust policy and economic learning were reasonably consistent in the 1940s to 1960s - both focused on simple indicators of market structure as reliable measures of likely market power. Markham had, however, argued for a less avowedly structural view of market performance.

166Mueller came to the FTC with the assurance that the economists would be reunited. See Mueller (2-2-03, p. 10). The accounting staff were also to have been reincorporated in BE, but that did not occur until much later, in 2002. Leaving the accounting staff in the legal bureau kept BE a bit further removed from the Robinson-Patman cases, where the accountants did a lot of their work.

167Auerbach (1964, pp. 401) citing the Chief of the legal bureau's Merger Division. In 1962, the antitrust legal Bureau had three equally-sized investigation divisions: one specialized in Robinson-Patman cases, a second handled non-merger assigned to antitrust work was small, numbering about 14, and was not as highly educated as would later be true. As a result, they could not cover all the case development work and provide litigation support. Mueller was interested in getting economists more involved in case selection and case support in the non-Robinson-Patman antitrust area.[168] He reportedly convinced FTC Chairman Dixon that in order to effectively support the increasingly complex antitrust cases, more highly trained economists would be needed.[169]

Surprisingly, economists also took on the job of initial merger screening in 1962 with attorney staff retaining the ability to overrule any BE decision.[170] The antitrust legal bureau's Division of Mergers also reportedly involved economists in almost all other aspects of their work. Economists' views were solicited in opening or closing investigations, in consent negotiations, and (at the discretion of the attorney-in-charge) in preparing a case for trial. On rare occasions, an economist might be asked to testify before a Hearing Examiner. Mueller, himself, had influence at the Commission because he served as the economic advisor to the Commissioners when cases came up for Commission level review in the administrative litigation process.[171] For example, Mueller worked with Richard Posner and Commissioner Phillip Elman in writing the 1963 Procter & Gamble decision. Citations to prominent industrial organization economists of the time were sprinkled liberally throughout the decision as the basis for the conceptual framework for the case.[172] Mueller was also instrumental in

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antitrust, and the third focused on merger work. Long-time FTC economists, Steve Nelson (5-12-00) and Mack Folsom (10-23-00), confirmed that as of the late 1960s, the Bureau of Economics had some influence in the merger area (Nelson, himself, did some automotive parts merger cases and Mack Folsom had a seat on the Merger Screening Committee), a little influence in the Robinson-Patman area (occasional work in producing evidence for cases in litigation, but no one asked BE's opinion of most R-P cases - everyone already knew by the late 1960s it was almost uniformly unfavorable), and no influence at all in the non-merger antitrust area. This situation apparently would change in 1969 when Caspar Weinberger became the head of the FTC.

168As Scherer's 1975 Congressional testimony makes clear, the BE staff had not been proponents of Robinson-Patman (RP) cases for many years and the FTC had started to scale back RP enforcement in the latter 1960s - all but abandoning it by the mid-1970s. The decline in RP enforcement did not sit well with the FTC attorneys who specialized in enforcement of that law and they complained to Congressmen who were RP enforcement proponents. As a result, Congress held hearings to examine the economists' antipathy toward RP enforcement and to "impeach" the recalcitrant economists. Fortunately, the economists were able to provide evidence that RP Act enforcement by the FTC was mainly harming the small firms it was originally intended to help, and, therefore, the decline in enforcement of the law was allowed to continue. BE History Roundtable, September 4, 2003, Folsom, pp. 64-66; Scherer letter, July 31, 2003, p. 6; Scherer, Prepared Statement, U.S. House of Representatives, Committee on Small Business, Recent Efforts to Amend or Repeal the Robinson-Patman Act, Part 2, Washington, December 1975, 145-150 and Appendix; reprinted in F. M. Scherer, *Competition Policy, Domestic and International*, Chapter 12, (Edward Elgar, 2000). In April 2007, the Antitrust Modernization Commission recommended repeal of the RP Act, but as of 2015 that action has not yet occurred.

169Steve Nelson (11-30-00). Mueller's vision for the Bureau included both in-depth case study work such as that taught by Edward Mason, but more importantly, cross-section industry empirical studies, such as those pioneered by Joe Bain, using line-of-business information and data obtained via compulsory process. See Mueller (2004, p. 97, and 2009, pp. 91).

170Auerbach (1964, pp. 400-401). A Merger Screening Committee existed since at least 1964 and the head of BE's Economic Evidence shop (Mack Folsom, and later Mike Glassman) was always involved in that meeting. Mack Folsom (10-23-00). Also see FTC Annual Report 1967, pp. 61-62. Economists also provided evidence for over 100 merger investigations each year. See FTC Annual Reports 1969, pp. 6-7; and 1973, pp. 17-24.

171Mueller often avoided any contact with the BE staff on cases so he would be available to serve in the advisory capacity under the Administrative Procedure Act of 1946.

172Mueller (2009, 67-68 and 167-168). Mueller (p. 167) describes the decision in the P&G conglomerate product extension merger as "a tour de force of economic analysis." The decision was the responsibility of Commissioner the development of several industry-specific merger guidelines, the advent of the FTC's 1969 merger pre-notification program (which later evolved into the Hart-Scott-Rodino Act),[173] and the early progress of the line-of-business reporting program.[174]

All of these 1960s developments may have been an out-growth of Mueller's efforts to become well-acquainted with top Commission decision-makers and political figures on Capitol Hill, as well as the White House. This contact with political figures and lobbying for data collection efforts and merger pre-notification was unique in BE history (although the FTC's first Chief Economist, Francis Walker, may have also been something of a political operative.)[175]

Economists' role in antitrust expanded beyond the merger review role after 1969 when the FTC was reformed in a major way. FTC Chairman Caspar Weinberger removed many of the previous legal bureau managers and altered the case selection criteria.[176] This pattern of reform continued with the following FTC Chairmen. Prior to the mid-1970s, the senior attorneys and perhaps an economist might talk to a Bureau of Competition deputy director to get a nonmerger case approved. By the mid-1970s, BE had some influence in nonmerger case selection, through a formal BC evaluation committee.[177]

The role of economists in antitrust cases grew from 1970 to 1990 not simply because of FTC internal reforms, but also because economics generally became a more important component of antitrust analysis and antitrust litigation.[178] Calls had come from many quarters for the Commission to engage in some form of planning to allow it to focus on important cases rather than focusing most of its

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Elman and was penned mainly by Richard Posner.

173See the discussion of the pre-merger reporting program in the section discussing systematic data collection at the FTC, Mueller (2009, pp. 133-142), and Mueller (2004, pp. 101-103).

174Mueller (2004, pp. 97-99).

175Mueller (2004, pp. 98, 103). For a description at greater length of Mueller's work in Washington in the 1960s, see Mueller (2009).

176Steve Nelson (5-12-00). Weinberger reportedly fired 18 of the 31 top FTC staff and reorganized the Commission around the consumer protection and competition missions. Major changes in lower-level FTC staffing occurred under the next Chairman, Miles Kirkpatrick.

177Clarkson & Muris (1981, p. 293), Eisner (1991, pp. 170-171), and Katzmann (1980, pp. 20-24). Katzmann (1980, pp. 50-51) indicates that even in the 1970s, however, the attorney staff would still prefer economists to be in support roles in the Bureau of Competition, rather than located in an autonomous Economics Bureau.

178See generally, Kovacic & Shapiro (2000) arguing that from 1940 to 1960 antitrust law and mainstream economics were consistent with each other, as economists focused heavily on in-depth industry studies and later on the effects of cross-industry market structure on market performance. That consistency began to break down in the 1970s as economists began to question the structurally-based antitrust paradigms. Also see Eisner (1991, pp. 217-219) who argues that economic expertise began to erode the supremacy of attorneys in antitrust analysis in the late 1960s and 1970s. Baker (2002, p. 68) argues that in the short-run, lawyers and judicial precedents move antitrust, but in the longer-run, economic thought tends to shape judicial thinking and, therefore, antitrust policy. Similar thoughts were expressed by Leary and by Salop, at least as it relates to the influence of economists in recent times (*Antitrust and Trade Regulation Report*, BNA, Feb. 23, 2001, pp. 155-156). The increasing influence of economists generally in antitrust was also evidenced by the founding of the Economic Policy Office (now called the Economic Analysis Group) in the Antitrust Division of DOJ in 1973 under the direction of George Hay. Previously, starting in the latter 1960s with Assistant Attorney General (AAG) Donald Turner, a more informal advisory role had existed for the academic economists, who held a short-term advisory position to the AAG. Industrial organization economists, Bill Comanor, Oliver Williamson, Leonard Weiss, Ken Elzinga, and Geoff Shepherd, among others, filled this slot. See Kauper (1984) and Eisner (1991, pp. 135-148.)

resources on small firms in relatively unimportant industries.[179] It was thought that economists might be able to help in that case selection effort. For example, a former BE antitrust manager argued that use of systematic data on market concentration, firm size, and company product lines would be essential components of a plan to target cases efficiently.[180] In addition to this move toward a case selection role, a major reason for enhanced economist involvement after 1970 was the diminished importance of *per se* rules in antitrust. As the law moved more toward rule-of-reason analysis in antitrust, more thought had to be given to market power and to the ultimate effects of various business practices.[181] No longer was it sufficient to prove that a firm behaved in a particular way, you also had to provide some evidence that the behavior likely harmed consumers. As that change occurred (slowly to be sure), economists became more valuable.[182]

The influence that economists have on the antitrust policy and enforcement decisions of the antitrust legal Bureau or the Commission is almost entirely derived from the interest of the Commissioners or Director of the legal bureau in economic analysis.[183] The Economic Bureau has no power of its own beyond its ability to influence the Commissioners' thinking through the strength of its evidence and logic.

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[179] Clarkson & Muris (1981, pp. 293-94, 301, 303) imply that BE and economists had influence in the 1970s because, in response to various critics, the FTC undertook a program to try to choose important cases and economists could use market structure data to help them do so. Economists' efforts to develop models that might incorporate market structure measures to be used to select cases for enforcement is mentioned in several FTC Annual Reports of the period, most explicitly in 1972, pp. 39-40; 1973, p. 2; and 1974, p. 2. Clarkson & Muris characterize that effort as misguided. Future BE Director Scherer (July 31, 2003 letter to Pautler, p. 4), who was a fervent supporter of the line-of-business data collection efforts, wrote a report in 1973 that was critical of the effort to use quantitative data to choose cases.

[180] Blair (1964, pp. 535-541) was convinced that conglomerate merger activity was one of the key problems facing the economy and that economists could help target future cases that would deter bad behavior by multifaceted firms. An antipathy toward conglomerate firms was fairly common among industrial economists in the 1960s and 1970s. See Mueller (2009, pp. 183-194).

[181] A comparison of the Supreme Courts' *Schwinn* (1967) and *Sylvania* (1977) decisions on manufacturer/retailer distribution restraints indicate this shift in thinking away from rigid rules toward an approach that focused more on the economic effects of the practices. Also see Calvani (2001, p. 13), Muris (2001), and Kovacic (May 2003, pp. 8-10) for a discussion of changes in the Courts that precipitated changes in antitrust policy at the agencies.

[182] See Jesse Markham (1964, pp. 409-410) for a discussion of the use of simple rules in antitrust law in the 1950s. Although Markham explicitly acknowledged the value of simple rules (if they were correctly set), he concluded that the use of such rules had made antitrust analysis too simple and had led to the wrong outcomes. He still clung to the notion that the FTC should be a body capable of in-depth analysis of complex business practices. The reliance upon simple rules was clearly inconsistent with any such expertise.

[183] The Commissioners, in turn, might have come to value economists due to their own preferences, the long term movement toward rule-of-reason analysis in antitrust, and/or due to the enhanced status of economists in many public policy circles. In discussing the influence of economists on internal FTC antitrust policy in the late 1960s and early 1970s, Katzmann (1980, p. 52) notes, "Indeed, Bureau of Competition executives were not especially attentive to the positions of the Bureau of Economics until the Commissioners became receptive to the economists' arguments." By 1982, the FTC's Annual Report noted (pp. 1, 5) that an economist had become the head of the Agency, consideration of economic issues had been elevated, and attorneys were taking courses in antitrust economics. Eisner (1991, p. 220) summarized the change "[o]ver the 1970s economic analysis had become an important component of most enforcement actions as a result of the evaluation committees and trends in judicial decision making. During the 1980s, economic analysis became paramount, as commission officials effectively prevented case recommendations lacking in economic merits from reaching the commissioners."

A. Industry-wide Antitrust (Shared Monopoly and More)

Individual accomplishments on the antitrust casework front from the 1970s and 1980s could include virtually every major case handled by the agency. Economists participated in them all, and played a disproportionate role in a few instances.[184] For example, many of the major 1970s antitrust cases focused on alleged exclusionary behavior by individual firms or groups of firms that would harm competitors and competition. In many of instances, the theories undergirding these cases were on the frontiers of industrial organization economic theory at the time. As a result, each of these cases would have required a significant effort to bring theory and evidence to bear, and the Bureau's economists would have been heavily involved. Many of the shared monopoly cases were begun in the early 1970s under the direction of BE Director H. Michael Mann.[185] Such cases focused on monopolization of the office copier market via patent pools and various exclusionary behavior (Xerox), preemptive capacity expansion in the production of titanium dioxide (DuPont), and predatory pricing in response to entry in roasted coffee (General Foods), and reconstituted lemon juice (Borden).

In addition, economists played a substantial role in various shared monopoly and facilitating practices cases that evolved during this period, including Kellogg (strategic foreclosure of competition via product proliferation and advertising in the production and distribution of ready-to-eat cereals), Exxon (allegations of industry-wide efforts to foreclose competition in the oil industry), and Ethyl (price signaling, most-favored-customer contract terms, and delivery terms that allegedly facilitated coordinated pricing of leaded anti-knock compounds). Most of these cases did not end in victories for the FTC, but the forays into economic (and legal) frontiers involved a great deal of economic input during the mid-1970s and early 1980s.[186] Economists at the agency would have learned valuable

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184It is difficult to define "greatest hits" for economists in the antitrust case area, because antitrust review is the day-to-day standard work and any "greatest hit" would have typically entailed the use of four times as many attorneys as economists. Although one cannot know with any certainty what actions the FTC or its staff would have taken but for the existence of BE, the available empirical evidence from a sample of FTC merger cases since the early 1980s indicates that BE economists had some independent effect on Commission actions even beyond any effect of economics generally on antitrust analysis. See Coate (1990, 2000, 2002).

185Mann indicated that "In one policy area, antitrust, many economists ... are advocating a forceful policy stance: placing greater emphasis on market structure and less on market conduct. And it is the case…that the Bureau of Economics played a strong role in the emergence and character of the [breakfast] cereals and Xerox antitrust cases; and that our efforts on behalf of policy planning have gently nudged the Commission toward looking at industries with particular structural characteristics." H. Michael Mann, "A Structuralist Direction for Antitrust: The View of a Policy Advisor," speech before a conference of the Minnesota State Bar Association and the University of Minnesota, April 28, 1973, p. 2; referenced in F. M. Scherer, "Merger Policy in the 1970s and 1980s," (pp. 83-101) at pp. 83-84 in Robert J. Larner and James W. Meehan, Jr., eds., Economics and Antitrust Policy, (New York: Greenwood Press, 1989). One particularly forceful voice for pursuing both the coffee industry predation case and the cereals industry shared monopoly case was BE economist/manager Michael Glassman (BE History Roundtable, September 4, 2003, Scherer, p. 45; Gaskins, pp. 59-60).

186The FTC did achieve a consent in the Xerox matter in 1975 requiring royalty free licensing of any three of various Xerox patents. Other patents had to be paid for. Whether the Xerox case, which spanned 1969 to 1975, was a success for consumers seems to be an issue of some debate. See Goetz and Schwartz' negative evaluation of the case and its outcome in Clarkson and Muris (Chapter 8, 1981). In addition, a Xerox CEO wrote (in David Kearns and David Nadler's, *Prophets in the Dark* (HarperBusiness, 1993, pp. 62-68 and 302)) that the "antiquated antitrust policies" just got in the way of the business and deflected attention from the Japanese threat, which was the real problem that Xerox faced. This CEO's story, however, might be consistent with a very positive outcome from the case, if the reason the lessons about the difficulty of applying new theory to the facts of particular industries.

One of the 1970s industry-wide efforts, the cereals case, was based on Chamberlain's and Stigler's oligopoly theories, Richard Schmalensee's space packing (product proliferation) entry barrier theory, and two empirical facts - the very high and persistent profitability and advertising intensity of the industry.[187] BE economists, particularly Mike Glassman[188] and Mike Scherer, supported the case vigorously and the litigation involved extensive debates regarding the appropriate methods of calculating economic profitability and the benchmark behavior that should have been expected in a fully competitive ready-to-eat cereals industry.

Regardless of the merits of the arguments on by both sides, the case attained a sufficiently high political profile that both presidential candidates in the 1980 election indicated that they would oppose the continuation of the case. The promotion of an anti-kid-vid program (aimed at limiting commercials on Saturday morning TV aimed at children) at the FTC also helped to undermine the case because it appeared to be "piling on" the cereals companies from another direction.[189] More substantively, the difficulties posed by determining when product variety was too extensive and devising a remedy for such behavior (if it existed) may have been two key factors in undermining the case when it reached the Commission level.[190]

Many of the other 1970's FTC monopolization and shared monopoly cases received substantial attention in the academic literature and BE economists who worked on the cases or who became familiar with them have been contributors to that literature. Although the list is too long to include all the articles, a few examples will illustrate the economists' involvement.

For example, for reviews of the General Foods coffee industry predation case, see John C. Hilke and Philip B. Nelson "Strategic Behavior and Attempted Monopolization: The Coffee (General Foods) Case," in J. E. Kwoka and L. J. White eds. *The Antitrust Revolution*, Scott Foresman, 1988; and Nelson, Philip, John J. Siegfried, and John Howell, "A Simultaneous Equations Model of Coffee Brand Pricing

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Japanese firms became the key factor in forcing Xerox to lower costs and improve quality was due to the licenses they had taken out under the order. Unfortunately, the book is very vague about whether the licenses were such a key factor. Regardless of how they achieved their expertise, however, the Japanese were producing products of higher quality than Xerox by the late 1970s. Scherer (2002, pp. 10, 327-342); Scherer letter 7-31-03; and BE History Roundtable, September 4, 2003, pp. 41-44) interprets the evidence as indicating that the Xerox remedy was quite effective and would have been unlikely to have significant deleterious effects on R&D activity. For an anecdote indicating that a Xerox repairman might have been the first "outsider" to see the FTC's Xerox complaint, see BE History Roundtable, September 4, 2003, pp. 71-72. Scherer (2015) recounts other 1970s industry-wide shared monopoly cases, the tetracycline "cartel" and ready-to-eat breakfast cereals.

187BE History Roundtable, September 4, 2003, Scherer, pp. 44-49, 69-71. Mueller (2-2-03 memoir, p. 13 and Roundtable, p. 72) notes that writing a memo to the Commission on the nascent cereals case in September 1969 was one of his last activities as Chief Economist at the FTC.

188Of non-Bureau Directors, Glassman may have been one of the most influential of BE economists. He was a forceful proponent of certain antitrust cases in the 1970s, and he (along with another BE economist Lloyd Oliver) started one of the first antitrust "boutique" consulting firms in Washington in 1976. Glassman's firm survived him for a few years before dissolving in May 2004.

189BE History Roundtable, September 4, 2003, Scherer, pp. 47-48.

190For a description and defense of the case by one of its chief proponents, see Scherer's discussion at the BE History Roundtable, September 4, 2003, pp. 44-49 and 69-70.

and Advertising," *Review of Economics and Statistics*, l. 74, February 1992, 54-63. For a description and analysis of the Ethyl antiknock compound case, see M. G. Vita, "Fifteen Years after Ethyl: The Past and Future of Facilitating Practices," *Antitrust Law Journal,* 2000.[191] In addition, David Scheffman argues that his 1980s work with Steve Salop on "raising rivals costs" was generated in large part by the search for a viable theory in the Exxon case.[192]

As with most antitrust matters (or other arguments in life), the proponents of the 1970s activist antitrust actions (in many cases, economists) continue to believe in the positive value of their efforts long after the case has been settled, even if the outcome was adverse to their position. Ex-BE Directors Mueller and Scherer argue that the cases undertaken in the late 1960s and early 1970s were effective efforts to promote consumer welfare.[193] Even those who were less enthralled with those cases consider that era to be a high-water mark for economists' influence in antitrust. For example, Ex-Director David Scheffman argued that the big 1970s FTC cases mentioned above represented the pinnacle of economists' influence on antitrust.[194] Jesse Markham appeared to concur. Markham, a BE Director in the mid-1950s, had long been a proponent of full rule-of-reason analysis in antitrust matters rather than enforcement based on simple rules. He viewed the big 1970s FTC antitrust cases as precisely what he thought should be done in antitrust - the use of economic analysis rather than simple rules to choose and pursue antitrust cases.[195]

Regardless of what one thought of the merits of the bulk of the 1970s monopolization and shared monopoly cases, one of them appeared simply to be an albatross around the neck of the Bureau and the FTC. That was the Exxon oil industry case, which was initiated mainly due to substantial pressure from various Congressional interests. The case involved the eight largest oil producers, who were alleged to have reduced competition via a number of industry-wide practices. Because that case had been proceeding without a viable theory for many years, in 1977 BE Director Darius Gaskins (with the assent of BC Directory Al Dougherty) convened a large team of well-known industrial organization economists and petroleum experts to study the industry and report back. The group concluded that the most of the correctable problems in the industry were the result of regulation, not market power, and that the antitrust case should be abandoned. That report, however, was suppressed by the BC Director and the case muddled forward for several more years before finally being jettisoned.[196] This investigation was part of an even larger energy studies project that started around

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[191]The Ethyl antiknock compound case, involving industry-wide practices that might tend to facilitate collusion, resulted in the publication of experimental research on industrial organization issues. Grether, David M. and Charles R. Plott (1984) "The Effects of Market Practices in Oligopolistic Markets: An Experimental Examination of the Ethyl Case," *Economic Inquiry*, 22, (October), 479-507. This was some of the early, applied research in the expanding field of experimental economics.

[192] BE History Roundtable, September 4, 2003, Scheffman, p. 77.

[193]BE History Roundtable, September 4, 2003, Mueller, pp. 72-73; Scherer, pp. 44-49, 69-70.

[194]BE History Roundtable, September 4, 2003, Scheffman, pp. 68, 95; and FTC 90th Anniversary Symposium, September 24, 2004, Tr. 112-114; and Calkins (2005, p. 1189).

[195]BE History Roundtable, September 4, 2003, Markham, p. 23.

[196]See Scherer (2000, p. 4), and BE History Roundtable (September 4, 2003, Gaskins, pp. 55-58). Gaskins argued that, as with many big antitrust cases, events over-took the Exxon case and made it non-viable regardless of its original merits. One good aspect of the Exxon case may have been that it acted as a "pressure release valve" for political complaints about the oil companies. Without such a release valve, Congress might have done something more harmful than initiating an unfocused antitrust investigation.

1975 and involved a number of economists who occupied half a floor in the modestly-sized Gelman Building. The studies covered oil and natural gas issues, including off-shore oil leasing. The investigations and studies were focused on describing the markets and uncovering conspiracies among the producers to reduce the output and raise the prices of various petroleum products.

B. Horizontal Merger Guidelines 1967-2010

Perhaps the most important series of antitrust events in recent times was the production and evolution of the merger guidelines. In Oliver Williamson's view, the "original" Department of Justice (DOJ) guidelines devised by Assistant Attorney General Donald Turner in 1967 were important to stop the trend toward blocking virtually all horizontal mergers, no matter how small and insignificant. The 1982/1984 rewrite of the horizontal merger guidelines was important, because for the first time the Guidelines provided information about why the antitrust agencies might block transactions.[197] It also slightly loosened the structural standards for a merger challenge, thereby allowing more horizontal mergers to proceed, and it took a much more explicitly economic approach to merger enforcement.[198] This was a break from very strict anti-merger structural rules that had evolved over the prior 40 years. A later rewrite in 1992 followed on the heels of major government defeats in the *Syufy* (entry analysis in movie theaters) and *Baker-Hughes* (entry and other factors limiting market power in the mining equipment industry) antitrust merger cases. That rewrite was also a major effort, led by the economics staff with relatively little attorney involvement until the end of the process. That revision (led by John Peterman and James Langenfeld of BE and Robert Willig and Paul Denis from DOJ) produced the first joint DOJ/FTC merger guideline document.[199]

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[197]The 1982 Guidelines were styled as a DOJ product, although both antitrust agencies had numerous attorneys and economists working on their development over the course of two years and some at the FTC thought they were intended to be a joint output. Several BE published papers flowed out of those efforts, including A. Fisher & R. Lande "Efficiency Considerations in Merger Enforcement," California Law Review 71(6), (1983), 1580-1696, and Pautler, P.A. "A Review of the Economic Basis for Broad-Based Horizontal Merger Policy," Antitrust Bulletin, 28(3), Fall 1983, 571-651; and "A Guide to the Herfindahl Index for Antitrust Attorneys," in R. Zerbe, ed., Research in Law and Economics, JAI, 1983, 167-90. In 1981, BE Deputy Director John Peterman surveyed several leading industrial organization economists to get their impressions regarding appropriate structural thresholds for antitrust merger challenges. That survey produced widely diverging opinions, with typical answers in the 2500 to 3000 Herfindahl range. (See BE History Roundtable, September 4, 2003, Peterman, pp. 92-93 and memorandum from Deputy Director John L. Peterman to Chairman James C. Miller III, February 19, 1982.) Regardless of what the academics thought, the DOJ ultimately decided to include relatively low numerical thresholds describing the market shares of the merging firms and the level of market concentration that would trigger a merger challenge. Almost simultaneously with the release of the DOJ Guidelines in both 1982 and 1984, the FTC released a Horizontal Merger Statement that provided less analytical detail and did not include numerical triggers. Those Statements, which almost immediately became a vestigial appendages, were penned by Walter Vandaele, and represented FTC Chairman Miller's preferred approach in providing guidance. For a discussion of the advent of the Guidelines from around the time, see Tollison (1983, pp. 211-215.

[198]For the argument that the 1982 Guidelines were a major advance in analytical rigor regarding market definition and that successive versions of the Guidelines took a more explicitly economic approach to merger enforcement, see Scheffman (1993, pp. 173-74), Langenfeld and Scheffman (1990, pp. 85-87), and Tollison (1983, pp. 211-215; regarding the 1982 Guidelines only). As these authors noted, the 1982 Guidelines did not very substantially loosen the numerical thresholds for merger enforcement that were included in the 1968 Guides. For an overview of the changes in the structural thresholds in the Merger Guides from 1968 to 1982, see Pautler, "A Guide to the Herfindahl Index for Antitrust Attorneys," in R. Zerbe, ed. Research in Law and Economics, JAI, 1983.

[199]Notes of a 02-03-05 conversation with John L. Peterman, former BE Director, regarding the advent of the Guides and the process of producing joint agency documents. The guide revision was initiated by DOJ (and likely by Bobby

The 1992 Guides added unilateral market power explicitly to the discussion of potential post-merger anticompetitive effects, made the post-merger collusion (coordinated interaction) scenarios more precise, and set more explicit standards for the conditions under which competitive entry might be expected to defeat a merger-induced price increase. The emphasis on unilateral market power issues was particularly important for the analysis of industries producing differentiated products.[200] Another revision of these Guidelines occurred in 1997. That revision was lead by the FTC, based on information gleaned from the FTC's 1995 Global Competition conference. It was much less extensive than the previous revision efforts, attempting to place more emphasis on the possibility that mergers might lead to efficiencies and making the analysis of those potential efficiencies more rigorous.[201]

The Antitrust Agencies produced a Commentary on the Horizontal Merger Guidelines in March 2006. The goal of the exercise was to enlighten firms about factors that might cause the analysis of a merger to vary in subtle ways. The Commentary also made it clearer that the antitrust agencies do not follow the guidelines in a linear fashion, but rather analyze facts and evidence in an iterative process to reach decisions about the likely effects of a merger. The Commentary, by providing a wealth of specific case examples, is still a valuable supplement to the Guidelines.[202]

By 2009, it had been almost two decades since the Guidelines were last revised and the new lead economists at both the DOJ (Carl Shapiro) and the FTC (Joe Farrell) wanted to update them, and so they did. FTC Chairman, Jon Leibowitz, and DOJ Assistant Attorney General, Christine Varney, publically announced the revision effort on September 22, 2009. Following various comment periods, the new version was ultimately released on August 19, 2010.[203] The revised Guides placed less emphasis on the formal definition of antitrust markets and moved the analysis toward a more complete examination of post-merger incentives for the merging firms and the rest of the industry. That change is consistent with various trends in the economics literature. In addition, the 2010 version raised the stated structural thresholds for a merger challenge to the levels that had actually been observed in challenges over the previous two decades.[204] The new Guides also explicitly

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Willig). Peterman had been tasked by Chairman Steiger to be the FTC leader on the project. According to Peterman, the four person, multi-month FTC/DOJ drafting process went quite smoothly relative to the later FTC review process. For a paper that presaged the 1992 Guidelines and provided a rationale for the revisions, see Willig (1991).

200In connection with the 1992 Guidelines revision, an effort was made by BE economists to raise the numerical enforcement thresholds, but that effort was unsuccessful. (BE History Roundtable, September 4, 2003, Peterman, p. 93).

201Some attention to efficiencies had existed since the 1984 Guidelines and the emphasis had risen in each subsequent version of the guides. In fact, the major reason for the 1984 rewrite was to include some discussion of potential merger efficiencies, a factor that was missing in the 1982 Guides. A DOJ challenge to a steel industry merger case in the early 1980s -- a merger that was said to be highly efficient by allowing capacity rationalization -- was likely the factor that precipitated this revision.

202See footnote 1 of the 2010 Guidelines for praise of the Commentary.

203Shapiro (2010), then Chief Economist at DOJ, provides some history of the Guidelines and discusses the 2010 version at great length. He and Joe Farrell, at the FTC, were the two key proponents of this round of revisions. After circulating a paper for a couple of years on the concept of Upward Pricing Pressure, they published their thoughts on the UPP concept in 2010, and Farrell (2011) corrected some misimpressions about the new Guides in his published work. Other members of the Guidelines team included Howard Shelanski, Richard Feinstein, Molly Boast, and Phillip Wiser.

204After a few initial efforts at enforcement, neither agency adhered to enforcement at the structural levels stated in the 1982 Guidelines. Rather, markets typically had to be more concentrated than indicated in the Guidelines before a discussed the likely effect of buyer strategies and buyer power on the analysis. In addition, they discussed the types of evidence that the agencies rely on in their merger analysis. The new version increased the analytical rigor and complexity of the Guidelines and focused attention even more on the conditions, other than structure or coordination (e.g., evidence of direct competitive effects) that might make mergers problematic. They accomplished this, in part, by introducing the concepts of diversion (from one particular product to another) and Upward Pricing Pressure (UPP), as factors to supplement HHIs in the analysis of mergers.

One FTC Commissioner (Thomas Rosch) voted for the revised guides, but wrote a critique that focused on the argument that the 2010 version looked too much like it was fashioned by economists who have little regard for facts and rely too much on profit margins to draw implications. That critique was generally consistent with Commissioner Rosch's (2007, 2009) speeches over the previous few years that evinced an antipathy toward the typical economists' approach to antitrust enforcement.

C. Merger Investigations

Apart from the major industry-wide case efforts of the 1970s and the guidelines projects, the Bureau played a major role in most large merger cases during the past twenty-five years.[205] BE often shaped arguments and presented evidence that affected how cases were pursued. Economic input into the

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merger was challenged. For evidence on this point as it applies to the FTC, see Coate (2000, pp. 335-337); and the FTC's 2013 update reviewing its 1996 to 2011 merger enforcement efforts. (https://www.ftc.gov/reports/horizontal-merger-investigation-data-fiscal-years-1996-2011). Werden (2001, pp. 15-16) notes that in his experience (at the DOJ) many mergers in the highly concentrated range were not challenged and very few government challenges occurred in markets unless the Herfindahl index changed by more than 500 points. Also see the charts in William Kolasky's (DOJ's Deputy Assistant Attorney General) April 24, 2002 speech to the American Bar Association, Antitrust Section on "Coordinated Effects in Merger Review: From Dead Frenchman to Beautiful Minds and Mavericks.").

[205]Prior to 1980 few horizontal mergers of any size were attempted, because firms knew that such mergers would be summarily blocked and the Courts would not overturn those Agency judgments. Thus, economists and attorneys did not have a target-rich field of mergers to choose from in bringing anti-merger cases. That changed a bit starting in the 1980s. A few of the major horizontal merger matters handled in the 1980s included: the GM/Toyota joint venture decided in December 1983 (BE provided over 1,000 page submission in the analysis of that matter and was instrumental in the outcome according to diverse sources (See Langenfeld and Scheffman (1990) and Statement of Ralph Nader and Jay Angoff before the U.S. House Subcommittee on Commerce, Transportation, and Tourism, February 8, 1984); the proposed oil mergers in the early 1980s involving Mobil/Marathon, Texaco/Getty, Gulf/Cities Service, and SoCal/Gulf; various hospital merger cases; the 1984 carbon black industry restructuring; the B.F. Goodrich/Diamond Shamrock transaction involving polyvinyl chloride and vinyl chloride monomer; a 1983 international merger in flat glass (Pilkington); the 1984 recorded music industry merger (Warner/Polygram); the proposed 1986 merger of PPG and Swedlow in high-tech aircraft transparencies; challenges to proposed 1986 mergers of carbonated soft drink producers, Pepsi/7-UP and Coke/Dr Pepper; and KKR's 1989 leveraged buyout of RJR/Nabisco (notable mainly for its size at the time ($25 billion)). Occasionally a vertical merger would be investigated in the 1980s. This occurred in conjunction with a series of soft drink bottling mergers (both vertical and horizontal mergers) that were part of the soft drink distribution industry restructuring in the mid-1980s. Although review of horizontal mergers remained the main pastime for economists in the 1990s (including another round of hospital and oil industry mergers, as well as several defense and pharmaceutical industry consolidations, drug wholesaling consolidations, and several consumer branded products mergers), mergers with a predominantly vertical character occasionally took center stage, such as various mergers of drug makers and pharmacy benefit management firms (e.g., Lilly/PCS, and Merck/Medco), and the media mergers of TimeWarner/Turner and AOL/Time Warner. In addition, time was found to pursue a patent-based monopoly case (Intel).

large antitrust cases are part of the daily give-and-take involved in framing arguments and developing evidence for merger and nonmerger cases.[206] Economists played a major role in such activities at least since the mid-1970s and had some lesser input prior to that time. Early in this period the issues in merger cases often revolved around fairly standard market definition and concentration measurement issues, but as time passed and a more analytical approach was taken to cases,[207] the issues became more complex, focusing more on the specific merger-related stories of anticompetitive effects.

The analyses often had interesting twists, involving questions such as the extent to which information from rival sellers or customers should be weighed in the analysis, the ability of sophisticated customers to deter seller coordination or to integrate backward into production (e.g., intermediate chemicals), whether internal capacity should be counted in the market (e.g., computer chips as inputs into PCs), the extent of supply elasticity by fringe firms, whether both used and new equipment should be counted in some industrial goods markets (e.g., mining equipment), whether contract terms should influence the way markets are defined (e.g., railroad box cars), how partial ownership shares might affect the incentives and ability to collude (e.g., pipelines), which retailing formats effectively competed with each other, whether the incentives of firms in a market might diverge sufficiently to make post-merger coordination difficult (e.g., flat glass), the differences between markets with posted pricing, negotiated pricing, and competitive bidding (e.g., defense industries). Patent licensing remedies even came to the fore on occasion (e.g., surgical products). Economists tried their hand at tackling these and many other interesting issues in the merger reviews.

D. Narrow Markets

One of the biggest changes that occurred on the antitrust merger front over the past 30 years has been the change from a focus on broad markets to a focus on narrow markets, particularly in consumer goods cases. This change has been most evident in merger enforcement. In the mid-1980s, economists (both inside the FTC and outside consultants for the merging parties) sometimes argued that "feet were in the market for shoes" or that "all potable liquids" was the proper product market in which to analyze a soft drink merger. These were fanciful perhaps, but they illustrate the point. Turning the clock forward to 2003, economists argued that reasonable product markets consisted of super-premium ice creams (Nestle's Haagen Das and Dreyers' Dreamery) in one case and high intensity breath mints (Wrigley/Altria) in another. In 2009, the FTC proposed a market of "drycast concrete hardscape products (pavers) sold through national homecenters" as a market (Oldcastle/Pavestone). Liquors were divided into markets by base liquor type and price points (Guiness/GrandMet). Had such cases existed in 1980, I can readily imagine that economists would

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[206] For a description of several FTC cases from the 1980s through 2002 indicating the increasing role of economic analysis in general antitrust casework over the period, see Scheffman, Coate, and Silvia (2002). This increase in the use of economics in the FTC's investigations and cases over this period could not have occurred without substantial input from the Bureau's economists. Indeed, as the SCS paper indicates, several BE economists over the years published papers based on antitrust casework done at the Agency.

[207] The more analytical approach placed less emphasis on the concentration and share numbers and more emphasis on other factors that might help predict the outcomes of mergers. For one view of the 1980s antitrust activity by economists at the FTC, see Langenfeld and Scheffman (1990). They argue that economists' day-to-day role in shaping antitrust was greater in the 1980s than in the 1970s, but that economists' general influence was less important than it had been in the days of the big antitrust cases of the 1970s.

have given serious consideration to markets such as desserts; treats or candy; building materials for decks and patios; or all alcoholic beverages.

The advent of these very narrow product markets was not just due to economic and legal consultants arguing whatever was best for their client at the time, although I have no doubt that such incentives affected arguments in some individual cases. So what did cause this change? At least two factors were at work. First, economists had come to take models of product differentiation much more seriously in merger analysis. Such models came to be used more often than collusion models in the initial thinking about merger effects (That is, Hotelling and game theory started to trump Stigler's model of collusion). Naturally, this change worked its way through to the attorneys over time and the focus on differentiation became a bigger part of the Merger Guidelines in 1992.

On the empirical front, as mentioned earlier, the availability of very detailed data on product pricing and sales (and the technology to move and analyze such data quickly) made it possible to see how prices of products affected each other in the short run. These empirical advances allowed estimation and that estimation often showed that markets were narrower than one might have previously suspected. So theory mattered and empirics mattered. You might still see a consultant walk into an antitrust agency today and argue that sales of water constrain the pricing of carbonated soft drinks, but without a lot of support from reliable data, that argument will not be given any weight. It is not clear how much of the change was caused by BE economists or how much they just followed a trend, but the change occurred and BE changed with it. The Bureau began to emphasize empirical work and based its conclusions about the likely effects of mergers on empirical results rather than on the more informal and older approaches (e.g., marketing documents and "common sense."). I do not mean to imply that common sense is out of style. Rather, common sense and documentary statements can now sometimes be tested with data; so prior beliefs are subject to verification.

E. Empirical Analysis Takes Off

Moving somewhat in tandem with the "narrow markets" phenomenon was the increase in empirical work and econometrics undertaken by economists. Although the merger waves of the late 1980s and second half of the 1990s produced a great deal of work for economists using the standard analytical methods (e.g., case studies based upon marketing and planning documents and interviews with producers and sophisticated customers to determine demand elasticities, supply elasticities, entry potential, potential for collusion, etc.), the latter 1980s also saw the increased use of econometrics and newly available microdata in antitrust analysis.

The new data-intensive work included residual demand analysis to delineate geographic and product markets and to measure market power potential; and later, in the 1990s, estimation of demand systems and simulations of post-merger effects. The growth in the use of quantitative methods in antitrust analysis has continued as data, computing resources, econometric methods, and software improved.[208]

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[208]Case-specific econometric work was conducted at least as early as the mid-1970s in conjunction with large investigations such as the cereals case (Scherer 7-31-03 letter, p. 5) and the coffee investigation (Folgers-Maxwell House). The estimation of the residual demand facing a dominant firm in a market became part of antitrust work in the mid to late 1980s. This type of analysis was developed at Stanford by Jonathan Baker and Timothy Bresnahan. Baker would later work as a Commissioner advisor and later still become the Director of the Bureau of Economics. One of the

One notable public manifestation of this continuing trend was the Staples/Office Depot office superstore merger case, considered a watershed event in the use (or misuse) of econometrics in the courtroom. This 1996 case involved an attempt to directly measure post-merger market power using very detailed data on store-by-store pricing and sales, comparing the outcomes in areas where the firms faced each other as competitors with those where they did not. This approach differed from the traditional reliance on experts or business people to provide opinions about post-merger performance without the help of data or natural experiments.[209]

As empirical work has continued to improve in antitrust cases, especially in consumer goods industries, some commentators have begun to argue that antitrust courts should rely very heavily on empirical "effects tests" and eschew the older, less direct inferential methods of determining whether a merger or practice is likely to harm competition.[210]

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earliest efforts to use sophisticated econometric analysis in a merger case in the Bureau was in connection with the analysis of oil and hot chocolate mergers in the mid-1980s by David Scheffman and Pablo Spiller. Jon Baker and John Howell also attempted residual demand estimation in conjunction with mergers in the carbonated soft drink industry in the mid-1980s. Innovative analysis of competition in auction markets was also begun in 1987-88 by Mark Frankena. For some discussion of the development of econometric techniques over the last two decades and applications to horizontal merger cases, see Scheffman, Coate, & Silvia (2002), and Baker & Rubinfeld (1999). The trend toward econometric estimation of demand and simulation of merger effects shows no sign of diminishing, and since about 1998, it has been commonplace for substantial econometric work to be done in connection with many major merger investigations where appropriate data exist. One outgrowth of that empirical approach to antitrust analysis is that antitrust case markets (especially those in final consumer end-markets) are often found to be quite narrow and more cases have been brought since the mid-1990s that focus on fairly narrow product overlaps.

[209]The fact that a "natural experiment" existed prior to the merger (Staples competed against Office Depot in some areas, but not in others) allowed econometrics to be brought to bear on the issues initially. For a discussion of the case and the extent to which the judge relied (or did not rely) upon econometric evidence see, Jonathan B. Baker, "Econometric Analysis in FTC v. Staples," *Journal of Public Policy & Marketing*, 18(1), (1999), 11-21. The Commission's expert witness in the case also provided a stock market event study focusing on the implications that might be drawn from the stock price reactions around the time of the merger announcement of Staples, Office Depot, and their closest rival, Office Max. See Frederick R. Warren-Boulton and Serdar Dalkir, "Staples and Office Depot: An Event-Probability Case Study," 19, *Review of Industrial Organization*, 2001, 469-481. That study was not, however, cited by the Court as a basis for the decision. The economist input on that case was substantial, even relative to that of the attorney staff. The BE contingent was one-half that of the attorney staff, and BE assigned at least 12 economists and 10 research assistant/statistical clerks to that matter (FTC Award ceremony listing of staff). At least 6 of the economists worked on the econometric component of the case over several months. Former Director Jon Baker argues that this was the most extensive commitment of resources to econometrics of any government antitrust case. See Ashenfelter, Orley, David Ashmore, Jonathan B. Baker, Suzanne Gleason, Daniel S. Hosken, "FTC vs Staples," in *Econometrics: Legal, Practical, and Technical Issues*, ABA Section on Antitrust Law (2005). As with all major litigated efforts, the experts did not always agree. For a critique of the FTC's efforts, see Jerry Hausmann's testimony in the case and Froeb, Luke, Steven Tschantz, and Gregory Werden, "Pass-through Rates and the Price Effects of Mergers," 23, *International Journal of Industrial Organization*, 2005, 703-715. For a more recent reminiscence about the case, see Baker, Jonathan B. and Robert Pitofsky, "A Turning Point in Merger Enforcement: Federal Trade Commission v. Staples," SSRN abstract 951943, October 2006; later published in *Antitrust Stories*, Eleanor M. Fox & Daniel A. Crane eds., Foundation Press 2007, 311-330. Interestingly, a renewed effort to bring the Staples/Office Depot merger to fruition is being made in mid-2015. The firms must think they have a stronger story to support the merger 20 years later.

[210]For a debate on this point involving three previous BE Directors, see the FTC 90th Anniversary Symposium, September 24, 2004, Tr. 130-139. The question was whether in, say, a merger case the "market definition" exercise can be can avoided entirely by using a direct empirical test of the effects. Interestingly, on July 29, 2008, the DC Circuit Court of Appeals, in the Whole Foods/Wild Oats merger case, indicated that the agency still needed to define a market, regardless of the empirical results.

F. The Litigation Onslaught of Summer 2007

The use of more high-powered empirical methods continued with hospital merger cases and consumer goods cases in the next decade. It is not clear, however, that the trend reduced the time it took the FTC to obtain favorable outcomes in anti-merger challenges. In Spring/Summer 2007 (surely the busiest antitrust litigation period since at least the Summer of 2000), the FTC had three merger proceedings in progress in federal courts.

The first of the three, the Western Refining/Giant Industries merger, involved the bulk supply of light refined oil products in northern New Mexico (e.g., Albuquerque). The challenge presented a relatively weak structural case to begin with (the number of significant competitors was decreased from 5 to 4 or 8 to 7 depending upon your view). One pricing anomaly, however, was sufficient to keep the enforcers interested. The FTC argued that due to pipeline capacity constraints the firms supplying the market would be unable to increase output in the event of a price increase (i.e., supply elasticities were low). Thus, the structural numbers alone would be misleading "low". The case was weak enough that it likely would not have proceeded in any industry other than oil (an industry in which the FTC enforced relatively aggressively). The FTC lost the case when, reportedly, key industry witnesses weakened their stories significantly on the stand from those heard by the staff during the investigation.[211]

The second litigation concerned Equitable Resources' merger with Dominion Resources. The parties were directly competitive natural gas distributors in Pennsylvania, because they owned "over-built" facilities in western Pennsylvania. The FTC challenged the transaction, but its task was made difficult by the fact that the Pennsylvania Public Utility Commission approved the combination. In May 2007, a District Court Judge disallowed the FTC's case, but a successful appeal allowed the FTC's challenge to continue. (Ultimately in mid-January 2008, the firms surprisingly backed out of the Equitable/Dominion transaction after 10 months of litigation against the FTC.)

The third summer 2007 merger, by far the most notable, involved Whole Foods' acquisition of Wild Oats. The FTC moved against the merger of the two high-end food grocers, using a narrow market definition of Premium Natural and Organic Supermarkets - PNOS. This case was supported by very substantial data work (the strength of which was open to debate within and outside BE) and by some of the "hottest documents" on record from the CEO and Board-level individuals indicating that the narrow market niche was real and that the merger would reduce competition and raise prices. Even

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[211] Because the Western/Giant transaction was consummated despite the FTC's efforts, there was potential for a post-mortem examination of the effects of the transaction. Such a review was eventually conducted and the economist author found no compelling evidence of a detrimental effect from the deal. Using El Paso as the primary control market, the author found that wholesale (rack) and retail gasoline prices in Albuquerque fell following the transaction, and they fell about as far as the FTC had predicted (6-10%) would occur in the "but for (i.e., no merger)" world. In essence, the post-merger effects examined in the study could all be explained without appealing to any purported adverse merger-specific effects. See Kreisle, Nicholas, "Merger Policy at the Margin: Western Refining's Acquisition of Giant Industries," Bureau of Economics Working Paper 319, September 2013 (later published in *Rev. Industrial Organization*, 47(1), August 2015, 71-89). As with most merger retrospective studies, the focus was on post-merger prices to consumers. Prices paid to input suppliers (e.g., sellers of crude) by the combined firm were not examined.

with the hot documents, the FTC lost at the District Court level in the summer of 2007, but later won on appeal in July 2008. Whole Foods mounted a challenge to the entire FTC administrative law process, but was rebuffed in that effort by the DC Circuit Court in January 2009. Ultimately, the FTC and Whole Foods settled the case in March 2009 with Whole Foods agreeing to spin-off thirty-two Wild Oats stores and various related assets via a Trustee. Some antitrust aficionados wondered if that remedy might be too weak to replace the competition provided by Wild Oats as a separate established brand. Perhaps a retrospective on the remedy will one day be undertaken to explore that possibility.

On December 13, 2007, the FTC lost its fourth litigation in succession, an MLS listing restriction case in southeast Michigan (RealComp) before an Administrative Law Judge. The Commission later reversed the ALJ's ruling and RealComp appealed. Once again, the FTC ultimately prevailed in that contest, when an appeals court denied RealComp's motion to overturn the Commission's decision in April 2011.

Even though the FTC faced initial bad first-round outcomes in several litigations in 2007, they ultimately prevailed in each matter. In addition, good news was forthcoming in January 2008, when the 5th Circuit decision came down on the long-running Chicago Bridge & Iron/Pitt Des Moines merger challenge in engineered tanks. The Court found for the FTC, ruling that the FTC had provided substantial evidence on each point of contention. BE had provided the expert witness for that litigation, which had started as an administrative trial in October 2001.

The 2008 period also marked the beginning of the end of the hospital merger retrospective project. That project straddled the world of research and competition case support. It involved the examination of the outcomes of several hospital mergers. After culling through a wide range of potential targets, the economics and legal staffs chose five transactions to examine in greater detail, mainly through the use of pricing data for hospital services. The selected transactions occurred in Chicago's North Shore (Evanston and Waukegan, IL), Eastern Missouri (Poplar Bluff), coastal North Carolina (Wilmington), and San Francisco's East Bay area.

For each of these cases, data were gathered both pre- and post-merger. In one instance (Poplar Bluff), the data were so odd and unreliable, that the economists could not pursue the empirical work to completion (and the number of payors were so few that they could not be anonymized in any event.) In those areas where the data were reliable, the retrospectives produced a wide range of results and not all of those results were consistent with the expectations of a believer in traditional, structure-driven antitrust policy. The area where the strongest structural case could be made (Wilmington) did not produce consistently higher post-merger pricing, rather the results across payors were wildly diverse. Two mergers, however, one in the Chicago area and the other in the eastern San Francisco Bay area, resulted in large, consistent price increases. The Evanston, Illinois transaction produced a large positive merger-specific effect, yet the hospitals did not compete very directly. The large effect almost surely was caused by alterations in the bargaining games that occur as buyers of hospital services (insurers) work to put together a network of hospitals.

The retrospective process ultimately led to the development of a legal challenge to the Evanston merger. Following an administrative trial and appeals, the case emerged from the final appeals process in April 2008. The FTC won, but because the hospital merger had been consummated in 2003, the

FTC did not try to force a divestiture in 2008 as a remedy. Rather, the Agency required the hospital to propose a means by which it would restore competition by setting up divisions to bid against each other to provide health care services. Although this remedy may well have been a classic example of Elzinga's Pyrrhic Victory in retrospective antitrust,[212] the FTC nonetheless had its first positive result in a litigated hospital case in a decade. That victory may have helped lead to the abandonment of a later proposed merger of Inova and Prince William hospitals in the Fairfax County, Virginia area in July 2008 (the firms backed out of that proposed merger prior to an administrative trial that would have been held with a commissioner (Rosch) as judge. (An unprecedented process in recent times.) Following the settlement, the Bureau was able to release the results of the empirical work to the public in 2009 due to the good graces of Chairman William Kovacic and BE Director Mike Baye, who were champions of transparency.[213]

G. The Pace Slows and Activity Shifts to Non-Merger Areas

Even with the decline of M&A activity in the economy generally after the credit crisis of 2008, antitrust enforcement activity did not disappear; rather it shifted into non-merger antitrust. One very notable non-merger case of that period involved a case against Intel for anticompetitively excluding rivals. Intel engaged in a number of practices to keep its rivals from gaining a foothold in the production of Central Processing Units (CPUs).

Several economists played a major role in the work on the case which focused on various aspects of Intel's pricing, share-based discount contracts, and marketing practices. In December 2009, the FTC issued a complaint alleging that Intel used a variety of practices, such as exclusive dealing and discounts based on the buyer's loyalty to Intel to foreclose competing CPU producers. The complaint also alleged that Intel bundled products and made retroactive discounts that dropped the effective prices on some products to predatory levels.

The settlement, reached in August 2010, addressed those problems by preventing Intel from basing discounts on market-share targets, from issuing retroactive discounts, or from pricing product bundles in a way that drops the incremental price on any product below Intel's incremental production cost for that product. The complaint also alleged that Intel strategically altered its monopoly CPUs to be less interoperable with other firms' graphics processors (GPUs). This action was alleged to maintain Intel's monopoly in CPUs The settlement required Intel to maintain certain industry-standard interfaces between its CPUs and rival GPUs for six years. It also clarified or strengthened the intellectual property rights of Intel's two rival CPU manufacturers, so independent GPU providers have additional possible firms with whom to partner in the development of integrated CPU/GPU technology. The complaint and settlement also addressed some deception issues having to do with claims about the performance characteristics of Intel CPUs, but the deception issue was a secondary consideration.

A 2010 study of the cost to consumers of patent settlements in the drug industry was yet another non-

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[212]A group of seven health economists lead by David Dranove wrote to the Commission on October 16, 2007 criticizing the self-competition remedy. Despite their entreaties, the remedy became final on April 28, 2008.

[213] A summary of the FTC staffs' economic work on the Evanston case and be found in Haas-Wilson and Vita (2011).

merger antitrust activity led by the economics staff. Colloquially called the "pay-for-delay" study, this analysis was done strictly for enforcement purposes. The delay was caused by the alleged abuse of various features of the Hatch-Waxman Act, which was intended to spur generic drug entry. Entry was sometimes barred by patents and as those patents approached expiration, generic producers sometimes wanted to enter early, arguing that the original patent was invalid. The innovator drug firms would initially fight such claims, but they often settled those patent disputes by paying the generic producer a sum of money and the generic producers would agree to remain out of the market for some length of time. Such settlements involving payment for delaying entry into a market look quite suspicious to those charged with maintaining competition (and to many, if not most, economists), and thus the FTC sought to challenge the practice. Using five years of data on prior settlements (2004 to 2008), a pair of BE economists estimated that perhaps $3.5 billion annually would be saved if pay-for-delay settlements were eliminated. That estimate, while perhaps not as precise or robust as one might like, was used liberally by the agency to support its efforts in Congress and the Courts to invalidate pay-for-delay deals that appeared to bring net harm to consumers.

Thus, the FTC (and the Bureau) shifted gears in the antitrust arena in the latter 2000s, and focused more intensively on nonmerger areas during the lull in merger activity following the 2007 to 2009 credit crunch and recession.[214]

H. Vertical Restraints and Mergers

Despite the clear impact of economics on merger techniques and on certain types of monopolization cases, it is less clear how much impact BE economists had on the vertical merger or vertical restraints enforcement front over the last thirty years, with the exception of the enforcement against Resale Price Maintenance. Certainly the enforcement levels fell markedly in the vertical restraints area from 1975 to 1985, and changes in economic and legal thinking generally had much to do with that reduction, but the role of economists on day-to-day enforcement decisions is unclear.[215] There were efforts to examine the vertical restraints area generally in BE studies, and those reports tended to indicate that many vertical cases were unlikely to provide net benefits given their likely economic effects.[216] According to former BE Director William Comanor, these reports followed upon an

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214 The nonmerger antitrust activity continued with the production of the Sherman Antitrust Act Section 2 Monopolization report. That examination of the state of monopolization law was initiated in 2005 by FTC Chairman Deborah Majoras and was undertaken mainly by the FTC staff with later input from the DOJ legal staff. It was intended to be a synthesis of legal precedent and legal/economic thought on government policy toward monopolization and exclusion. Economists had relatively little to do with production of the report, and that ultimately may have been good for morale, because the document became a symbol of all that was wrong with the allegedly limp antitrust enforcement of the time. As it wound its way through the review process at DOJ and at the FTC, the report was embraced by DOJ's AAG, Thomas Barnett, but it was renounced by certain FTC Commissioners. The Section 2 report was released as a DOJ-only product in September 2008, but it was later revoked in 2009 by a new DOJ AAG, Christine Varney, who had been an FTC Commissioner in the late 1990s.

215 It is important to recall that there was widespread approval of vertical restraints enforcement among academic economists through the 1950s. Breit, William, "Resale Price Maintenance: What Do Economists Know and When Did They Know It?" 147, *J. of Institutional and Theoretical Economics*, (1991), 72-90. Serious research into the effects of those restraints was an endeavor that began in the 1960s.

216 Overstreet, Thomas R. *Resale Price Maintenance: Economic Theories and Empirical Evidence*, BE, FTC, November 1983; Lafferty, Ronald N., Robert H. Lande, and John B. Kirkwood, *Impact Evaluations of Federal Trade Commission's Vertical*

already existing trend in academic circles that was unfavorable toward vertical restraints enforcement. Reductions in vertical restraints enforcement at the FTC began in the latter 1970s, although the final contractions in that enforcement did not occur until the 1980s.[217]

While there was little action at the FTC on the vertical restraints front in the 1980s, selected merger cases that had substantial vertical components were pursued in the 1990s (e.g., drug maker/pharmacy benefit manager mergers, Time Warner/Turner, and AOL/Time Warner).[218] In addition, economists in BE examined the state of the empirical literature on vertical restraints in 2005 to see if there was anything new in the literature that could support a reinvigoration of enforcement on the vertical restraints front. They failed to find such evidence.[219] Despite that result, the search for welfare reducing vertical restraints and vertical mergers that fall well short of "monopolization" of a market will almost surely continue, but until some compelling market-based empirical evidence can be gathered demonstrating consumer losses from such restraints, the search will likely produce little of value. Having said that, the Intel monopolization investigation (2009) and the McWane iron pipe fittings challenge (2013) each focused on distributor restraints of various types and were successfully pursued by the FTC with the help of BE economists.

I. Influence of Economists on Antitrust Cases

Antitrust economists have long had influence in shaping cases and helping to separate the wheat from the chaff (e.g., in merger screening meetings), but whether the economists often altered bottom-line decisions on whether a well-developed case was pursued is harder to judge. There are certainly many examples where economics was an important consideration and there are examples where economists' arguments may have carried the day.[220] So such events happen, but they are not a daily occurrence.

Restraints Cases, FTC, August 1984; Ippolito, Pauline M. *Resale Price Maintenance: Economic Evidence from Litigation*, BE, FTC, April 1988. This work, and other BE research, might have had some influence in a 2007 RPM case at the Supreme Court. See Baye et al. (2008).

217 For a discussion of the latter 1970s decline in enforcement against vertical restraints, see BE History Roundtable, September 4, 2003, Comanor, pp. 49-52.

218 There were also occasional vertical restraints cases undertaken in the early 1990s, although the economists in BE may not have been enchanted with those particular efforts. See Harris & Milkis (1996, p. 317) citing James Langenfeld, former BE antitrust manager, discussing the Nintendo (electronic game systems) and Kreepy Krauly (swimming pool cleaners) resale price maintenance cases.

219 Cooper, James C., Luke M. Froeb, Daniel P. O'Brien, and Michael G. Vita, "Vertical Antitrust Policy as a Problem of Inference," *International Journal of Industrial Organization* (2005). Also see the response by William S. Comanor, F. M. Scherer, and Robert L. Steiner, "Vertical Antitrust Policy as a Problem of Inference: The Response of the American Antitrust Institute," AAI Working Paper No. 05-04 (April 19, 2005). Interestingly, all the authors on both sides of the debate have direct connections to the FTC – with the AAI authors being from a previous generation of BE economists.

220 In a rare 1975 public glimpse into internal FTC disputes, BE carried the day in the American Gas Association investigation where the Bureau of Competition had proposed pursing a case based on the AGA's alleged under-reporting of gas reserves to the Federal Power Commission. While some under-reporting was observed, over-reporting also occurred, and BE argued that the evidence did not reveal systematic underreporting and thus did not support such a charge if all the data were examined. This heated internal FTC dispute was made public when Chairman Engman relented to a request from Congressman Moss for the FTC's analysis of the case. See Katzmann (1980, pp. 42-43, 150-53), and Scherer July 31, 2003 letter, pp. 4-5. Also see Carole Shifrin, "Aides Grilled on Gas Reserves Decision," Washington Post, June 27, 1975, D9 for a description of one Congressional hearing in which BE staffers (who did not recommend pursuing the AGA case) were grilled about output reporting issues involving the American Gas Association. More generally, Katzmann (pp. 52-53) indicates that in the mid-1970s, BE's views prevailed at Commission meetings

One reason they are not too frequent is that the economics and attorney staff do not disagree on most matters, and when they do, such differences of opinion are often reconciled prior to presentation of cases to the Commission.[221]

Economists seldom influence cases after a consent is signed by a respondent. At that point, the review process is usually over. But not always. There have been a handful of cases over 30 years where decisions were altered substantially even though a signed consent was "in hand." One such case involved the alleged role of an electronics firm in inappropriately affecting the standard setting process for a product to deter entry of a rival. After considering the economist's discussion of the facts, the Commission closed the case, rather than accept the negotiated remedy. Perhaps this unusual event occurred because BC upper management suggested closing the case out of concern that the facts in the case were unclear and complex, thus making this an unsuitable case for sending a clear message to the industry regarding appropriate actions in the standard setting context.

J. The New Antitrust Transparency, 2001-2013

The vast bulk of the Commission's work on antitrust investigations (especially those that do not result in public court challenges) is unseen. That holds true for the work of both economists and attorneys. Although those who deal with the Commission regularly can know the general outlines of the work of economists through personal interaction, speeches, the release of general guidelines, and certain other policy pronouncements, since 2001 additional efforts were made to bring more of this work into the light and to make it more "transparent."

Since about 2001, additional transparency regarding the mode of analysis undertaken by the staff and the decision-making process of the Commission was provided to allow firms to better understand whether a particular business practice or business combination might be challenged by the agency. For example, in an unusual instance of transparency, in 2004, the FTC released a post-review analysis of Genzyme's acquisition of Novazyme, explaining to the public why the Commission chose not to challenge the merger of drugs used to fight an uncommon, but life-threatening childhood affliction called Pompe disease.

An effort was also made to interact more directly with (and provide more feedback to) the experts for the parties than had previously been the case. This effort at additional transparency is conceptually an extension of the idea behind the DOJ/FTC merger guidelines and other agency guides for the public. On the antitrust side of the Agency, transparency about merger decision-making had been a personal

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sufficiently often that the Bureau of Competition was induced to include economists more fully in initial decision making. Many of these "victories" may have occurred on Robinson-Patman enforcement matters, where the economists consistently opposed the attorney staff who specialized in such matters (Scherer, 7-31-03 letter, p. 6; and BE History Roundtable, September 4, 2003, Folsom, pp. 64-66).

[221]See Scherer letter, July 31, 2003, p. 7 regarding the 1970s process. Bulow (*FTC Watch*, March 26, 2001, p. 4) indicated that economists and attorneys tend to agree on cases 75 percent of the time. Regarding the 1990s, Jonathan Baker indicated that on merger cases where the legal and economics bureaus disagreed, BE arguments regarding the cases often carried the day if the legal bureau had not already obtained a signed consent from the merging parties. If such a consent was in hand, however, then the attorney staffs' position would almost always prevail, and certainly would prevail if BE was taking a less aggressive enforcement stance than the legal bureau. There are, in fact, a few observations to the contrary, but they are quite rare.

crusade of one economist for well over a decade. Malcolm Coate (and various coauthors) had been publishing papers every few years since 1990 regarding the FTC's merger decisions and the factors that seemed to lead to these decisions. This effort finally became an agency project in 2001, and the data set on merger cases was expanded and improved. In February and August 2004, these data were released to the public in a way that would not reveal confidential information.[222] Follow-up data releases providing updated information occurred intermittently after that, most recently in January 2013.

In addition, since 2001, Bureau Directors and other economists became more active in explaining case analyses to the antitrust bar and to the public through journal articles and speeches.[223] Indeed, since the mid-2000s, the merits of most significant litigated antitrust cases were debated in public forums almost as soon as the trial ends, and sometimes before it ends.[224]

K. Expert Witness Work and Litigation Support in Antitrust

Bureau of Economics economists provide support for antitrust cases beyond the collection of information, analysis of that information, and the evaluation of the merits of a case. They also provided various types of support for litigation. This support occurs regardless of whether BE economists originally recommended that a complaint be issued. Litigation support comes in several forms.

First, economists might provide testimony at trial. If a staff economist generally expresses interest in being a witness, and the attorney staff feels comfortable with the economist as an expert, the economist would be given an opportunity to review documents and read transcripts obtained during the investigation. If, after reviewing the material, the economist is willing to support enforcement action, the staff economist prepares her testimony as the Commission's witness in the trial.

Second, BE economists provide background support to the testifying witness, whether it is a colleague from the Bureau of Economics, or an economist (or other expert) from outside the FTC. This support for the expert witness consists of data collection and cleaning, econometric testing, document compilation, critical give-and-take to test ideas, and testimony drafting. This interaction greatly facilitates the development of effective testimony by providing reasoned analysis and evidence to support the position taken by the witness.

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[222]Coate, Malcolm B. and Shawn W. Ulrick (2005) "Transparency at the FTC: The Horizontal Merger Review Process 1996-2003" BE Economic Issues paper, February 2005 (containing the February 2004 data release as Appendix C).

[223]For example, see the speeches of Bureau Directors on the FTC website and see Coleman et al. (2003) describing in some detail the analyses undertaken by the economics staff in connection with an unchallenged merger of cruise ship lines in 2002. Many other recent FTC antitrust investigations and competition research projects are discussed in the BE submission published annually in a fall issue of the *Review of Industrial Organization*, 2002-2014. From 1998-2000, a previous Bureau Director, Jeremy Bulow, had worked vigorously to make BE analyses of mergers available to the public, but at that time the FTC was not yet ready for as much transparency as Director Bulow desired to provide.

[224]There was also some effort to be more "transparent" with individual litigants and their expert consultants by sharing concerns and trading analyses. Scheffman (FTC at 100, New York, October 24, 2008, p. 75) described his efforts along these lines in the early 2000s and indicated that the effort failed to produce any lasting change. Rather, he argued that the FTC staff and DOJ, to a lesser degree, still fail to join the issues with the parties in antitrust investigations.

Economists also assist the attorney staff in deposing the other side's expert witness and in preparing for the cross-examination of that expert. Furthermore, if the Commission's expert is inexperienced in the testifying role, more experienced economist staff may provide mentoring for the expert, to make their testimony more effective. Finally, economists provide support for the arguments made by the legal staff, whether or not they are directly in support of an expert. Devising theories and providing evidence to support those theories is a key role of the legal and economics staff at trial.

Although Bureau of Economics' staff spent time working on antitrust investigations and providing litigation support functions from 1940 through the 1960s,[225] they did not often act as expert witnesses. The major reason may have been that economic experts, per se, were not used very often in litigation work in those days.[226] In addition, most of the BE staff at that time would not have had advanced training in economics and would not have had the credentials to serve as expert witnesses. Beginning in the 1960s, that began to change as economics became a larger part of antitrust analysis and the formal training of the average BE staff economist increased.

Even though the number of Ph.D.s on the staff increased in the 1970s, there was not a great demand for testimony by in-house experts, probably because sufficient money existed to hire experts from the academic community.[227] As Commission resources shrank in the mid-1980s, including those available for hiring outside consultants, attorneys in the Bureau of Competition turned with increasing frequency to BE for in-house experts to support its litigated cases. This was particularly true in merger investigations when the Commission had authorized staff to go to court to seek a preliminary injunction to block a proposed transaction.[228] Economists testified in a broad range of industries, including carbon black, aircraft transparencies, and auto parts.

In-house economists considered testifying often in the early 1990s, but they did not ultimately agree to

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[225]See FTC Annual Reports 1943, p. 7; 1947, p. 5; 1954, p. 63; 1955, pp. 57, 60-61; 1957, p. 67; 1962, p. 75. Auerbach (1964, p. 401) indicates that in the early 1960s economists would occasionally appear as witnesses before FTC Hearing Examiners. The earliest references to economist participation in litigation came from the 1930s, where the FTC annual reports indicate economist participation in evaluating cost defenses and serving as experts in Robinson-Patman cases. See FTC Annual Report of 1937 (pp. 8, 48-50) and 1938 (pp. 9-10).

[226]See Markham's (1964, pp. 409-10) argument that antitrust enforcement in that period was based on rules, rather than reason. In a rules-based environment, economic testimony would be less relevant. In addition, in the 1950s, the FTC did not use in-house experts because Hearing Examiners placed little weight on their testimony. This was apparently true of both economic experts from BE and medical/scientific experts from the legal bureau's Division of Scientific Opinions. See Bureau of the Budget (1960, p. 93).

[227]An outside expert may be preferred by the attorney staff because they appear more objective and cannot be easily characterized as part of the plaintiff's legal team. Whether there is any validity to such a position is questionable, given the vast differences in marginal pay of an in-house versus an outside expert, but the argument is still frequently made and (presumably) frequently believed. Other factors that might influence the choice of an inside or outside expert would include knowledge of the industry, reputation (e.g., resume length and quality), testifying experience and skill, and rapport with the individual attorney.

[228]From fiscal year 1987 to February 1989, at least twenty-five merger and non-merger investigations were staffed with in-house economists serving as expert witnesses. These cases were as diverse as the set of industries the FTC oversees: glass containers, tobacco, paper packaging, waste disposal, corn milling, oil refining, drug distribution, ambulance services, auto dealers, one-way do-it-yourself moving, and aircraft transparencies to name a few. (See John L. Peterman to Professor Kenneth Elzinga, February 17, 1989, Attachment 3, pp. 6-7). From 1987 through 1992, BE provided in-house experts for at least 52 matters spread across 16 different economists.

testify often enough to suit the budget administrators and the managers of the legal antitrust bureau. Those who viewed the issue simply as a budgetary problem had a simple answer -- just assign one of the antitrust economists to testify. Unfortunately the problem is not quite that simple, because an expert needs to believe firmly in what they are saying and have sufficient presentation skills to appear credible to a judge. Assigning the task to an antitrust economist will not work in those circumstances. Some who questioned the Bureau's commitment to providing testifying experts seemed to suspect that BE tended to hire economists who were disinclined toward an activist antitrust agenda. That was not, however, the case.[229]

One of the biggest problems with being an in-house expert is that attorneys have a tendency to treat the expert as a resource with a low opportunity cost. On the other hand, internal experts may have a greater opportunity to review more of the record than would an outside expert, who would typically be given more limited information to reduce the cost of using the outsider.[230] BE management and previous testifying economists spent a good bit of time from 1992 to 1994 trying to solve the expert witness problem that confronted the budget administrators and the legal Bureau.[231]

The extent of antitrust expert witness work by economists in BE is difficult to quantify. Records of such separate litigation-based activity are not systematically collected. The best records that exist for any single period indicate that in the 1994-1995 period, economists spent 1½ to 2½ workyears on direct expert testimony in each of those two years. It is not clear if this counted background support work for outside experts or not.[232] Some economists during this period prepared to testify or provided mentoring support on as many as ten separate matters.

An additional increase in BE emphasis on litigation support and expert witness work occurred from 1995 to 1998 under the aegis of BE Director Jonathan Baker.[233] This took the form of additional training sessions on being an expert witness and "talking-up" the opportunities. In addition, there was some effort to make the activity more a "part of the job." This attempt to expand the job description was a continuation of a movement that had begun in the early 1990s. Prior to this time, economists

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229One can peruse the list of schools from which BE economists graduated in the materials prepared annually for economist recruiting. It would be impossible to conclude from such a review that economists in BE tended to come from graduate schools with a reputation as being less than enchanted with antitrust. Indeed, the opposite inference would be much easier to support.

230The outside expert would almost uniformly have access to all of the evidence, but they would not be given rooms full of documents. Outside experts are a self-selected group who find testifying less objectionable that those who have not opted for that opportunity. For in-house experts, the work is exciting and there are clear career enhancement opportunities from testifying, but it is also a great deal of work for which the witness receives scant reward if the investment return is not considered. Whether the investment makes any sense for an individual depends on their future plans and their own preferences. Many, but certainly not all, FTC staff economists who successfully testify as in-house experts, eventually leave the FTC for private consulting.

231In mid-1994, the Bureau took several steps to try to place additional emphasis on expert witness work.

232Bureau economists served or prepared to serve as expert witnesses in 22 antitrust matters in FY 1995. The list of expert witness work is impressively long, but simply from a list it is impossible to know how much work, or what type of work, was done.

233At BE Director Jonathan Baker's going-away party in 1998, George Cary, a former BC manager and litigator (who also worked as a staff attorney at the FTC in the mid-1980s), indicated that Jon made a large beneficial difference in improving the level of BE litigation support compared to the 1980s. For Bureau Director Baker's view of the increased emphasis on litigation support, see BE History Roundtable, September 4, 2003, Baker, pp. 104-106.

who were recruited into BE, typically were told that antitrust testifying was potentially an opportunity that might present itself, but the idea that such testimony was a routine component of the job was never part of the implicit employment contract.

A high point in BE antitrust litigation work was probably reached in 2000, when the Bureau of Economics staff provided substantial litigation support and expert witness work in several concurrent investigations, including the BP/Arco oil merger, the Hoechst/Andrx generic drug entry deterrence case, the Mylan generic drug pricing case, the Food Lion/Hannaford grocery store merger, and the AOL/TimeWarner vertical media transaction, among others.[234] In the Summer of 2000 alone, economists in BE prepared to testify or actually testified in Court in three matters: the Kroger/Winn-Dixie grocery chain merger; the Swedish Match/National Tobacco moist snuff merger; and the Heinz/Beech-Nut baby food merger.

BE economists also provided back-up work for a fourth near-litigation case that Summer -- the Conso/McCall sewing pattern merger. The litigation expert work continued throughout the next decade as BE economists testified in the Chicago Bridge & Iron merger case involving large storage tanks, in 2005 in the Evanston hospital merger case, and prepared to testify in the Nestle/Dreyer merger of super-premium ice cream producers in 2003. One economist (the FTC's Chicago Bridge expert in 2002) prepared three expert reports for three separate litigations in 2007-2009 (Marathon/Citgo in oil, Houghton/Stuart in aluminum hot rolling oil, and Daramic/Polypore in plastic battery separators) while he was doing a research report on the U.S. Postal System. An economist also prepared to testify in a concrete hardscape merger case (Oldcastle/Pavestone) in late 2008, but the firms chose to drop the transaction. Another economist prepared a report and prepared to testify in Carillion/CAI, a medical imaging merger in Roanoke, VA in 2009, and also testified in the McWane iron pipe monopolization case involving exclusive distribution in early 2013. In addition, BE's financial analysts/accountants prepared to testify in dozens of matters from 2005 to 2013.

As noted earlier, a very substantial amount of litigation support also occurred around the Summer of 2007 when the FTC undertook several litigations that were discussed in the previous section. (Whole Foods/Wild Oats supermarket merger, the Equitable/Dominion natural gas distribution over-build merger in Pennsylvania, the Giant-Western refining merger in New Mexico, and RealComp, a real estate MLS access restriction in Michigan.) Economists provided a great deal of analytical and econometric support for those litigations, especially Whole Foods and RealComp. Unfortunately, the FTC lost the first rounds of litigation in each of those cases, but all of them ultimately resulted in victories for the FTC. Later Courts overturned two decisions, and the firms backed out of the Equitable/Dominion deal. The Whole Foods matter not only used a great deal of BE economic inputs, it also produced an unexpectedly large bill from outside economic consultants - an event that helped to focus even more attention on the FTC's expert consultant bills.

Although economists had often provided input on decisions regarding the choice of expert economic

[234]Other merger litigation support occurred in industries such as cement, grocery stores, chemicals, electricity production, and data software. The single case in which BE provided the most litigation support was likely the 1996 attempted merger of Staples/Office Depot. A very large portion of the BE antitrust managers and staff played some role in that investigation and litigation. Those efforts were led by the top managers in the BE Director's Office. I do not recall any other investigation that received that much "on the ground" effort from the Director's Office.

witnesses, in 2007, there were efforts made to incorporate BE's views more systematically in BC's decisions regarding expert witness use. BC was trying to get control of its out-of-pocket spending on experts which had increased from about $100,000 in 1992 to $3 million in 2007. Spending declined somewhat after 2007, as merger activity receded and more effort went into using inside experts and paying less to outside consulting experts. Initially, in May 2007, the problem was thought to be solved simply by a bit more BC Director attention to the matter (and consultations with a manager in BE), but by November 2007 it was clear more would need to be done. A new schema was put in place to ensure that a central-office BC manager looked over all the expert "buys," and that an economist also looked over those choices.

The hope was that centralization would reduce any tendency on the part of individual lead attorneys to over-spend on experts. Whether this will reduce total spending is unclear, since it is questionable if the incentives of the lead attorneys were the big problem initially. They may have been doing what their managers would have wanted in litigation, where purse strings tend to be a bit loose. Surely the general rise in economic consulting fees (e.g., from about $300 per hour in 1990 to over $800 per hour in 2007 for a top testifying economist and proportionate increases for other classes of consulting services) was driving a good bit of the cost and that could not be addressed via centralization.[235] In mid-2009, a similar budget issue arose when the FTC's chosen outside expert for a proposed monopolization case asked for a surprisingly high level of compensation. Even though high billings for expert work focus attention on the outside economic expert problem, it is likely that expenditures for such experts will increase further as hourly rates continue to rise and as merger challenges requiring economic evidence and testimony became even more common, following the trend of the past few decades.

After arriving as the new Bureau Director in mid-2009, Joe Farrell spent a good deal of time trying to improve the expert witnessing process. In particular, Director Farrell wanted to ensure that BE-provided witnesses did not feel pressured to testify and that they took an approach more akin to a "friend of the court" than that normally taken by an expert for a party. As one might suspect, there is no reason why BC or BCP should like that approach. That effort resulted in at least two large scale presentations/meetings of economists and attorneys to discuss the roles of experts, expert "handlers," (supporting economists), and attorneys who work with the experts.

The first such meeting featured litigation-hardened BC attorneys and various previous BE experts who each provided guidelines about the expert witness process and discussed the benefits and costs of being an expert. The meeting was attended by both antitrust economists, and economists from the

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[235]The economic consulting business had grown substantially in the US from about $300 million in 1998 to over $1.6 billion in 2006. (This does not include the much larger management consulting business that uses some economists). Antitrust-type consulting may have accounted for about 25% of that total in 2007. One public consulting firm reported in 2006 that its revenues were about $395 per employee hour and that utilization of staff was about 75% to 80%. For a discussion of the growth of economic consulting in Europe recently and in the US in the 1990s, see Damien J. Neven ("Competition and Antitrust Economics in Europe," *Economic Policy*, October 2006, 742-791; "Competition Economics in Europe" *The 2007 Handbook of Competition Economics*, Global Competition Review), and Michael J. Mandel, "Going for the Gold: Economists and Expert Witnesses," *J Economic Perspectives*, 13(2) Spring 1999, 113-120 regarding the US. When antitrust activity slowed in 2008 and 2009, economic consulting similarly slowed and many consultants were redeployed and shifted firms. Interestingly, casual empiricism seemed to indicate that hourly rates did not fall substantially, although the rate of increase likely slowed during that period.

consumer protection division who were interested in learning more about the activity. As seemed to be true of such discussions in prior years, the topic produced a wide range of views and did not define a single best way to prepare to be an expert, but a plethora of good advice was provided. A second meeting focused on the writing of an expert report on the CP-side of the house. Training episodes also occurred intermittently, such as a session run by BCP to train their attorneys in ways to undertake and defend against Daubert challenges to their experts' expertise. In addition, BE hired an experienced ex-FTC testifying economist to talk about his experiences and his approach to testimony.

Howard Shelanski, as BE Director, continued the effort to improve the expert witnessing process during early 2013. He was particularly interested in sending a message to the Commission about how much expert witness work is done by BE. Because Commissioners are very far from the litigation "trenches," and because their information flows are very largely provided by the legal bureaus, they typically know little about BE's role in litigation. Some effort went into producing information about the level of BE litigation work. That search revealed that a surprisingly high percentage of economists' time was spent in direct litigation support and expert witness work -- 19 percent on the consumer protection side and perhaps 8 to 10 percent on the antitrust side of the house. During a peak period of litigation support and expert witness preparation (such as the summers of 2000 or 2007), as much as 20 percent of BE's antitrust resources might go into such efforts. The litigation support resource expenditures on the antitrust side in a recent typical year (2012-2013) might be valued at about $5 million per year (at typical consulting rates), and the CP-side litigation support work might total $2-$3 million annually.

Has the repeated emphasis on expert witness work had an impact? It is hard to tell whether the current percentages of economist time allocated to litigation support are optimal. Certainly a typical economist's workload is now more litigation-intensive than ever before. Whether it is the truly the right level is hard to assess.[236]

L. Antitrust Case Generation and General Policy Analysis

Several times during the past 60 years, economists tried to provide the antitrust legal Bureau and the Commission with cases to pursue. Reference to such case generation efforts begin in the late 1940s, when economists had hoped to use data on industry structure to target various industries for review.[237] This was done more formally in the early 1970s (under Bureau Director Michael Mann) when economists tried to model market behavior using market structure information.[238] In addition, in the 1970s, economists were significantly involved in the "industry-wide" shared monopoly or predation

[236]Informed guesses regarding antitrust economists' time expended in expert witness work or litigation support in recent times were provided by Tim Deyak, BE's Associate Director for Antitrust (8-7-13). Consumer protection litigation data come from two CP staff surveys conducted by Jim Lacko, a long-time Division of Consumer Protection manager, in 2011-2013.

[237]See Blair (1964, p. 527) discussing the death of a planning council initiated in 1947 which he hoped would have been able to focus resource allocation based on recently-collected firm size and market structure data.

[238]FTC Annual Report 1972, pp. 37-47. The Commission often argued that one purpose of the long-awaited line-of-business data collection program was to target cases more effectively. See Aluminum Company of America v FTC, 589 F. Supp. 169 (S.D.N.Y. 1984), pp. 171-173. Others argued that major gains would come from firms reallocating resources to the those businesses with higher returns which would be revealed via the LB data.

case generation efforts that were major initiatives of the Bureau of Competition. This process directly or indirectly produced cases in various industries, including automobiles, coffee, ready-to-eat cereals, titanium dioxide, and antiknock compounds.[239]

In addition, a later 1980s effort led by the legal Bureau, examined industries with conditions that were thought to be conducive to coordination. That particular effort produced no new cases, however. Also in the 1980s, economists attempted to find resale price maintenance (RPM) cases that appeared to them to be economically defensible. This attempt failed, as might have been expected, since the conditions under which RPM was thought to be likely to be anticompetitive were quite rare.

More recently in the mid-1990s, economists tried to generate cases by searching for unusual patterns in prices that could not be readily explained by events that were publicly known to have occurred in specific industries.[240] Each of these efforts produced some new information, but the output was not large. Often, the interesting cases had already been identified through other traditional means (competitor complaints, customer complaints, etc.) or had been discarded for various reasons.[241] Smaller scale case generation efforts had also been attempted as one economist or a task force of economists might be assigned to think about various cases that might be pursued in a particular area of expertise.[242]

Economists antitrust work extends beyond case to include the analysis of broader policy issues that arose in a multiple cases. BE provides the Commission with its analysis of such general issues. In the past, such issues have included: Robinson-Patman enforcement policy, antitrust enforcement guidelines in certain areas (e.g., health care, intellectual property, horizontal merger process and policy), grocery slotting allowances (payments by manufacturers to retailers to obtain shelf space),

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239For a less than flattering depiction of the industry-wide program, see Stone (1977, pp. 147-50). Also see Clarkson & Muris (1981, pp. 65-73 and pp. 96-97 criticizing the role of economists in this planning exercise). A more positive evaluation of the planning process in general is provided by Katzmann (1980, pp. 27-35).

240Jonathan B. Baker and Peter A. Woodward, "Market Power and the Cross-Industry Behavior of Prices Around a Business Cycle Trough," BE Working Paper #221, December 1998.

241For example, the 1996 to 1998 case generation effort was coordinated by two BE economists and entailed over a year of staff time in total, so it was not simply a lark. That project identified one viable target that had not been otherwise identified (three instances of suspicious patterns that could not otherwise be explained were identified from the 25 quick investigations, but two had previously been identified through other case generation routes.) The Bureau Director at the time, Jonathan Baker, wanted to examine another 25 possible industries, but the exigencies of merger work precluded continuation of the search. For a discussion of that case generation effort, see BE History Roundtable, September 4, 2003, Baker, pp. 108-110. Additional case generation efforts that involved both economists and attorneys in the late 1970s and the early 1980s were also described in Baker's presentation at the FTC's 90th Anniversary Symposium, September 23, 2004, lunch session transcript, pp. 117-124.

242In the late 1980s, as part of a smaller scale case generation initiative begun by Bureau Director David Scheffman, economists identified infant formula manufacturers as a possible target for investigation. Public sources indicated that the industry was highly concentrated and subject to entry impediments, unusually large price increases were occurring, and there was reported opposition by the largest producers to competitive bidding for state-run health/welfare programs. An investigation of the industry was begun by the legal Bureau in May 1990. Under Acting Director Ron Bond, a committee of economists was formed in April 1994 to try to devise new cases. Bureau Director Jeremy Bulow also initiated some case generation efforts in 2000 focused on high tech and information technology areas. Director Luke Froeb solicited case generation ideas from the staff in May 2005 and while that request did not blossom into a project, it illustrates the point that virtually every BE Director gives some thought to case generation, because everyone would like to encourage "good" cases.

merger divestiture procedures, and antitrust enforcement of section 2 of the Sherman Act or section 5 of the FTC Act. These policy reviews are most often done in conjunction with the attorney staff, and since the late 1990s the attorney staff often played the leading roles in producing such reports, if written output was ultimately provided. In addition, the Bureau Directors' occasionally produced speeches or papers on topical antitrust policy issues for presentation to groups such as the American Bar Association or the Antitrust Modernization Commission during its 2002 to 2007 lifetime.

V. The Role of Economists in Consumer Protection

Economists contribute to many aspects of the consumer protection mission, including the development and review of consumer protection cases, trade regulation rules, and policy initiatives.[243] They also conduct surveys and studies on issues related to the Commission's consumer protection mission. Economists provide expertise in the economic analysis of markets, incentives, regulations, and consumer and industry behavior. In addition, they provide expertise in quantitative and statistical analysis, and assessment of scientific studies.

This expertise is applied to the Commission's consumer protection mission in a variety of ways, including: (1) analysis of the potential benefits and costs of proposed or existing Commission actions, rules, or policies and design of remedies that will be the least intrusive effective remedy; (2) assessment of the amount of consumer injury caused by the unfair or deceptive practices, and assessment of the amount of ill-gotten gain obtained by respondents; (3) evaluation of penalties sufficient to obtain deterrence of the unfair or deceptive practices; (4) evaluation of alternative liability rules, (5) development and analysis of consumer surveys and copy tests; (6) statistical analysis and sampling methods for investigations; and (7) the preparation of studies and policy analyses aimed at consumer protection topics.[244]

As of 2013, the staff of BE's Division of Consumer Protection (DCP) included three economist managers, nineteen staff economists, and six research analysts. The economists all have advanced degrees in economics and extensive experience applying economic and statistical analysis to consumer protection issues.[245] In addition, during summers, students are often added to help on various projects.

Although economists currently play a role in many consumer protection matters, that was not always the case, and the economist's role on the consumer protection side of the FTC is less well-ingrained than it is on the antitrust side. In part, this is due to the fact that there is less external validation for the use of economists in consumer protection compared to their use in antitrust. Economist experts hired by respondents in FTC consumer protection matters appear only infrequently, and although the deception and unfairness statements can be said to be cost-benefit approaches to section 5

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[243] Much of the descriptive material in this subsection was provided by Jim Lacko.

[244] For discussion of BE work in some of these areas, particularly calculations of injury and optimal deterrence, see Baker (1997, 870-71).

[245] At one time, one of the economists in DCP worked mainly on antitrust casework in a Regional Office, indicating that the lines between divisions within the Bureau are not rigid. The ratio of attorneys to economists on consumer protection matters remained about 15 to 1 over the decade prior to 2010, but in 2013 this ratio is closer to 12 to 1. This compares to an attorney/economist ratio of roughly 4 or 5 to 1 on the competition side of the Agency.

enforcement, they are not as thoroughly economic in nature as is true of the Horizontal Merger Guidelines.[246]

From its inception, the FTC undertook investigations of false and misleading advertising for goods sold in interstate commerce under its authority to deter unfair methods of competition.[247] In 1938, the Wheeler-Lea amendments gave the FTC broader authority to regulate advertising and marketing practices as unfair and deceptive acts and practices.[248] The Bureau of Economics did not have any role in the consumer protection mission until the latter 1960s, when economists worked on fraud matters in litigation (e.g., land frauds and pyramid schemes). That work was not extensive, however, and would not have been the economists' main tasks.[249]

In addition to the litigation support work, the economics director (Fritz Mueller) and staff had a major role in the initiation of rules requiring affirmative disclosures of product characteristics for gasoline and light bulbs (the octane labeling and light bulb labeling rules).[250] The rules were initiated, in part, in response to a White House report written by Mueller, in his capacity as the head of a committee on price stability, that had been critical of the FTC for failure to use its ability to mandate disclosures in

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[246]For an argument that economics is a key to efficient consumer protection enforcement, see MacLeod (2005). Economists occasionally appear as experts in consumer protection matters. In recent times, expert economists, marketers, or accountants have appeared in litigations or investigations involving Joe Camel tobacco products, Ciba-Geigy/Doan's Pills, Capitol City Mortgage predatory lending, Wonderbread brain function health claims, FAMCO subprime lending, NCO - a Fair Credit Reporting Act case, AmeriDebt debt management, QVC, and various other matters. Most such expert appearances involve national advertising cases or consumer credit issues, although experts have at times appeared in big dollar fraud matters (e.g., the 1999 Equinox pyramid scheme).

[247]The FTC Annual Report 1935, p. 101 indicates that more extensive examination of newspaper, magazine, and broadcast advertising began in 1929 with the formation of a three-person team to focus on that area. According to various histories of the FTC, most of the Agency's advertising cases (and antitrust cases) were generated by complaints from firms, who disliked their rivals' aggressive business practices and advertising. See especially, Stone (1977, pp. 64-73).

[248]FTC Annual Report 1938, pp. 2-4. The Wheeler-Lea amendments broadened the FTC's jurisdiction and explicitly included deception (in addition to unfairness) among the actions the FTC could attack. The restrictions on advertising claims included in the FTC Act are very general. Several more specific labeling and credit laws were subsequently passed and vigorously enforced by the FTC (e.g., wool labeling (1939), fur labeling (1951), textiles labeling (1958), fair packaging and labeling (1966), truth-in-lending (1968), fair credit reporting (1970), fair debt collection practices (1978), etc.)

[249]Steve Nelson discussion (5-12-00). Ron Bond discussion (5-23-00). According to Dennis Murphy, a long-time CP economist (5-19-00), the land fraud cases quickly became a quagmire for both the economists and attorneys. Some of the pre-1974 consumer protection work by economists would have included some general "brainstorming" with staff of the FTC's Office of Policy Planning & Evaluation regarding directions for consumer protection efforts, and work on occasional Magnuson-Moss rule cases that were handled through BE's Economic Evidence shop. In addition, in 1972, BCP Director Robert Pitofsky asked the BE Director to assign economists to help out part-time in four consumer protection areas - debt collection (creditor remedies), affirmative disclosures, warranties, and insurance. See memo from Robert Pitofsky to H. Michael Mann, "Economic Support for Consumer Protection Projects," July 20, 1972 and a reply from Mann on September 11, 1972 naming the economists who had been assigned.

[250]Mueller (2003, pp. 13-14; 2004, pp 101-102; and BE History Roundtable, September 4, 2003, Mueller and Folsom, pp. 143-150). In the 1960s, economist involvement in what today would be considered consumer protection matters almost always began with competition issues. For example, the light bulb rule analysis was pursued in large part because GE at the time had a virtual monopoly on light bulb sales. Similarly, octane disclosure requirements were considered by economists as an off-shoot of on-going work on the competitiveness of gasoline retailing. It is interesting that when the European Union began using economists in consumer protection in 2007, they took the same tack - consumer protection is seen as having applications in markets where competition is not effective.

various areas. Perhaps more importantly, Mueller played a major role in the initiation of the cigarette labeling requirements in 1964.[251]

The initial impetus for the systematic involvement of economists in consumer protection is shrouded in the mist of time. It may be that Robert Pitofsky, BCP Director, and Jodie Bernstein, a BCP senior manager, in the early 1970s, either on their own volition or at the prodding of Commissioner Mayo J. Thompson, began to request more economists on consumer protection matters.[252] Regardless of the particular source, in response to the requests, Bureau Director F. M. Scherer, prevailed upon one of his former students, R. Dennis Murphy, to leave his academic post and come to the FTC to see what he could do on the consumer protection front.[253] At that point in 1974, it was not clear (to BE or BCP) what economists might bring to the consumer protection area, although economists had already begun to examine law and economics issues related to liability rules. Economists generally were just beginning to examine issues that would later become important in the development of law and economics.[254] Other economists from the Bureau's report-writing group, Industry Analysis, did small amounts of work in the area (mostly in support of rulemaking activity), but that was not their primary responsibility.[255]

By 1977, responsibility for managing the economic analysis of consumer protection matters had been

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[251]Mueller (2-2-03 memoir, p. 13) was not happy with the cigarette disclosures, thinking that much more significant additional regulation needed to be applied to cigarette marketing. The remedies in each of these matters (cigarettes, gasoline octane, and light bulb life and light output) involved mandated disclosures that would have allowed consumers to make more informed choices. This remedy was consistent with the efforts to obtain disclosure remedies for home mortgages and other loans, a process that was underway in the 1960s as economist and Senator, Paul H. Douglas (D-IL), pushed for loan disclosures in his draft of what would later become the Truth-in-Lending Act in 1968.

[252]Murphy (5-24-00, 10-10-00, 8-12-03, 10-27-05, and Scherer correspondence 7-31-03, p. 5; and letter to Pautler, October 17, 2005; and 10-25-05 e-mail to Pautler). Murphy indicated that Commissioner Thompson's interest related particularly to consumer protection cases generated by the FTC's Regional Offices. Clarkson & Muris (1981, p. 305) argue that economists got into the consumer protection area, in part, because of legal requirements in the rule-making process. The Magnuson-Moss Warranty/FTC Improvements Act (1975) specified certain evidentiary standards for FTC rulemaking. This led to the expanded involvement of economists and to the production of various reports in the 1970s and 1980s by BE and the legal Bureaus. See Office of Policy Planning (Appendix F, April 1981, pp. 67-71).

[253]Murphy was the main BE input on consumer protection issues from 1974 to 1976. For a discussion of Thompson's request for cost-benefit analysis of antitrust matters, see Clarkson & Muris (1981, p. 292). They indicate that this plan to initiate such analysis on antitrust issues never had any lasting effect. The reason for this outcome is not discussed.

[254]George Stigler's paper on the economics of information ("The Economics of Information," *Journal of Political Economy*, 69, 213-225) had been published in 1961 and Phillip Nelson's work on search and experience characteristics of products were completed in the early 1970s (e.g., Nelson, Phillip. (1970) "Information and Consumer Behavior," *Journal of Political Economy*, 78, 311-329). These papers were important pillars for the development of consumer protection economics. For the analysis of rules, simply providing a conceptual benefit-cost analysis would have been an advance. For a compendium of early consumer protection papers done by economists and attorneys with an economics bent, see Craswell Richard and Richard A. Poole (compilers), *Readings in Economic Analysis of Consumer Protection Issues*, Office of Policy Planning FTC, September 1981. For a discussion of the early thinking about consumer protection economics, see BE History Roundtable, September 4, 2003, Bond 135-143, esp. 139-140. For a 1986 survey and bibliography of the economics literature that forms much of the basis of consumer protection economics, see Ippolito (1986).

[255]Economists apparently participated in a newly formed consumer protection case evaluation committee beginning in March 1976. See FTC Annual Report 1976, p. 21. For additional discussion of early economist activity in consumer protection, see MacLeod and Rogowsky (1989, p. 75-77). At least one economist located in the Office of Policy Planning & Evaluation provided input into consumer protection rules (the retail unavailability rule, and the franchise rule) in the 1976-1978 period. (Peterman outline prepared for BE History Roundtable, September 4, 2003; 9-3-03.)

assigned directly to the Industry Analysis division, and then, late in 1978, the Bureau of Economics formed the organization that would be the vehicle for economist input into consumer protection matters, the Division of Consumer Protection (DCP). The Division was to be headed by Assistant Director, John Prather Brown, who was brought in, not just by BE Director Comanor, but also by FTC Chairman Pertschuk, in order to obtain better information about the potential downsides of his actions and to provide some benefit-cost analysis.[256] The initial staff for DCP came mainly from reassigning approximately half of the Industry Analysis (industrial research) staff to the newly created division.

A. Economists and Trade Regulation Rules and Guides

Until at least 1980, the economists' involvement with consumer protection was dominated by then recently-initiated trade regulation rulemakings.[257] Some of the work took the form of direct support to the BCP rulemaking staff, and some took the form of more traditional BE studies of the markets in which rulemaking was contemplated. Economists sought to provide benefit-cost analyses for rulemakings regarding Credit Practices, Used Cars (mandated testing and disclosure), Mobile Homes (warranty enforcement), Vocational Schools, Childrens' Television (kid-vid), Food (nutrition and health claims in ads), Over-the-Counter Drugs, Antacids, and Eyeglasses (prescription release and commercial practice), among others, with varying degrees of success.[258] Cost-benefit analysis had been coming into vogue in the regulatory area since the mid-1970s, and by 1984, the Commission had adopted a statement requiring benefit-cost analysis in rulemakings.[259] Many of the rulemakings that culminated in the 1980s, including Unavailability (reasonable quantities of advertised products had to be available at the store or rainchecks had to be given), Eyeglasses II (contact lens prescriptions), and the Funeral rulemakings (price disclosure and item-by-item pricing for funeral goods and services), relied heavily upon economists for their benefit-cost frameworks.[260]

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[256]Gerard R. Butters 5-00 interview. Also see, MacLeod and Rogowsky (1989, pp. 84-85) for a similar observation.
[257]Economists also participated in cases involving automobile defects and in general consumer policy development work. Most, but not all, FTC rules have to do with consumer protection issues. In the late 1970s, there was an effort to extend rulemaking to the competition realm (primarily physician control of health insurance plans), but that effort never produced a rule. Currently, the competition rules are limited to one that requires firms to provide information about mergers prior to their consummation (HSR 1976) and a rule regarding market manipulation in the oil industry, which was initiated in 2009.
[258]See John L. Peterman to Professor Ken Elzinga, February 17, 1989 Attachment 3, p. 13; and FTC Annual Report 1977, p. 30.
[259]See the Statement of Basis and Purpose of the Credit Practices Trade Regulation Rule, 49 Fed. Reg. 7740, March 1, 1984. It would be wrong, however, to presume that the Commission embraced a benefit-cost framework for its rulemakings solely because the economists urged it to do so. The deregulatory political environment that began in the mid-1970s required agencies to be increasingly cognizant of the impacts of their actions. By the early 1980s, Howard Beales, an economist working in BCP (who would much later become BCP Director), wrote a template for the questions that should be asked before a rulemaking was initiated to address a purported problem. See BE History Roundtable, September 4, 2003, Gramm, pp. 155-156.
[260]Economist input on the funeral rulemaking began fairly early. The BE Director during the mid-1970s, F. M. Scherer, recalled that the FTC was bombarded by complaints from Congress (each Congressman has several influential funeral directors in their district) regarding the investigation of the industry, but that the Commission's evidence of problems was sufficiently convincing that the continuation of the rulemaking could be justified. (Scherer 7-31-03 letter, p. 6 and subsequent conversation.) A BE economist provided an empirical estimate of the effect of the funeral rule soon after its adoption. He found little, if any, impact in that early period. See, Timothy P. Daniel, *An Analysis of the Funeral Rule Using Consumer Survey Data on the Purchase of Funeral Goods and Services*, BE, FTC, April 1988.

Many of the rulemakings from the 1970s and early 1980s were very time consuming exercises that generated extensive formal "records," but on many occasions the records included relatively little systematic evidence regarding the problem to be solved or the best way to solve it. A major reason for the high time cost was the extensive procedural rules required for a rulemaking. The nonsystematic nature of the evidence obtained was often due to a failure to appropriately plan the rulemaking process, and the reticence of firms to provide systematic information. Due to the costliness of the rulemaking process (combined with the belief that many of the rules could not pass a benefit-cost test in any event), many of the large rulemakings were abandoned or scaled back in the early 1980s.[261]

By the early 1990s, the rulemaking process was often handled differently, with a less cumbersome process. Unfortunately, the new process was perhaps even less likely to result in the collection of systematic evidence about the problem or its best solution. Many of the rules from the 1990s were explicitly required by legislation under more expedited procedures than had previously been followed.[262] Often the rulemaking process, including the rounds of public comment, had to be completed in 270 days, which left virtually no time to assemble information systematically. The information that was collected came from comments submitted by the interested public (often the industry, its representatives, academics, and certain consumer advocacy groups) in response to a Federal Register notice. These comments might be supplemented with one or more public workshops in which the interested parties could orally present their views in a setting mediated by the FTC legal staff. Systematic data are seldom forthcoming from such a process, and as a result, there would be little data for an economic assessment of the significance of a problem or any proposed solutions.

Although the typical rulemaking has not included a systematic cost-benefit analysis, the Agency often provided some informal benefit-cost analyses of its actions.[263] Examples from the 1990s include: analysis of modifications to the Franchise Rule, Care Labeling Rule, 900-number Rule, Jewelry Guides, the Telemarketing Sales Rule (TSR), and an analysis of a variety of issues concerning the privacy of consumer information particularly on the Internet.

At about the same time that the rulemaking process was becoming less burdensome for the FTC staff,

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261For a general description of the rulemaking period, see Clarkson & Muris, eds. (1981, pp. 161-221) and MacLeod and Rogowsky (1989, pp. 71-88), who provide a list of 12 terminated rulemakings and 11 promulgated rules during the 1970s and early 1980s (p. 73).

262The FTC rulemaking process in the latter-1970s most often followed requirements in the 1975 Magnuson-Moss FTC Improvements Act. Many later rules were required by specific legislation that mandated the use of more streamlined procedures for "notice and comment rulemaking" under the Administrative Procedure Act. The 1990s Telemarketing Sales Rule, for example, followed such a path.

263What passes for a benefit/cost analysis is often in the eye of the beholder. Sometimes a brief listing and analysis of possible costs and benefits is sufficient. Other times, empirical estimates of the magnitudes of those costs and benefits might be required. Various efforts to devise cost-benefit guidelines have been undertaken over the years, beginning at least with a series of 1960s Congressional hearings and reports. More recently, the Office of Management & Budget provided updated guidance in September 2003 regarding the best approaches for conducting cost-benefit analyses of major rules (OMB's Circular A-4). The FTC tends to do non-major rules (those having effects less than $100 million) and these smaller rules are not subject to the same rigorous external standards that apply to larger rules under the Regulatory Flexibility Act. In addition, since the FTC is an independent agency, it may not be subject to all of the rulemaking strictures imposed on the Executive Branch agencies. See Baker (1997) for the argument that BE's existence tends to assure that benefit-cost thinking will be incorporated to at least some degree in almost all major FTC actions.

the FTC initiated a more structured process to evaluate its existing rules and guides. In 1992, the FTC formalized and expanded its process for reviewing each of its Rules and Guides.[264] This process continues today and economists play a role in the effort, although economic input into the rules is not a high priority for most of the reviews.[265] In the majority of reviews of older rules and guides, where both the benefits and costs of the rule or guide are essentially zero, economists have little role.[266] In a minority of instances, however, the initial reviews reveal significant issues, and in those instances, economists may take a closer look at the various alternatives to the existing situation. This occurred, for example, on the Watch Guides, which were rescinded in part based on BE efforts in 1993; and the Jewelry Guides in the mid- to late-1990s (regulating a host of claims for diamond and precious metal jewelry including efforts to require disclosure of diamond lasering).

In addition, economists spent a great deal of time in the 1990s sorting through the intricacies of the 900-telephone number rule and the franchise disclosure/business opportunity rule. In an unusual turn of events, economist Dennis Murphy handled the Power Amplifier rule review largely on his own in the 1998 to 2001 period, not so much because of his economics training, but because he built high quality speakers as a hobby (and because the attorney originally assigned to the review died in the middle of the review).

Most of the reviews of the rules that *a priori* seemed unnecessary were done without much resource cost. Others, that were considered likely beneficial, were given more emphasis and sometimes required more thought. As with the newer rules, the process mainly followed a "notice and comment" format, rather than a more formal "hearings and studies" process. Any rule that was initially promulgated under the cumbersome Magnuson-Moss process, however, might require an expensive formal process to rescind or revise, so such rules would have to pass a tougher screen if they were to be changed or expunged.

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[264]Prior to 1992, the FTC reviewed rules and guides on an ad hoc basis. A review of several of the older rules and guides reportedly occurred in 1975 at the request of FTC Chairman Calvin Collier. In the mid-1980s, the rules (but not the guides) were examined in a one-time project and two anachronistic rules were voided - the transistor rule (regulating claims about the number of transistors in radios) and the automatic sewing machine rule (restricting claims about the "automaticness" of sewing machines). Robert Easton discussion (1-30-92).

[265]At the time the rule review process was instituted, the Commission had one member, Dennis Yao, who was an economist. He dissented from the majority decision to implement a ten-year cycle of rule reviews. He argued that systematic review was not a wise use of resources. (Report on Implementation of Regulatory Reform Activities at the FTC, April 1992, Appendix D). In at least one sense he was right. Most of the older rules and guides provide few if any benefits, but they also impose little if any cost on consumers or firms because even if the rules were unneeded or too costly initially, they long ago were incorporated into everyday business practices or were ignored by the industry and by the FTC. Thus, one finds that many of the old Guides and Rules provide near zero benefits and impose near zero observable costs. It is hard to become enthused about spending resources reviewing such rules. The process of reviewing these "zero-zero" rules and guides is a lot like cleaning out an attic - a useful endeavor if it can be done at low enough cost, and as of 2000, the process seemed to have been done at relatively low cost. About half of the rules and guides that existed in 1992 were rescinded under this review program. (See FTC Regulatory Plan for 2000, August 2000, Attachment 3). Interestingly, Alan Greenspan, Federal Reserve Board Chairman from 1987 to 2006, mentioned a similar central bank policy of reviewing and discarding inappropriate rules on a 5-year basis. See Alan Greenspan, *The Age of Turbulence*, 2007, p. 375.

[266]In cases of a zero benefit/zero cost trade-off, BE often just concurs in the legal bureau's preference. On other rare occasions, a more determined effort to obtain information might be made.

Perhaps the longest running rule review and rewrite of all time was the Franchise Rule review (October 1994-January 2007). The attorney staff handled most of the work, but one economist handled that review for the first two years and then the review was handed-off to another economist who handled it from 1996 to January 2007. That same economist, Keith Anderson, dealt with the follow-on work on the spin-off, Business Opportunity Rule, from 1999 to October 2011. No studies were done, but the rewrites were extensive and never ending, in part, because the affected industry and its critics were quite engaged in the process. Ultimately, in order to avoid conflicting standards, the franchise rules were rewritten largely to follow the format chosen previously by various states.

Economists worked on a dozen other rules in the 1990s and 2000s. Three of the more prominent recent rules and rule reviews involved debt settlement (a Telemarketing Sales Rule (TSR) amendment to disallow pre-payment for debt settlement services) and mortgage regulation (Mortgage Assistance Relief Services Rule (MARS), now Truth-in-Lending Act (TILA) Regulation O) and mortgage advertising (Mortgage Acts and Practices Rule (MAP, now TILA Regulation N). Those efforts were led by attorneys and the fact basis for the rules were drawn very largely from roundtables in which relevant actors in the industry and other interested parties were asked to participate in a forum moderated by the FTC legal staff. The MARS, MAP, and TSR amendment rules were done without the benefit of systematic evidence regarding how the industries worked and how extensive the fraud was in the industry.

Despite the lack of broad-based information, there was no doubt that mortgage rescue was successful in only a small minority of cases. There was also no doubt that many (and likely most) firms made claims to desperate consumers that were misleading regarding the outcomes they would likely achieve. Those debtors who signed-up for a plan, but did not stick with the debt settlement program, lost all of their up-front fees and those fees could be substantial. Many firms appeared to be pure frauds, collecting the up-front fees and providing no rescue services. Others appeared to be more legitimate, but were unable to help a broad swath of customers in a tough market. Systematic industry-wide evidence might have allowed the Commission to fine-tune the regulations to stop the frauds, while allowing the legitimate portion of the industry to provide services desired by some financially strapped consumers.

The review done for environmental claims (the Green Guides) was also a major undertaking, and the review process was unique in employing extensive systematic evidence. Those Guides, which were first written in 1992, are revised occasionally as new environmental terms are used in marketing and as consumers' understanding of "green" issues evolves. Revisions, undertaken from 2008 to 2012, utilized extensive consumer survey research (as did the 1992 version) to fine-tune the guidance and help ensure that consumers would not be misled by the claims. The reviewers were also well aware that firms had to be able to tout their favorable environmental characteristics. Without the ability to inform consumers about those advantages, few firms would have the incentive to make the changes needed to make their products more "green." Economists and attorneys worked as a team to generate improvements to the guides that made the trade-offs necessary to reach the goal of maximizing consumer welfare. Although (as usual) there were disagreements along the way about the best way to handle certain marketing claims, the process worked well, with the Commissioners having substantial input and making the final decisions. That collaboration will likely continue every few years as more environmental issues are raised and more improvements are made.

B. Individual Case Reviews

Economists also came to play a role in major consumer protection cases, although this role was limited in the early years of DCP. Albert Kramer, the Director of the Bureau of Consumer Protection in the late 1970s, invited economists to participate in BCP cases because he needed help on issues that required economic analysis (e.g., cost-benefit analysis for rules, risk analysis, product defects cases, contract rules, liability issues, optimal penalties, and injury calculations, etc.)[267] Kramer indicated that economists should be included in all phases of BCP endeavors, but it is not evident that his plan was ever put into practice. Beginning in about 1979, economists gained the opportunity to present their views on most important matters via a relatively formal evaluation committee process that used as inputs memoranda from both BCP and BE regarding each major case. Requests for approval to continue an investigation were sent to the evaluation office, which, in turn, forwarded them to the Bureau of Economics. If the matter was simple, and there was little need for economic involvement, a telephone conversation between a BE manager and the BCP evaluation office often ended BE's involvement. For many, and perhaps a majority, of matters, however, an evaluation meeting was scheduled.[268] A BE staff economist wrote a memorandum discussing the issues he or she believed to be relevant for further discussion.[269] The BCP Director's decision about whether or not to proceed beyond the initial stages with a case could then take account of both economists' and attorneys' views.

Beyond providing input for the BCP Director's decisions, the economists could also make independent recommendations regarding cases to the Commission, if the cases proceeded to that stage. Apparently, during the early 1980s, the participation of economists was not uniformly appreciated by the attorney staff and participation in investigations sometimes had to be forced through direction of the Chairman's formidable chief of staff, Carol Crawford.[270] But as time passed, economists participation became more the norm, and the Commission requested more information that often fell naturally into the purview of an economist. For example, in 1986 the Commission directed the staff to provide consumer injury and ill-gotten gain estimates in each civil penalty case.[271] During that latter 1980s period, which may well have been the height of economist influence in the CP area, economists in the Division of Consumer Protection would annually produce dozens of

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[267]See the November 7, 1980 memorandum from Al Kramer to BCP Assistant Directors and Regional Directors indicating the many areas where economists should be used in case selection, case investigations, negotiation, case evaluation (implicitly in item 7), program design, and the rule-making process. Based on the information at the BE History Roundtable (September 4, 2003, Gramm, pp. 150-154), it does not appear that many BCP managers had put Kramer's framework into practice.

[268]The evaluation committee meetings would typically involve attorney staff, BE staff and managers, and the BCP managers who made decisions regarding the future of various cases. The increased participation of economists in almost all consumer protection matters was a major goal of the Miller administration in the early 1980s. (BE History Roundtable, September 4, 2003, Gramm, pp. 150-159.)

[269]Former BE Director and DCP head, Wendy Gramm, discussed certain types of cases that often engendered negative reactions from economists in the early 1980s. Such cases might involve actions that were initiated in response to rivals' complaints; cases that failed to show systematic harm, but rather just imperfection in ads; and cases based on defects theories where the violation was simply a failure to meet consumer expectations rather than something sinister and systematic, or any case that failed to seriously consider whether a challenged business practice might have a reasonable business rationale. BE History Roundtable, September 4, 2003, Gramm, pp. 150-157.

[270]BE History Roundtable, September 4, 2003, Gramm, p. 151.

[271]Staff Bulletin 86-3, Robert S. Walton, August 8, 1986, "Staff Civil Penalty Recommendation[s]."

evaluation committee memos and more than 20 Commission memos.

The formal evaluation committee process was discarded in about April 1990, but BE's role in BCP's case evaluation process continued through weekly meetings between BE and BCP Director's Office-level managers. These meetings allowed for information exchange, but little analytical input. This less formal process was, itself, abandoned in 1995, in favor of relatively haphazard monthly or bimonthly discussions between BE's primary consumer protection manager and the BCP Associate Directors.[272] During the later 1990s, the BCP Director occasionally requested input from economists who worked on an investigation, but such requests were unusual. The bulk of economists' input tended to be either at the attorney staff level or at the Commission level, with relatively little input at the intermediate Director-review stage. In 2001, an increase in Bureau interaction was accomplished when a biweekly meeting was established between the BE consumer protection managers and the BCP Director and Deputies. As with the earlier 1990s meetings, this meeting facilitated information flows, but was insufficient to allow much discussion on an analytical level, although it occasionally led to plans for later BE analytical input.

Economists participate in cases covering the spectrum of consumer protection matters, from major involvement in cases focused on implied claims that might engender both costs and benefits to various groups of consumers, to minimal involvement in hard-core fraud cases.[273] In the case review role, economists provide an additional perspective that augments the BCP staff's legal analysis, providing an assessment of the market implications of the policy implicit in various enforcement actions. Cases can occur in virtually any area where claims are made for products or services purchased by consumers or small businesses: gasoline or oil additives; nutrition supplements and diet aids, cellulite reduction, or slimming claims; health claims for traditional foods (e.g., margarine);

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[272]These weekly or monthly meetings were initiated at the request of Gerard Butters, BE's long-time manager on the consumer protection side of the Bureau. The informality of the new evaluation process should surely not be read to say that BCP became more haphazard generally in the mid-1990s. Just the opposite was true. Under Jodie Bernstein, the consumer protection bureau planned more effectively and moved forward with enforcement plans at an unprecedented pace. Input and later "buy-in" for the plans was induced from each BCP manager. BE had virtually no role in the planning process. Most of the work focused on multi-case fraud "sweeps" and did not approach any analytical or policy frontier concerning consumer issues. Thus, the fraud enforcement agenda could be pursued quickly and efficiently. See Muris and Pitofsky (2005, p. 804).

[273]In general, the consumer protection agenda of the FTC over the 1980s and 1990s had become increasingly oriented away from the frontiers of national advertising issues and toward more mundane, but more clearly harmful, outright fraud. Fraud cases tend to raise few of the questions that benefit from economists' insight, compared to national advertising cases (e.g., ad interpretation (the implicit contract), scientific substantiation for the claims, consumer harm calculation, or optimal enforcement policy). Thus, as BCP grew during the late 1990s, BE's consumer protection component did not need to grow, because the vast majority of the fraud cases required little economic input. The only interesting policy question raised by the anti-fraud program involved our ability (or inability) to actually deter this clearly undesirable activity. BE occasionally questioned the adequacy of remedies obtained in some of the larger individual fraud cases, where it appeared that larger monetary redress was available. (BE History Roundtable, September 4, 2003, Baker, p. 160.) BCP often found such BE suggestions to be vexing, however, and BE input in this area was particularly frowned upon during periods when top FTC managers promoted a strategy of pursuing and quickly settling a large number of cases, rather than expending resources to obtain larger penalties in a smaller set of cases. Not everyone would have applauded that move toward a heavier fraud component in CP cases. At the BE ex-Director colloquium in 2003, Mary Gardiner Jones, an FTC Commissioner from the 1960s, decried resource allocation choices that resulted in a fraud-intensive enforcement program, because she saw it as an abandonment of the important frontier work one should do in Consumer Protection. (BE History Transcript, pp. 163-164).

tobacco and alcohol marketing; credit services (e.g., credit monitoring, or subprime lending practices); and medical devices (e.g., HIV test kits) to name a few.[274]

One particularly interesting policy area for economists involved the relative health benefits of low-tar cigarettes (compared to smoking full-flavored, high-tar brands). This was a significant issue over the 1980-2008 period. No one thought smoking was benign, but the question was whether low-tar cigarettes were significantly less harmful than full-flavored cigarettes. And if so, should the government allow or encourage dissemination of the information to consumers? The FTC most often tended to encourage truthful information flows, but the government medical community typically did not. The scientific evidence (as with all science) changed over the decades and the evidence that low-tar cigarettes were "healthier," got weaker over time, because more evidence suggested that smokers tended to compensate for much of the nicotine reduction by smoking more intensely to obtain their desired nicotine level (simultaneously increasing their tar intake, since tar and nicotine levels in cigarettes are highly positively correlated).

The FTC, and BE economists, worked on several cases involving advertising claims for low-tar cigarettes, and on issues related to the ways of measuring the tar content of cigarettes.[275] In the latter 1990s, the economists suggested teaming with medical personnel from other agencies to devise a tar metric based on blood cotinine (measuring the ingestion of nicotine) to replace the unreliable FTC metric based on the tar levels measured by a smoking machine that failed to account for compensating behavior by smokers.[276] That never happened, however, and after a decade of FTC temporizing on the topic, the issue largely went away in November 2008, when the FTC pushed the low tar issue to the FDA and other health agencies. Those agencies felt that disseminating tar measurement information was misleading to consumers and diverted their attention from quitting. Congress, soon thereafter, transferred almost all tobacco advertising regulation issues to the FDA.

Beginning in 1996, economists began to reduce their input in the consumer protection case evaluation

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[274]For several years after about 1996, which marked the end of a long series of food marketing cases, BCP pursued relatively few investigations aimed at large, reputable national advertisers. These were the types of cases that previously had provided opportunities for economists to help to devise and evaluate copy test results. For examples of BE work on the issue of copy testing, see Pappalardo, Janis K., "The Role of Consumer Research in Evaluating Deception: An Economist's Perspective," 65(3), *Antitrust Law Journal*, Spring 1997 (a paper produced for American Bar Association and FTC sessions on copy testing and deception in August/September 1996); Murphy, R. Dennis, et al. Generic Copy Test of Food Health Claims in Advertising, FTC 1998 and Murphy, R. Dennis, "Consumer Perceptions of Qualified Health Claims in Advertising" BE Working Paper # 277, July 2005. Most of the advertising cases done in the latter 1990s focused on claims that were sufficiently clear and deceptive that the machinery of marketing research was not typically needed. In those instances where copy tests were needed, the legal bureau often used a part-time marketing advisor to devise the survey instrument, although some general continuing research on food health claims copy testing was carried out during this period. One long-term paradox is that since the 1980s, certain marketing professors have blamed BE for reducing the use of marketing academics at the FTC. This reduction occurred after the demise of the major rulemakings in 1983. The legal bureau (surely not BE) perhaps in conjunction with the Commission would have made any decisions about the use (or non-use) of marketing experts in connection with the consumer protection mission.

[275]Other tobacco cases involved the possible spillover of cigarette advertising to youths, and other potentially misleading or unfair claims for cigarette brands that might have induced teens to take up the habit.

[276]For one FTC staff effort to engage the medical community and anti-tobacco activists on the issues (from fairly late in the debate), see Peeler, C. Lee and Gerard R. Butters, "Re: It's Time for a Change: Cigarette Smokers Deserve Meaningful Information About Their Cigarettes," *Journal of the National Cancer Institute*, 92(10), May 17, 2000.

role. That reorientation away from individual case evaluation and toward studies and larger enforcement areas was fully consistent with the new FTC strategic focus that began in 1995 on hard core fraud and away from national advertising cases. The trend away from individual case involvement became even more pronounced after 2001, when the economists' move away from case evaluation was reinforced by the Chairman and Bureau Director of the period, who devised and closely monitored the case enforcement agenda.

Thus, beginning in the early 2000s, as work on the standard case evaluation front declined, new areas emerged as an incoming administration took more interest in a broader law and economics agenda and what came to be known as "policy R&D." Economists participated more extensively in the privacy and subprime lending areas (which had also been a major area of agency endeavor during the 1990s). In addition, new research was begun on (1) consumer surveys to try to better target anti-fraud efforts, (2) improved credit disclosures for mortgages (real estate closing disclosures and loan document disclosures), (3) consumer-related class action suits, and (4) certain rules, particularly the Do Not Call segment of the telemarketing sales rule, or (a bit later) the e-mail opt-out segment of the CAN-SPAM Act.

From 2004 to 2013, economists' work on consumer protection issues was very heavily influenced by Congress, as several Congressionally-mandated studies were started related to changes in the credit laws (FACTA revisions to the Fair Credit Reporting Act). These studies included credit report accuracy and completeness, the effects of the use of credit scores in selling insurance, and credit report rulemakings. These credit market activities dominated the consumer protection agenda and at certain times consumed fully one-half of the consumer protection economics staff.[277]

Economists did a good bit of consumer protection work on various privacy and data security issues in the 1998 to 2012 period. Privacy proved to be a hard notion to model and it was just beginning to get formally modeled around 2008. The main question in the late 1990s was whether a rights-based approach to privacy (the four fair information privacy principles including consumer "ownership" of data about them) was superior to a harm-based approach (in which misuses of data and abuses of privacy that led to significant conceptual or observable harm were pursued vigorously.)

In the late 1990s, economists worked on several pieces of proposed privacy legislation and in mid-2001 produced a white-paper on issues such as: (1) regulating the commercial use of information, (2) the Fair Information Privacy Principles, (3) children's online safety, (4) identity theft, and (5) spam. The harm-based approach to privacy enforcement was normally followed at the FTC until about 2008. That approach allowed most data collection and use, so long as consumers were not harmed.

[277]The rulemakings were led by BCP attorney staff with help from economists. The studies were most often led by economists, but BCP often worked on the packaging of the products at the end of the process. During the 2000s, this somewhat "uneasy" collaboration became common as the BCP attorney staff and their marketing arm repackaged the economist's products for consumption by Congress and the public. This team process was required whenever the subject of a report was closely tied to a legal or policy issue in which BCP or Congress had a particular interest. The attorney-economist collaboration was also fostered by a 1990s change in Federal rules that required that all studies using a survey of more than nine entities had to be publicly announced and approved by the Office of Management and Budget to ensure that the government would not impose an inordinately high paperwork burden on the public. This review process naturally drew attorney staff into any project that required survey work.

To that end, several cases were brought to enforce against misuses and abuses in data security, child on-line safety, and ID Theft. BE economists contributed some thinking to the ID Theft component of privacy in a set of reports on ID Theft and a paper on the topic more generally.[278]

In 2008, the hottest topic in privacy was Internet-based "behavioral advertising" that targets consumers with ads they are likely to find interesting (and sometimes "creepy") because they are so well-targeted compared to the norm for mass media ads. Good targeting for general interest websites (e.g., newspaper or weather sites) requires substantial information about consumers' interests, and many of the firms collect that information about individuals based on their on-line browsing behavior. Although the data are often retained in an aggregated form so individuals are not identified, many privacy activists fear that identifying individual consumers using the information would be relatively easy. (And it is, according to MIT's Abelson and certain other technically savvy software engineers. Abelson, however, sees the solution to the privacy problem as setting up accountability systems to ensure that information is not misused.)

It is unclear how behavioral advertising ultimately will be handled. Such advertising produces a great deal of the revenue that supports the Internet, and restrictions on such targeted ads will significantly reduce those revenue streams and presumably reduce free content. The FTC (and especially then Chairman Jon Leibowitz) had pushed for a system to allow consumers to choose to opt-out of such advertising and data collection. The online advertising industry responded with a mechanism to allow consumers to opt-out of advertising, but not necessarily out of data collection. Certain web-browsers also allow such options, sometimes as the default option. Whether these mechanisms will be sufficient going forward is unknown, and economists are trying to find a useful role to play in the analysis of that policy choice.

As of 2013, there is probably a weak presumption in BCP that economists should be included in the development of the most important non-fraud matters. Given the large number of CP matters on the agenda (200 to 300 per year), the economists and managers have to choose which matters they would like to be involved in based on their priors about the policy implications of the cases and economist value-added. As in the past, however, how fully involved an economist might be on a case, ultimately depends largely upon the preferences of the particular attorney or BCP Associate Director in charge of the case or rulemaking. BE tends to participate in most chosen matters (because most attorneys do not object to economist's input and some even encourage it); but in some instances, economists are not very well "plugged-in."

Efforts to improve information flows have occurred over time, but the process of economist inclusion remains difficult. There is no institutional mechanism through which economists would become aware of, or involved in, many matters until they are well along or nearly completed. While BCP/BE manager meetings occur on a monthly basis, for whatever reason, the most economically interesting matters do not always get discussed at those meetings. In the 1980s and early 1990s, there was an expectation (by BE management and the Commission) that BE would provide the Commission with a recommendation regarding major consumer protection matters. That has been somewhat less true

[278] Anderson, Keith, Erik Durbin, and Michael Salinger, "Identity Theft," *Journal of Economic Perspectives*, 22(2), Spring 2008, 171-192.

since at least the late 1990s, but began to change in 2012 as Commission-level demand for economic analysis increased.

C. Influence of Economists in Consumer Protection

Prior to the 1970s, any influence of economists on consumer protection would have been small, scattered, and non-systematic. Economists worked on certain land fraud matters, and Bureau Director Willard Fritz Mueller may have instigated two consumer protection rules through his role at the White House,[279] but for the most part, economists had little, if any, role.

Since the mid-1970s, however, economists have been providing analysis of rules and they have provided analysis of cases (with varying vigor) since the early 1980s. The cost-benefit work on rules likely had some influence, and FTC Chairman Michael Pertschuk thought that the economists brought something of value to the process.[280] Economists' influence on cases is hard to assess and the cases are clearly too numerous to examine. The influence of economists is quite clear, however, in a couple of areas where the economists' training provides a unique skill. One such area is enforcement against racial discrimination in lending. While this area has only sporadically been a major area of Commission endeavor, the case development effort has often utilized econometric analysis. The goal in this analysis is to hold constant all other factors that might affect creditworthiness such that one can identify the effect that race might have on either the probability of acceptance or the rate paid for the loan. This econometric work could not be done by attorneys, and thus the economists' unique contribution is obvious. The same type of influence is clear in the subprime lending area generally, which was a major enforcement area in the late 1990s. The economists influence in credit areas, however, is waning because the FTC is slowly being weaned away from credit issues as the Consumer Financial Protection Bureau at the Federal Reserve (which was formed in 2010) begins to occupy the field in consumer financial law enforcement.

As on the antitrust side of the agency, any influence economists have had in the consumer protection area has occurred due to the persuasiveness of arguments, rather than positioning in the chain of command. There was never any time when economists in the Bureau of Economics had final decision-making power regarding consumer protection matters. There were, however, times when economists had more impact than others. In the early 1980s, after the Miller administration began, some persons who were trained as economists and were previously employed in the Bureau of Economics obtained policy-related roles in the Bureau of Consumer Protection.[281]

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[279]See Mueller (2003, pp. 13-14; 2004, pp 101-102; and BE History Roundtable, September 4, 2003, Mueller and Folsom, pp. 143-150).

[280]See MacLeod and Rogowsky, "Consumer Protection at the FTC During the Reagan Administration," in Meiners and Yandle, eds. *Regulation and the Reagan Era*, 1989, pp. 84-85.

[281]For example, Howard Beales and later Robert A. Rogowsky were economists who worked in BCP. Much later in 2001, after pursuing an academic career at The George Washington University, Beales became the Director of the consumer protection legal bureau. Fred McChesney, who was never directly connected to the Bureau of Economics, was another attorney/economist who served as a manager in the BCP Evaluation office during the 1980s. For some discussion of this period and the role of economists (and economics) in shaping policy and defining the limits of market intervention in rulemakings and various policy guides, such as the Deception and Unfairness statements, see MacLeod et al. (2005, pp. 945, 962), Beales (2005, pp. 1062-63), Scheffman (BE History Roundtable, September 2003, Tr. 167-168), and Scheffman (FTC 90th Anniversary Symposium, September 23, 2004, Tr. 115).

Perhaps economists had the most influence in consumer protection matters in the mid to late 1980s when William MacLeod was BCP Director and a formal case evaluation process existed as a mechanism for economist input. This observation would have to be tempered by the realization that because Director MacLeod thought a lot like an economist, it could have appeared that economists had some sway during his Directorship, when in fact all it indicated was that the BCP Director had influence. In either event, however, "economics" certainly had an impact during that period.

The impact of economists on the consumer protection side of the agency is probably best examined by considering how much the agenda and thinking about consumer issues has changed since the mid-1970s, when economists first systematically started to participate in consumer protection matters. Since the mid-1970s, the agenda has changed markedly and the factors considered in the analyses by both attorneys and economists now uniformly include the kinds of factors economists find important. In this long-run sense, economics has had a major impact on the agency.[282]

There is one area, food marketing policy, in which the economists' influence is unmistakable. Since the days of the proposal for a food rule in the 1970s, BE economists had been working on issues related to food marketing policy, and health claims, in particular. Conceptual and empirical work on health claims for foods have helped move the Commission's policy away from the restrictive regulatory approach taken by FDA and toward a more flexible policy that allows non-misleading health claims and allows marketers to explain to consumers why they should care about improving their diets. The FTC (and the Courts) have moved FDA off its highly restrictive policy and BE economists have been leading the intellectual charge for the FTC.[283]

A more recent example of BE impact is the work on appliance labeling in August 2007. As mentioned above, the FTC has a policy of revisiting its rules every 10 years to ensure that they are still viable (e.g., still pass a benefit-cost test.) In 1993/94, the FTC had examined the labels and BE (Gerard Butters) had argued for a label that focused on the cost of the energy used by an appliance as the factor consumers would most care about. BCP and the FTC, however, decided to go with a label that focused on energy use (kilowatt hours), rather than cost. Such a focus on energy use was favored by

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[282]One can readily note effects on certain individual cases, but if the collaborative process works well, economists' influence the investigations and cases throughout the investigation process and thus their contributions are incorporated in the teams' work. See BE History Roundtable, September 4, 2003, Bond, pp. 140-143; Gramm, pp. 155-159. Gramm (p. 155) noted that policy-makers (and most economists) wanted to refocus the case selection toward fraud since 1981. That alteration in case selection finally occurred in the mid-1990s.

[283]For a description of the BE economists' role in this area, and their research indicating that restrictions on food marketing should be relaxed to enhance consumer welfare by inducing greater competition among producers on the health dimensions of food products, see Pappalardo's segment in Froeb et al. (2004, pp. 355-361). In the early 1980s, in connection with the food rule, attorney staff wanted to disallow health claims for foods unless the claim had obtained full scientific agreement (BE History Roundtable, Gramm, pp. 157-159). In large part, due to the work of economists in the 1980s and 1990s, that restrictive policy (at least at the FTC) was abandoned in favor of a more flexible standard that allowed more information on possible (but uncertain) health benefits to flow to consumers. By 2010, however, the FTC had moved again, toward a policy that tended to discourage truthful health claims for traditional foods through a series of cases it pursued beginning in 2009. As of 2014, it is unclear whether a flexible or rigid policy approach will prevail in the future. For general discussion of that policy choice, see Beales III, J. Howard, 2011, AHealth Related Claims, the Market for Information, and the 1st Amendment,@ Health Matrix, 21(7), 7-30. Consumer protection economists similarly led the activity to allow more freedom for drug-makers to market their products via direct-to-consumer advertising.

environmental groups because the labels would tend to push consumer choices toward more expensive, but more energy efficient, products. They did not favor a label that made it clear that energy use was not a large cost of an appliance at energy price levels at the time. When the time came to review this rule again in 2005, BE economists pushed hard for consumer testing of various label options In addition to FTC testing, certain interested private and governmental groups provided their test results. Based on this extensive consumer testing of alternative disclosures, the focus returned to operating costs for the consumer and not on energy efficiency for the final rule in August 2007**.**

D. Expert Witness Work and Litigation Support in Consumer Protection

Economists also provide post-complaint support to litigation, or act as expert witnesses for major consumer protection matters. Over the years, economists provided litigation support for cases involving complex statistical or survey methodologies, and they served as expert witnesses in rulemaking proceedings for Eyeglasses II, the Unavailability Rule, and the Funeral Rule. This work was episodic, because major rules and litigated cases were not the norm in the consumer protection mission for most of the 1980s and 1990s. More recently, in the latter 1990s, economists' role in litigation has expanded somewhat to include support during the litigation of Commission cases, in both administrative proceedings and federal court.[284]

Some notable examples include: (1) more than a dozen pyramid scheme cases from 1997 to 2012, including expert testimony for the State of Florida, the SEC, and one for an Assistant U.S. Attorney in Texas. The declarations analyzed the pyramid structure and resulting consumer injury in each case;[285] (2) HIV home test kit cases providing statistical analysis of test results assessing the accuracy of respondents' HIV test kits; (3) several cases involving fraudulent consumer debt consolidation plans in which the economists provided financial/analytical evidence; (4) the Verity case in 2005 involving liability for middlemen in bogus telephone billing; (5) a marketing case in which the firm used negative options to derive money illicitly from consumers who were not aware that they had opted-in to a purchase; and (6) R. J. Reynolds, a 1997 case alleging that the Joe Camel advertising campaign caused young people to begin or continue smoking. In that case, economists provided extensive support during the litigation, preparing strategies and arguments, lines of questioning, direct evidence, and

[284]Economic expert witness work was not common on the consumer protection side of the agency in the 1990s, but since 2000, such testimony has become much more common. In the mid-1990s economists prepared to testify on consumer protection cases including: baldness cure claims, car auction frauds, franchise cases, and a hearing aid case. The testimony often involves issues related to statistical sampling and consumer harm. In 1999 to 2001, expert witness work and litigation support may have comprised as much as ten percent of BE's consumer protection resources at the height of enforcement against multi-level marketing/pyramid frauds. Such work comprised 19 percent of DCP resources in 2012.

[285]One line of attack on FTC personnel who serve as experts is that they have not published sufficiently in scholarly journals to be recognized as an expert. One means of addressing this critique is to encourage economists to publish more extensively. As one example, Peter Vander Nat co-authored a paper in the 2002 *Journal of Public Policy and Marketing* that combines case law with economic analysis describing a general model of member compensation that allows one to distinguish potentially legitimate sales incentive mechanisms from illegitimate pyramid schemes. As of 2013, Vander Nat was the main economic testifying expert, participating in civil or criminal cases involving pyramids for the FTC and other law enforcers. At the culmination of one such effort in 2006, an SEC real estate ponzi scheme, the defendant went to jail for 15 years. Other economists later followed in Peter's footsteps and played a substantial role in litigation support and testimony, especially after 2008.

rebuttal to opponents marketing and economic experts.[286] Ultimately, the Agency's case was dismissed (without prejudice) by the FTC after the states reached a broad-ranging accord with the cigarette companies in November 1998 restricting numerous cigarette marketing practices, including those challenged in the FTC case (the Multi-State Agreement).

The extent to which economists work on litigation matters is determined, in part, by the types of cases pursued by the consumer protection legal bureau. In recent years, and perhaps always, that legal Bureau typically worked hard to avoid costly litigation, especially in complicated nonfraud cases.[287] Some firms however, are remarkably determined to keep their ill-gotten gains, and expert testimony by BE economists has been required in some such cases. Recent examples from 2008 - 2009 include Lane Labs' claims for nutrition supplements, Alternatel's telecom billing schemes, Moneygram's facilitation of fraud by "moving the money" for the fraudsters, and Suntasia's undisclosed negative option sales. In 2009-2013, there was an even greater demand for economists as experts in consumer protection cases. As data became more abundant, someone needed to examine it and tell the Court what it meant. That job typically would fall on the economists, who would provide mostly data analysis, but also some interpretation of that data.

Interestingly, the cases that required economist testimony tended to be smaller fraud cases rather than larger national advertising cases. If the perpetrators of the fraud would not settle, an economist's testimony helped prove the fraud and provide information about the extent of consumer harm (and thus damages). Larger national advertising cases tended to require marketers and scientists, rather than economists, as the experts, but there were far fewer such cases that made it to the litigation stage. As of 2013, BE's Division of Consumer Protection was using almost 20 percent of its resources in expert testimony or litigation support. That is surely an all-time high.

E. Consumer Protection Policy Analysis and Case Generation

Policy analysis in consumer protection has covered many areas, including optimal penalties, direct to consumer (DTC) drug advertising, policy regarding low tar cigarettes, health claims for traditional foods, and mortgage disclosures. The research studies undertaken in those areas showed the way toward more economically sensible policy approaches. The learning was not always incorporated by the FTC or retained once it was incorporated. Ultimately, however, facts and analysis usually improve policy, so the policy R&D work done by the economists at the agency will likely have a positive long-run effect.

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[286] *R. J. Reynolds Tobacco Co.* 127 F.T.C. 49 (1999). Economists had also provided extensive empirical work based on consumer survey data in the earlier investigation of this same issue.

[287] The Bureau of Consumer Protection clearly has incentives (much as private firms) to avoid the substantial expense of the "big" consumer protection case. But unlike private class action attorneys, the Bureau and its attorneys do not keep a substantial portion of the payout from a successful litigation or settlement. That incentive structure might lead BCP to settle "cheap and easy" relative to the private litigants. Cases against national advertisers of consumer products requiring only one high-quality copy test and a single expert can be quite resource intensive and large predatory lending cases can require 10 workyears or more in staff time and many hundreds of thousands of dollars for experts and travel. The median consumer protection litigation uses about 1,800 staff hours, but the mean is 3,500, and large cases run upwards of 10 workyears. (Based on a September 2009 review of the 88 open CP litigations (X matters).) The alternative of doing dozens of fraud cases (which even if litigated often tend to be low cost) with those resources produces more countable output and perhaps greater consumer benefits.

Economists also played a minor role in consumer protection by trying to initiate cases or rules. Everyone occasionally sees ads that they think are surely wrong and will mislead anyone who believes them, and economists are no different. One of these ads, a light-hearted ad about the brain functioning wonders performed for children by a bread product, actually led to an investigation. Whether that claim might have surfaced otherwise through the advertising enforcement division's normal screening of advertisements is unknown. Other cases have been generated by staff or Commissioners in similar ways. The idiosyncratic method is not a very efficient way to generate advertising enforcement cases, however, because the cases would not necessarily be consistent with levels of consumer harm or with programmatic goals. BE economists sometimes meet resistance to case suggestions, because the cases they propose are hard to prove. That is surely one factor to consider in case selection, especially if a programmatic goal is to bring as many cases as possible because such a strategy might produce more deterrence (and more positive press releases).

VI. The Role of Economists in Competition and Consumer Advocacy[288]

The interests of consumers are oftentimes not well-represented in legislative and regulatory forums. Consumers are not able to effectively oppose anticompetitive actions in such settings because they individually lose relatively little from most regulations (even if the aggregate loss is large) and they have high costs of organizing compared to the various groups who have a direct and substantial stake in the outcome. Regulatory bodies regularly hear from parties who have a direct and substantial stake in a particular decision, but they seldom hear comments from parties that have the general consumer welfare as an overriding concern. Consequently, laws or regulations are sometimes proposed that harm consumers by restricting entry, limiting competition, chilling innovation, reducing consumer information, raising prices, restricting choices, or reducing the quality of goods or services.

The goal of the Commission's advocacy program is to share the FTC's experience and expertise with relevant governmental and self-regulatory bodies about the potential effects on consumers of proposed legislation, rules, industry codes, etc. Such sharing occurs only when the FTC receives a request for comment from an interested legislator or regulator, or when there is a public request for comments. Even if many of the regulators themselves have insufficient incentive to incorporate the FTC's arguments and evidence, they may be induced to avoid actions that harm consumers by a public display of the costs imposed.

A. The Substance of the Advocacy Program[289]

The Bureau of Economics typically bore primary drafting responsibility for many of the advocacy comments addressing issues that required new analysis and empirical work.[290] This was particularly

[288]For a published discussion of the advocacy program, some of which is drawn from this history, see Cooper, Pautler, and Zywicki (2005).

[289]A list of post-1994 advocacy filings may be found on the FTC Web site at https://www.ftc.gov/policy/advocacy/advocacy-filings. Lists and descriptions of these and earlier filings can be found at the back of the FTC's Annual Reports, at least through 2000.

[290]Although BE played a substantial role in the innovative advocacy comments, the filings that were largely repetitions of prior arguments were more often handled by attorney staff with some review by an economist manager. From 1991 to

true in the 1980s and early 1990s. Economists in BE authored comments containing original empirical research on specific regulatory issues to the Federal Communications Commission, the Department of Transportation, the Food and Drug Administration, and numerous other federal agencies.[291] These filings tended to be the most convincing work of the program, because the empirical work made the filings more valuable and more credible than they might otherwise be. Several other extensive filings contained factual information and analytical insights that might not qualify as empirical analysis, but these comments provided information that otherwise could have been overlooked or under-emphasized by the recipients of the comments.[292]

The focus of the advocacy program changed over time, following changes in the public policy issues on the competition, consumer protection, and regulatory fronts. A number of topic areas, however, survived over fairly long periods of time. These hardy perennials and the years when they were most active include: restraints on international trade (1975-1990),[293] restraints on health care advertising and commercial practices (1978-1994), horizontal restraints and entry barrier legislation lobbied for by various professions and business groups (1980-2013), regulation issues in airline, rail, and truck transportation (1980-1993), comments regarding regulatory reform in telecommunications, broadcasting, and cable TV (1983-1995), regulation of food claims in advertising and labeling (1987-1993, 2000, 2003), and, most recently, restructuring of the electricity generation, transmission, and

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1997, these repetitious filings were most often drafted by the attorney coordinator of the program. Repetition was quite common especially in state-level filings, since one issue (e.g., restrictions on attorney advertising) might be under consideration in many different state legislatures at the same time. Several filings were also truly joint products of the economics and legal staff in which BE provided analytical and empirical analysis, while the legal bureau provided expositional aid and legal analysis (e.g., numerous International Trade Commission filings on dumping and trade protection issues in the 1970s and 1980s).

291 See, for example, Woodbury and Anderson on the Federal Communications Commission's AM/FM Radio and Television Ownership Rules, July 15, 1987; Ogur on Massport's (Boston's airport authority) Program for Airport Capacity Efficiency, February 29, 1988; and Rogers and Woodbury on the FCC's Rules Concerning FM Translator stations, MM Docket 88-140, January 23, 1989; Kobayashi on the FCC's financial interest and syndication rule which restricted ownership of the rights to re-run TV shows, 3 filings in 1990-1991; Vita on the FCC's Must-Carry Rules for network TV (requiring carriage of local broadcast signals by cable systems), November 26, 1991; Kobayashi and Schumann on Federal Aviation Administration regulation of take-off and landing slots at certain airports, November 15, 1991, and November 23, 1994; Ippolito and Murphy on the effects of the Food & Drug Administration's regulation of health claims for food labeling and food identity standards, January 8, 1990; and February 25, 1992.

292 See, for example, Cox on Housing and Urban Development proposals to ban referral fees paid by home mortgage lenders, July 15, 1988; Vita on Federal Communications Commission cable TV rate regulation, April 20, 1990; Vita on the FCC's prime-time access rules for TV networks, March 8, 1995; Hilke on the Federal Energy Regulatory Commission's open access rules for electricity distribution, August 7, 1995; and Pappalardo on the Food and Drug Administration's direct-to-consumer prescription drug advertising rules, January 8, 1996 and regulations regarding the labeling of trans-fatty acids, April 17, 2000.

293 BE undertook extensive investigations of trade restraints issues. Many of the filings contained new empirical and conceptual work based on BE research. See, for example, D. Tarr before the International Trade Commission on Stainless Steel and Alloy Tool Steel, No. TA-203-16, Prehearing Brief of the FTC, March 27, 1987. This was one of a long line of advocacy filings focusing on international trade restraints on products ranging from softwood lumber to DRAM computer chips. Such filings were a staple of the 1980s advocacy program with about 53 individual filings (in dozens of product categories) from 1982 to 1989. Three such filings occurred in 1990 and one final outlier filing was done in September 1994. (Source: Counts from the advocacy index 1982-1997). Scherer (7-31-03 letter, pp. 2-3) indicated that in 1990 the chief economist of the International Trade Commission felt that advocacy efforts from the FTC and other federal agencies on behalf of consumer interests produced a "Missouri mule" effect. The ITC became more determined to lean away from a free trade position and to enforce trade restraints.

distribution industry (1995-2004, 2007-2013). The Bureau also prepared several filings concerning various postal regulation issues between 1981 and 1989.[294] Certain other narrow topic areas would survive only a year or so.[295]

Certain of the advocacy comments likely had some effect on final outcomes.[296] A few leading examples of advocacy filings that appeared to have had an impact upon a final outcome were: (1) the National Highway Traffic and Safety Administration based its 1986 and l988 decisions not to raise its automobile fuel efficiency standard on an analyses provided by BE staff,[297] (2) comments on the New York state milk regulatory system that may have cost New York consumers over $50 million annually,[298] (3) the testimony in early 1989 on certificate of need legislation in North Carolina was said to have played a key role in the Policy Board recommendation against continuing the entry restraints; (4) a November 1991 comment to the FAA regarding "use or lose" rules for airport landing slots convinced the FAA to alter its rule,[299] (5) comments to the FCC regarding the relative merits of price cap regulation versus rate of return regulation in 1987 provided the basis for the FCC action,[300] (6) BE's empirical work showed that rules proposed by FDA would disallow health claims for large classes of arguably healthy food, such as fish and lean meats. As a result of the work, FDA altered the rules such that better versions of bad foods would be able to tout their superior characteristics,[301] and (7) an attorney for an advertisers' trade association indicated (three years after-the-fact) that the FTC staff filing to FDA on direct-to-consumer drug advertising in early 1996 "turned the tide" toward

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294See comments on U.S. Postal System (USPS) entry into the electronic mail business in 1983, and Postal Rate Commission evidence issues in the later 1980s regarding Express Mail. The last of the filings was warmly praised by the PRC Commissioner Crutcher, who invited further FTC participation. (Hilke memo to Daniel and Pautler, March 21, 1990.) Comments to the Postal Service ended in 1990 after Janet Steiger became FTC Chairman. Steiger had previously been a member of the Postal Rate Commission which was charged with overseeing the actions of the U.S. Postal Service. Much later in 2008, BE helped OPP produce a Congressionally-requested report on the "levelness" of the competitive playing field for USPS and its rivals.

295For example, in 1993 there were many comments about "any willing provider" laws, as pharmacy groups and others were lobbying state legislatures for protection against the anticipated effects of health care reforms. Most of these health care-related comments had been requested by and issued to state and local legislatures and other government bodies. In 1987, the FTC staff filed dozens of comments with states regarding potentially anticompetitive aspects of attorney ethics codes.

296It is very difficult to know whether any particular study or advocacy filing actually affected a decision. Decisions may have been based on the decision-makers' initial uninformed policy preferences (or rent-seeking incentives), rather than on any factual or analytical basis. Even when decision-makers later indicate that they relied on particular evidence or arguments, one can never be sure that such statements are not just after-the-fact justifications. Having made this disclaimer, I will note a few advocacy filings that appeared to have an impact.

297See Robert P. Rogers, Comments of the FTC Staff to the National Highway Traffic Safety Administration, March 24, l986.

298For a discussion of that work, see the speech by FTC Commissioner Andrew J. Strenio Jr. (June 8, 1987).

299On November 15, 1991 the staff (Bruce Kobayashi) filed a comment with the Federal Aviation Administration, which was considering revisions to the rules governing the sale and transfer of the right to take-off or land at one of the four high density airports. On August 18, 1992, the FAA published its Final Rule increasing the "use-or-lose" usage rate from 65% to 80% on a weekly basis. In explaining its decision to adopt an 80% "use or lose" rule, the FAA cited prominently to the FTC staff comment, which reported that slot usage by the major slot-holders already approaches or exceeds 90%.

300The Chairman of the FCC, Dennis Patrick, cited these results as the basis of the FCC policy choice. See letter from Patrick to U.S. Representative John Dingell, January 25, 1988.

301See the FTC staff comment (Ippolito and Murphy) to FDA, February 25, 1992; and DHHS: FDA Food Labeling: General Requirements for Health Claims for Foods. *Fed. Reg.* vol 58 (3), January 1993, start p. 2478, esp. p. 2493.

allowing information to flow to consumers regarding drug therapy options.[302]

More recently, FTC efforts to highlight the competition issues in electricity industry restructuring had a valuable impact as one leading researcher in the area used BE's arguments to make the point that open access to transmission grids would only work if sellers truly trusted the independence of the grid operator.[303] In addition, one FERC Commissioner used FTC staff advocacy comments as a principal basis for his speech material.[304] In the credit area, work on mortgage disclosure issues has also had an obvious and direct impact in improving HUD's disclosure forms for mortgages.[305] That work ultimately led to the improved mortgage disclosure forms released by the Consumer Financial Protection Bureau (CFPB) in 2013. Due to the emergence of that agency in 2010, work on mortgage regulation will not be a growth area for the FTC's advocacy program.

B. Synergy between Research and Advocacy

The research function of BE was an integral part of the Commission's Advocacy program in its heyday. The research and literature reviews prepared by the Bureau often served as a major input into FTC staff comments to local, state, and federal agencies. Indeed, without the research as a stimulus to thinking, few if any of the empirically-based advocacy comments could have been produced. The time it takes to do good empirical work is too long to allow it to be produced solely for an advocacy (where the lead-time is normally from two weeks to three months). Thus, much of the work had to be done even before the advocacy opportunity emerged. That was the case with almost all the empirically-oriented advocacy filings. For example, the state antitakeover law study provided needed evidence on the effects of antitakeover laws on shareholder values.[306] That study also provided credibility for the staff's claims of expertise on takeover issues. In addition, studies on the effects of health claims regulation allowed the FTC staff to speak credibly on food regulation issues and to break down decades-old barriers to health claims.[307]

Several other economic studies have provided the empirical basis for comments to state and local authorities (often authored by other Bureaus or Regional Offices). One example is the study of retail market area laws in auto retailing[308] which provided the basis for comments to various states concerning the effects of retaining such restraints. Similar experiences occurred with health care

[302] Jan Pappalardo's staff filing to FDA on direct-to-consumer drug advertising (6-00 comment by advertising attorney).
[303] Statement by Bill Hogan, *Public Utilities Fortnightly*, July 1, 1999, pp. 19-20.
[304] FERC Commissioner William Massey 1998 speech on Independent System Operators for electricity transmission.
[305] The FTC staff reports on mortgage disclosures in 2004 and 2007 were the basis for several advocacy comments to the Department of Housing and Urban Development (HUD). HUD researchers altered the GFE and HUD-1 forms significantly as a result of that prodding. For one of many discussions of that FTC research, see "Disclosure Debate Reheats in Wake of FTC Report," 6-18-07 RESPA Monthly, and Washington Post editorial 9-16-07, p. B6. Also see FTC at 100, Chicago 9/25/08, T. Schwartz Tr. 55, 101. Later on, comments were provided to the CFPB staff regarding the production of new and improved forms.
[306] Schumann, Laurence, *State Regulation of Takeover's and Shareholder Wealth*, BE, FTC, 1987.
[307] Ippolito, Pauline M. and Alan D. Mathios, *Health Claims in Advertising and Labeling: A Study of the Cereal Market*, BE, FTC, 1989; *Information and Advertising Policy: A Study of Fat and Cholesterol Consumption in the United States, 1977-1990*, BE, FTC, 1996; and Ippolito, Pauline M. and Janis K. Pappalardo, *Advertising Nutrition & Health: Evidence from Food Advertising 1977-1997*, BE, FTC, 2002.
[308] Robert P. Rogers, *The Effect of State Entry Regulation on Retail Automobile Markets*, BE, FTC, January 1986.

certificate-of-need studies, the dental hygienist study, examinations of any-willing-provider laws, restraints on gasoline distribution, airport slots, studies of internet distribution of wine, sales of contact lenses over the Internet, and numerous 2007-2008 and 2012 federal-level comments on the regulation of the mortgage process and other consumer credit issues.[309]

In addition, Bureau research on the regulation of long distance telephone pricing and entry[310] was used by third parties before the FCC and several state public utility commissions.[311] The 1984 study of taxicab industry regulation provided the basis for numerous comments to local jurisdictions regarding the likely effects of taxicab regulation and deregulation.[312] Economic Issues series papers on trucking regulation, and airline regulation, served as the basis for comments and testimony before several regulatory bodies.[313] Research estimating the computable general equilibrium effects of trade restraints served as the basis for comments to the International Trade Commission on the effects of manufacturing trade restraints, and research on occupational regulation has been used to support several advocacy comments regarding the licensed professions.[314] In short, much FTC economic research was used to provide empirical or analytical support for proposed positions on state and local advocacy issues. Without this research base, FTC staff comments would, on average, be both less complete and less compelling.[315]

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[309]See, for example, Daniel Sherman, *The Effect of State Certificate-of-Need Laws on Hospital Costs: An Economic Policy Analysis*, BE, FTC, January 1988; J. Nellie Liang and Jonathan D. Ogur, *Restrictions on Dental Auxiliaries*, BE, FTC, May 1987, Michael G. Vita "Regulatory Restrictions on Selective Contracting: An Empirical Analysis of "Any Willing Provider" Regulations," *J Health Economics* 20 (2001) 955-966, Michael G. Vita, "Regulatory Restrictions on Vertical Integration and Control: The Competitive Impact of Gasoline Divorcement Policies," *Journal of Regulatory Economics*, November 2000, Donald Koran and Jonathan D. Ogur, *Airport Access Problems: Lessons Learned from Slot Regulation by the FAA*, BE, FTC, May 1983, Alan Wiseman and Jerry Ellig, "How Many Bottles Makes a Case Against Prohibition? Online Wine and Virginia's Direct Shipment Ban," Working Paper #258, March 2003 (published as "Market and Non-Market Barriers to Internet Wine Sales: The Case of Virginia" in *Business and Politics*, 2004, the OPP study done by an economist James C. Cooper, "The Strength of Competition in the Sale of Rx Contact Lenses: An FTC Study," February 2005, and Lacko, James M. and Janis K. Pappalardo, *The Effect of Mortgage Broker Compensation Disclosures on Consumers and Competition: A Controlled Experiment*, FTC, February 2004; and Lacko, James M., and Janis K. Pappalardo, *Improving Consumer Mortgage Disclosures: An Empirical Assessment of Current and Prototype Disclosure Forms*, BE, FTC, June 2007.

[310]Alan D. Mathios and Robert P. Rogers, "The Impact of Alternative Forms of State Regulation of AT&T on Direct Dial Long Distance Telephone Rates." Working Paper #159, December 1987 and *The Impact of State Price and Entry Regulation on Intrastate Long Distance Telephone Rates*, BE, FTC, November 1988.

[311]FCC, Docket No. 87-313; Texas Public Utility Commission, Docket No. 7790; Missouri Case No. PO-88-142; Colorado PUC, Application #39020; and the Florida PUC.

[312]Frankena, Mark W. and Paul A. Pautler, *An Economic Analysis of Taxicab Regulation*, BE, FTC, 1984. The entry restrictions into taxicab service that have existed in most cities have been challenged intermittently for decades. Attempts to enter markets by new mobile phone technologies that match riders and drivers (Uber, Lyft, etc.) is once again making the topic relevant in 2013 and the FTC once again commented on the process.

[313]Diane Owen, *Deregulation in the Trucking Industry*, BE, FTC, May 1988; and Jonathan D. Ogur, Curtis Wagner, and Michael G. Vita, *The Deregulated Airline Industry: A Review of the Evidence*, BE, FTC, January 1988.

[314]Carolyn Cox and Susan Foster, *The Costs and Benefits of Occupational Regulation*, BE, FTC, October 1990.

[315]Research on regulatory issues slowed substantially in BE after 1990, and since 2000, with the exception of work on credit disclosures, such studies have been almost nonexistent. Regulation studies have, however, been occasionally produced by the Office of Policy Planning (sometimes by attorneys with economic training who often populate that office). This lack of empirical work on regulatory issues would make it difficult to renew an advocacy program with the substantive depth of the program that existed in the 1980s. The few regulatory studies that were completed in the 1990s, were not used extensively in advocacy filings because such filings themselves were out of favor. Thus, the studies of AT&T price cap regulation, ocean shipping, state trucking regulation, and gasoline retailing divorcement laws were

C. The Competition Advocacy Process and History

One can perhaps argue that the Advocacy program (known internally as the "intervention" program in the 1970s and 1980s) dates back to the earliest days of the Commission, when the FTC submitted comments to the Fuel Administration (on coal pricing) and the War Industries Board (on steel). The more recent establishment of the program was undertaken as part of a general revitalization program for the FTC in the mid-1970s. Competition advocacy was made part of the Competition mission in 1975, under Chairman Louis Engman.[316] Scherer argues that the regulatory intervention program began as the result of several 1970s BE economic reports documenting the costs imposed by clumsy government policies (e.g., petroleum pricing, optician regulation, and occupational licensing).[317]

Celnicker (1989) provides a history and evaluation of the Advocacy program.[318] Although he does not mention the Engman era, he notes that Alfred Dougherty, Bureau of Competition Director under Chairman Michael Pertschuk, wrote that "the intervention program played an important role in advancing the Commission's competition goals."[319] Under Pertschuk, the Commission or its staff presented comments to numerous federal level agencies on a wide range of issues.[320] One important focus was on breaking down barriers to international trade, which the Commission in that day saw as a major threat to consumer welfare.[321] Health professions advocacy work was also significant.[322]

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not used intensively. The demise of regulatory studies is implied by the FTC's Annual Reports, which discussed or explicitly listed a BE subsection on studies of "regulation" from about 1981 to 1991. This subcategory disappeared in 1992, and has not reappeared. That research would have been the component that most directly supported the advocacy functions.

316Kovacic (1982, p. 649). See Engman's October 7, 1974 speech concerning regulatory excess that is sometimes designated as the beginning of the advocacy program. That speech did not, however, propose any process for FTC intervention in the regulatory machinery, but rather generally urged that aggressive antitrust enforcement be considered as a substitute for regulation. A year later, in August 1975, President Ford launched a campaign of general deregulation of industry. (Greenspan, Age of Turbulence, 2007, p. 72.) The 1975 FTC Annual Report (pp. 7, 15) is the first report to discuss anything that sounded like advocacy activity. The first listing of "interventions" occurred in 1980, but it is clear that many federal level advocacy activities occurred in the intervening years. For example, see the 1978 FTC Annual Report (pp. 2, 10-13, 24-25) discussing support and advice to both states and sister federal agencies.

317Scherer (1990, p. 471).

318Celnicker was an attorney at the FTC prior to writing this article as a law professor at Ohio State University. Other evaluations of the program are found in speeches by FTC Commissioner Andrew J. Strenio Jr. (June 1987), and Chairman Deborah P. Majoras, (February 2005). Since about 2005, the Office of Policy Planning has taken on the task of surveying recipients and users of the FTC's advocacy comments to gauge their value.

319Celnicker (1989, p. 384) citing Alfred F. Dougherty Jr. memorandum to the Commission, June 30, 1980. The FTC Annual Reports for 1978 (pp. 10-12) and 1979 (pp. 7-9) list several activities that would fall into the advocacy category.

320Comments would have been filed with almost every alphabet agency of the federal government that dealt with micro-economic policy issues including the CAB, ICC (both now defunct), DOE, DHEW (now DHHS), FCC, ITC, USDA, and USTR. The legal basis for the Advocacy Program stems, in large part, from Section 6 of the Federal Trade Act, which empowers the Commission to gather a broad range of information on business organization, conduct, practices, and management and to report it to the public. This authority has for years been interpreted to authorize the presentation of economic or legal analyses on issues affecting the operation of markets and the competitive process.

321There were many filings with the International Trade Commission from 1975 to 1982; see McChesney et al. (1982, pp. 38-42, A27-A28). Tollison (1983, p. 217) notes an early 1980s focus on both postal regulation and international trade restraints. The view that restraints on international trade should be high on the list of advocacy targets remained until 1990, when Chairman Steiger de-emphasized trade-related advocacy work. The trade-related advocacies had offended

The advocacy program was further emphasized and formalized in 1982 under FTC Chairman James Miller, who provided a public rationale and plan for the program, and who placed coordination of the program in the Bureau of Consumer Protection.[323] The formalization was intended to facilitate a well-defined advocacy program with procedures to allow one week turnaround for comments. The program was based on longer term empirical research that would be the basis for multiple comments. Much of the focus was on health care, transportation, energy, international trade, and communications. The agenda under Miller was to file comments with federal and state agencies regarding a broad range of regulatory activities bringing benefit-cost principles and economic evidence to bear on the proposed regulations.[324]

The advocacy program was controversial from its inception, because it could not avoid offending someone on each issue it pursued. Certain Congressmen tried unsuccessfully to place substantial restrictions on the program in 1987 as part of the FTC's reauthorization process.[325] Some of the animus toward the Program was likely based on disputes over specific policy suggestions, while more general objections may have arisen regarding the proper role (if any) of a federal Agency in providing suggestions regarding competition or regulatory policies to a state legislature or regulatory body. Some restrictions were eventually imposed on the program in 1994 requiring that the FTC notify Congress of upcoming advocacy filings.[326]

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many politicians (and some ITC commissioners) over the years, particularly those who wanted to manage trade or deter imports. Opponents of the FTC's advocacy efforts in this area went so far as to argue that the FTC's advocacy program, which focused on consumer welfare effects of trade restraints, had advocated violations of the law by the ITC because it drew the ITC's attention toward consumer welfare (which the trade laws did not allow them to consider) and away from the distress of the trade-impacted industries.

[322]FTC Annual Report 1979, pp. 7-9.

[323]See McChesney, et al. (1982) and Tollison (1983, pp. 217-18). During this initial period from 1982 to 1984, the advocacy program was led by future ICC and FTC Commissioner, Andrew J. Strenio, Jr.

[324]Beginning in 1983, the number of state-level filings increased dramatically. This was a change from the prior era when comments were largely restricted to other federal-level agencies. This change appeared to be a major cause of the animosity generated by the advocacy program. Some state legislators and regulators viewed the FTC staff comments as unwelcome meddling. Celnicker's (1989) survey, however, did not indicate widespread problems. It is possible that a few, very upset, recipients were the cause of the complaints. More likely, those who complained to Congressional leaders about the program were not the recipients of the comments (after all they had asked for them), but rather were the political opponents of the recipients, who perhaps felt that the FTC staff comment had adversely affected their interests.

[325]Celniker (1989, pp. 393-400) describes the effort in some detail. Interestingly, Bill Baer, mid-1990s BC Director and an FTC Congressional liaison official in the turbulent late 1970s, indicated that advocacy work (which Baer implicitly defined as all non-law-enforcement activity) on insurance and agricultural co-operatives (this would better be described as "research") was a major source of Congressional angst regarding the FTC in the late 1970s. Baer also indicated that in the late 1980s, he was not a fan of the non-law-enforcement agenda. [See FTC 90th Anniversary Symposium transcript, September, 23, 2004, "Beyond Litigation: Studies, Guidelines and Policy Statements," pp. 89-92, at https://www.ftc.gov/news-events/events-calendar/2004/09/ftc-90th-anniversary-symposium. Later mentioned in Calkins (2005, p. 1189)].

[326]In fact, since the mid-1980s, the FTC staff had routinely sent copies of the filings to the Oversight Committees for the FTC and staff comments were not sent to a state agency or legislature without a specific request for the comments. Long after the zenith of the advocacy program, the FTC Act Amendments of 1994 (Reauthorization Act), Section 11, required that Congressional Committees be notified prior to FTC advocacy activity. That requirement for prior notice expired in 1998, after which the FTC sent copies of advocacy filings to House and Senate Commerce committee staff on a monthly basis. As of 2013, the advocacy program has not been a target of Congressional ire in almost two decades,

Congressman Dingell and Senators Luken and Gore maintained vigilant oversight of the FTC's advocacy and research activities in the mid to late 1980s and nontrivial effort was put into responding to their requests for detailed information about the cost and content of each advocacy and study. FTC Chairmen James Miller III and Daniel Oliver were routinely asked penetrating questions about the program. Certain Congressional critics indicated that the advocacy program was sufficiently expensive that it kept the Commission from aggressively pursuing predation and other nonmerger antitrust activities. But lack of resources was surely not the reason that the FTC leadership had chosen to avoid those areas. Rather, the leadership felt that many cases in those classifications would be welfare-reducing.[327] The advocacy program never consumed more that 4% of FTC resources at its zenith (and by 2000, the percentage was so small that the program was virtually invisible).[328] The real problem with the advocacy program was not the cost; rather, it was the fact that it made enemies on each issue it addressed and it was sometimes seen as an unwanted meddler in state-level issues. The more active it was, the more enemies it made; and, given the content of the program, those enemies were likely to be those who supported active regulation of markets and less market-based competition. This characteristic of the program was effectively addressed in 1989 when a new FTC Chairman, Janet Steiger, de-emphasized the advocacy program, reducing tensions between the FTC and other regulators and regulation advocates.

In 1988, the activity was reorganized with the formation of a new Office of Competition and Consumer Advocacy (OCCA) which was established to be the focal point for requests for comment and to coordinate work done by other staff members and facilitate (and reduce) review by Commissioners' offices.[329] This office would continue to exist until about 1994.

Efforts were made to assess the Advocacy Program's impact over the years. Indeed, the Advocacy program is likely the most systematically reviewed of all FTC activities. On two occasions, survey questionnaires were sent to the recipients of advocacy comments. A 1989 Law Review[330] article discussed the responses to a survey sent to the state and local parties that received FTC Advocacy comments dated June 1, 1985 through June 1, 1987. Based on the survey responses, the author concluded that

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and no advocacy filings have been forwarded to Congress since at least 2004.

327Celnicker (1989, p. 399). The FTC Chairman during that period, Daniel Oliver, was an advocacy proponent and a strong opponent of government malfeasance. He presented the one and only “Consumer Fleece Award” to New York state officials who supported anti-consumer milk market regulation.

328The Advocacy Program consumed about 3% to 4% of FTC staff resources (30 to 40 workyears) at its 1987 zenith (See James Giffin, Associate Executive Director, memorandum to Andrew J. Strenio (FTC Commissioner), July 28, 1987 cited by Celnicker (1989, p. 399)). The program likely used about 6% to 8% (7 to 10 workyears) of direct BE resources during this peak period. Advocacy resources were about 2% of FTC resources in 1989 and less than ½ of 1% of FTC resources in 1994 (4 to 5 agency workyears). By 1994, Bureau of Economics employees were the only staffers writing substantive advocacy filings and the attorney who headed-up the Office of Competition and Consumer Advocacy was writing all the shorter filings. In 2000, less than two workyears would have been used in the agency-wide advocacy program. (The data for that year, such as they are, indicate that less than one workyear is devoted to advocacy across the agency). As of 2002, the total agency workyears devoted to advocacy might have been closer to five, and that may have expanded to 7 or 8 agency-wide by 2007, when a number of consumer finance comments were undertaken.

329Celnicker (1989, pp. 385-386).

330Celnicker (1989, pp. 400-401).

> the FTC provided input that decisionmakers found useful. [I]n only twenty-five percent of the cases did the decisionmakers find the information or perspectives provided by the comment duplicative of other comments, or information already well understood by the decisionmaker.
>
> Sixty-five percent of the survey recipients indicated that they either had requested, or plan to request, FTC input on other issues . . . These survey results lead to the conclusion that the FTC comments were of value to the decisionmaking process.

In 1989, a virtually identical survey was sent by the Director of the FTC's Advocacy Office to recipients of comments dated June 1, 1987 through June 2, 1989. The responses to this second survey were consistent with those from the first.[331]

The 1989 "Kirkpatrick II Report"[332] contained the following description of the Advocacy Program:

> The FTC's Competition and Consumer Advocacy Program is one of the most important of the FTC's various projects. Only two other federal government entities, the Antitrust Division and the Council of Economic Advisors, also serve consistently in this capacity. Of these three, the FTC devotes the most intellectual energy and resources to the task. The FTC has consistently, and on the whole correctly, pursued the objective of promoting consumer welfare. It has generally provided quality advice about issues of consequence.
>
> The FTC's competition advocacy program permits it to accomplish for consumers what prohibitive costs prevent them from tackling individually. It is the potential for the FTC to undo governmentally imposed restraints that lessen consumer welfare, and to prevent their imposition, that warrants the program's continuance and expansion. Because ill-advised governmental restraints can impose staggering costs on consumers, the potential benefits from an advocacy program exceed the Commission's entire budget.

Despite the ABA's positive appraisal of the advocacy program, it was substantially de-emphasized during Chairman Steiger's tenure,[333] and, after 1995, advocacy positions were much more closely

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[331]Most advocacy comments are reportedly helpful and welcome and many of the comments do have significant influence on decision makers. In recent times, the Office of Policy Planning routinely sent surveys to comment recipients to follow-up on the effects of the comments and to evaluate their impact. The results of those surveys were included in the Agency's annual performance and accountability report. In addition, in February 2005, Chairman Deborah P. Majoras gave a speech providing an impressionistic cost-benefit appraisal of the program.

[332]Report of the American Bar Association, Section of Antitrust Law, Special Committee to Study the Role of Federal Trade Commission, Antitrust and Trade Regulation Report, 56, Bureau of National Affairs Special Supplement (April 6, 1989) at S-23.

[333]Chairman Janet Steiger's term covered late 1989 to mid-1995. One of her major goals was to improve relationships with various state agencies. De-emphasizing the advocacy program was one means of achieving that goal. (For a discussion of Chairman Steiger's goal of federal/state cooperation, see "Cutler Hangs up FTC Armor Again," *Food & Drink Daily*, May 1993, p. 2; Cutler's paper in the NAAG Consumer Protection Report, February 1991, pp. 1-3; and

coordinated with other government agencies (e.g., DOJ, FCC, FERC, DOT) to ensure consistency of viewpoint and a generalized executive department consistency.[334]

As of early 2000, on matters of substance, the FTC's program of regulatory comment was proceeding at a much reduced pace, focusing on the restructuring of the electricity generation and distribution industry, where numerous comments were filed. The electricity reform effort raises both competition and consumer protection issues and thus both legal bureaus have done something on the issue, although since 1995 the bulk of this effort was undertaken by one economist (BE's Electricity Project Coordinator) with drafting help from BE's one attorney, until that attorney's December 1997 departure. At that point, the Advocacy function moved back to OPP. Scattered comments on other substantive issues were produced (e.g., an occasional comment to FDA on a food advertising or drug regulation issue, a privacy/Internet issue, a comment related to a BCP rule, or a random state horizontal entry restraint of some kind in the professions or the liquor selling business), but they were few compared to the heyday of advocacy activity, and virtually none were supported by empirical work. Indeed, the electricity work, which was the most substantive work in the advocacy area from 1995 to 2000, was not based on empirical research done within BE. Substantive empirical work on those issues is done by the state regulators and private academic consultants, but FTC comments would have assured that such evidence was on the regulatory record.[335]

The FTC's advocacy program was reinvigorated to some degree in late 2001 as the program sought to expand beyond electricity, into areas that were familiar ground in the 1980s - restraints on entry in local markets and governmental restrictions on competition. The program from 2002 to 2008 used less than 2 BE workyears and perhaps 6-7 workyears across the entire FTC. There was some effort to provide an empirical basis for some of the advocacy work via FTC Workshops and Hearings and short-term research projects that were led by the Office of Policy Planning. The general regulatory

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Steiger's 1989 -1990 speeches, especially "Agenda for the FTC," November 3, 1989, 23rd New England Antitrust Conference, p. 2.) Fairly early in Chairman Steiger's tenure, the regional offices, which handled a good bit of the advocacy generation and production work at the state level, lost interest in advocacy work. A few regional office attorneys who had an intellectual interest in the issues handled by the advocacy program continued to do some advocacy work, but it was no longer an essential part of their duties. The early phase of the decline in advocacy from 1989 to 1990 resulted in the reduction in both advocacy filings (49%) and resources used in the program (20%) over that period. That decline continued throughout the 1990s. From 1991 to 1994 few, if any, resources were allocated to the effort by the two legal bureaus or the regional offices. In 1994, the separate Advocacy Office was disbanded, and the advocacy coordinator was moved into the Bureau of Economics. When that coordinator left the agency in December 1997, the program moved to the Policy Planning shop. Still later, the advocacy coordination function moved to the General Counsel's Office in about June 2001 for 3 months and then reverted to a reformed Office of Policy Planning, although responsibility for electricity and pharmaceutical advocacies remained with the General Counsel. As one can see, the siting of the advocacy administrative function has always been exceedingly flexible.

[334]It is interesting that the original conception of the formal advocacy program indicated that if the comments were redundant with those of other agencies, the program would be less valuable. See McChesney et al. (1982, p. 13). By 1995, extensive coordination across the Agencies had become a goal, ensuring that only one view would be forthcoming. In a broader context, coordination with the Department of Justice on advocacy and competition policy fronts continually increased over the 1990s and 2000s. This enhanced coordination occurred on both international and domestic competition policy.

[335]The FTC did, however, hold a conference on electricity regulation in Summer 1997. A few knowledgeable academics attended that gathering. In addition, the FTC provided a Congressionally-requested descriptive report on retail electricity sales in 2001. An appendix to that report provided a useful compendium of retail electricity regulation in each state.

research that previously supported the program in the 1980s, however, was no longer in existence, so the basis for comments would have to be found elsewhere. But the program did become more active and diverse. In particular, more comments were pursued in the areas of attorney services, real estate closings, gasoline retailing restrictions; barriers to entry in various lines of e-commerce; and other government-supported barriers to entry (many in health care areas), restraints on food and drug marketing, and mortgage lending. Following this modest reinvigoration, the administration of the FTC's program remained in the Office of Policy Planning, where it had been located since 1997.[336]

By 2008, the advocacy program was small, but diverse and focused on traditional FTC issues. In that year, the FTC filed twenty advocacies (including 2 or 3 amicus briefs) focused on health care entry barriers (CON and other entry restraints on innovative forms of service provision), electricity reform, credit disclosures, real estate, and the unlicensed practice of law (UPL). Twenty filings per year seemed to be the norm in the first half of the 2000s. The advocacy program was given immense support in the FTC at 100 consultations in 2008. No one, of over 100 global participants, said anything negative about the activity and several persons expressed great support. See Kovacic (2009, pp. 121-124, 169.) As of 2014, the advocacy program retains its 2008 character, being a minor element of the FTC's arsenal of weapons targeting anti-consumer practices or supporting pro-competitive actions.

The competition advocacy mantle has not been owned by the FTC alone. Various groups have taken on the task. For example, an American Enterprise Institute/Brookings group formed in 1998 to review government regulation.[337] For a decade, that group pursued one of the primary notions behind the advocacy program from the late 1970s and early 1980s - analysis of regulatory issues uncolored by rent-seeking motives and focused on competition and consumer protection matters.[338] The AEI/Brookings joint center disbanded, however, in late 2008 (perhaps due to policy re-positioning connected to the upcoming presidential elections).

From 1982 to 2014, the 32 years for which data exist, about 947 comments were issued, an average of about 30 per year. The rate was much higher in the early years, peaking in 1987 at 102.[339] From 1991 to 1997, and 1999-2001 production of comments was relatively low given the output in the earlier

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[336]The Office of Policy Planning has been led by a political appointee since the 1970s. The Office has historically experienced a good bit of staff turnover as administrations changed. Several heads of that office have gone on to other government positions, including FTC Commissioners, Secretary of Labor, and US Senator.

[337]In addition to AEI/Brookings, other groups also do some work that falls in the advocacy category. These groups include: the Mercatus Center at George Mason University, the CATO Institute, the Consumer Federation of America, and the Department of Justice. The DOJ's advocacy efforts seemed to lose steam about the same time as those at the FTC, but the DOJ routinely examines mergers in regulated industries and thus does more work in those industries than does the FTC.

[338]The number of "easy" regulatory issues has decreased over the past 20 years as deregulation of transportation, certain utilities, telecommunications, etc. have moved forward. Thus, there may be somewhat less need for an advocate for rational analysis of regulatory and competition issues than there was in the 1970s and 1980s. There are still enough issues left, however, to provide fodder for a program, especially those related to government-supported entry barriers. Without empirical work as a base, however, the FTC's arguments in opposition to most such barriers will be less compelling than they might be.

[339]Recall that advocacy-type filings had been produced since at least 1975, but no systematic count of early filings has been located.

period, averaging 17 per year. The single year nadir of the program occurred in 1997 when 7 advocacy filings were produced. Currently, about 15 to 20 filings occur each year. Over the past decade, the number of annual advocacy filings has been in the mid-20s during Republican administrations and in the mid-teens during Democratic administrations. Comments during the past decade have tended to focus on various electric utility activities especially at the consumer level, health care, occupational regulation topics (especially entry restrictions), telecommunications, privacy, taxicab regulation, and (in 2005) on antitrust issues raised by the Antitrust Modernization Commission.

VII. International Technical Assistance and Policy Coordination: Advice to Other Countries (1990-2013)

With the fall of Communism in eastern Europe and the weakening of the juggernaut Japanese economy about the same time, a new activity arose for the FTC in 1990. Several of the former Communist-bloc nations and newly emerging nations in the less developed world were trying to reconfigure their economies. Many of these nations had an interest in emulating the institutions and laws of the most successful Western market-oriented nations. Through its international "technical assistance" program, the FTC played a role in trying to explain how our system of laws evolved and how it enhances productivity. Obviously, the areas that the FTC attorneys and economists knew best were competition and consumer protection laws, but property rights issues and legal systems generally were also essential components of understanding how the U.S. system works.[340]

Often under the auspices of the U.S. Agency for International Development (USAID), the FTC and the Justice Department sent emissaries to Central and Eastern European, African, Latin American, and Far Eastern nations in an effort to pass on knowledge about how antitrust and consumer protection work in the U.S. and how they might be made to work in nations with other cultures and other institutions. Essentially, the FTC got into the business of exporting the U.S. antitrust and consumer protection systems to foreign lands.[341]

Exporting the U.S. antitrust and consumer protection systems was accomplished in several ways. Knowledgeable staff from the FTC and Department of Justice (DOJ) were sent on missions to help fledgling competition agencies in other nations. These missions could last from one week to one year. The Bureau of Economics played a significant role in this activity, providing staff for several missions.[342] Economists often went with attorneys as a team, oftentimes mixing DOJ and FTC

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[340]Interestingly, many of the newly independent states thought the capitalist economic system in the United States resembled the "Wild West" in which no rule of law existed. They must have gotten this wild misimpression from watching old episodes of TV shows such as Bonanza. Regardless, they soon learned (Russia, in particular) that modern economies cannot flourish in an environment without enforced property rights and private ownership principles.

[341]Whether forming competition agencies was a good use of the scarce resources of newly evolving nations was debated by some (see Godek 1992), but the reformers appeared to appreciate the training effort, an effort that was mimicked by the EC.

[342]Early in this process (1990-1991), BE took a leadership role in out-reach efforts to Eastern European nations. One economist manager was particularly interested in the activity taking several trips to aid the newly reformed nations. Various other economists took one- and two-week trips to dozens of nations over the years. On one occasion, in early-1997, an economist took one of these trips to Tirana, Albania and managed to become immersed in social instability caused by the collapse of a large pyramid scheme, an area of particular expertise for that economist. Ironically, following the advice of the State Department, he could not discuss the pyramid issue while on the trip due to the unrest.

staffers. The missions focused on the more developed eastern European nations from 1992 to 1995 and then the focus shifted toward the newly emerging nations in the old USSR. In the early 2000s, more attention was being placed on South American and African nations.

Economists also provided input from Washington, DC by commenting on drafts of competition and consumer protection legislation from nations that were considering such initiatives and by meeting formally and informally with officials from foreign nations as they toured Washington to learn about U.S. antitrust and consumer protection processes. On occasion, these foreign visitors stayed for weeks or months to learn about U.S. legal institutions. Competition issues seem to be of more interest than consumer protection, which is consistent with the historical development of such laws in the U.S., where the development of explicit competition statutes preceded specific consumer protection laws. Long-term stays by visitors became more common after late 2006 legal changes (USA SAFEWEB) allowed more exchange of information. Economists from Hungary and Egypt were the first of several planned long-term visitors. On occasion visitors wished to discuss broad issues of policy, but more often they wanted help with the nitty-gritty details of how the U.S. antitrust agencies actually do investigations, how much ability they have to compel information from firms, what their remedial powers are, etc. Economists often participated in those meetings and provided written background information for the visitor's consideration. For example, in 1990 economists participated in seminars in Washington for visitors from Pakistan, Russia, Sweden, Canada, Bulgaria, and Nigeria, to name a few. In 2010, the line-up of countries that received competition ("C") or consumer protection ("CP") advice from economists included Indonesia, Singapore, Mexico, Hungary (both C and CP), India, Columbia, Ecuador, Kenya, and Turkey (all CP).

Much of the early international outreach work was coordinated through the Bureau of Competition's International Office.[343] The training work was done at the same time that bilateral and multi-lateral agreements were reached with the antitrust agencies of the developed nations (e.g., European Union, Mexico, Brazil, etc.) to cooperate on the antitrust enforcement front. Antitrust has become a global exercise as multi-national companies merge and many nations want to review the transactions for potential adverse effects.[344] Currently, the EU and the U.S. are the world leaders in antitrust and

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Economists also made extended visits to Poland (1995), Lithuania (1995), South Africa (2000), and Indonesia (ASEAN) (2007) trying to help those nations' fledgling antitrust enforcers with merger enforcement work. An attorney housed in BE, also took many out-reach trips from 1995 through 1997.

343The Chairman's Executive Assistant, and later members of the General Counsel's Office, also played significant roles in coordinating international activities. Within BE, the coordination of economist input shifted across several individuals over the decade of the 1990s, eventually coming to rest with BE's Assistant Director for Economic Policy Analysis in mid-1997. That coordination function moved to DEPA's successor group, the Office of Applied Research and Outreach (ARO), in 2008.

344Coordination of antitrust policies across nations had been a growing endeavor during the 1990s. For example, the International Antitrust Enforcement Assistance Act (1994), 15 U.S.C. 6201 *et seq.* encourages international cooperation and data sharing. Just before leaving his post as DOJ's Assistant Attorney General for Antitrust, Joel Klein, gave a speech indicating that the United States considered the time right for a more unified global approach to antitrust enforcement (*Wall Street Journal*, September 15, 2000). Other U.S. and European Union antitrust enforcers echoed those views within days or the next month. See "EU Competition Commissioner Signals Readiness to Proceed with Global Forum," Antitrust and Trade Regulation Report, BNA, November 3, 2000, pp. 449-50. That coordination occurred through various task force meetings between the US and EU antitrust managers and staff over the next several years. DOJ and FTC attorneys led that coordination effort in 2001-2002 and various economists from the FTC and DOJ participated in the transfer of antitrust policy experience and views in connection with that effort. In 2004, the BE consumer protection analysis, but other nations do not want to be left behind.[345] Formation of the International Competition Network (ICN) in October 2001 was evidence of the growth of antitrust enforcement internationally. As of about 2010, the ICN had grown to over 100 members representing over 90 jurisdictions including the large majority of nations with active competition laws and policies. In October 2003, BE sponsored a conference of economists who were involved with international antitrust regulators to help foster idea exchange and convergence of economic thinking behind antitrust enforcement policies worldwide.

The total amount of time spent by economists on this international-outreach activity is often centralized in a few persons who spend the bulk of their time on foreign missions or in coordinating the visits and presentations.[346] Meetings with foreign visitors who come to Washington are spread more widely across the economist staff as the visitors are interested in talking to a wide range of staff working on a variety of projects. On occasion, economists prepare analyses of various regulatory issues for the Organization for Economic Cooperation and Development (OECD), or the United Nations (UNCTAD), which act as a clearing houses for coordination of information on regulatory policies and effectiveness across many nations. Work along these lines has included examinations of vertical restraints, international trade restraints, and competition in the market for satellites, airlines,

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Bureau Director was making at least bimonthly trips to European capitals to discuss US antitrust approaches and to try to convince the Europeans that the US approach to antitrust (focusing on horizontal market power) was superior to the European (EU) approach which focused more often on vertical restraints and single firm dominance. As with virtually all antitrust debates, each side said their approach was the one based on "the evidence," whereas the other's was simply "theoretical." Since 2000, the BE Directors have often accompanied the FTC Chairman and Commissioners to Europe for OECD and EU meetings on competition issues.

[345]The US and EU do not always see eye-to-eye on competition issues. From 2000-2004 disputes arose regarding the handling of the GE/Honeywell merger (which the EU blocked) and the MicroSoft software dominance cases. BE and the FTC's competition policymakers played a role in US/EU discussions regarding those cases, but DOJ (particularly Bill Kolasky on GE/Honeywell) was the main protagonist. The GE/Honeywell matter seemed to be a turning point in antitrust coordination because the dispute regarding that merger made it clear to everyone (even those outside the antitrust community) that international coordination of antitrust policy was something that had become a necessity. Substantively the biggest disagreement between the groups was on the definition of market dominance and the circumstances under which unilateral market power might appear. Among other things, the EU was generally more willing to suspect the existence of market power at lower levels of concentration and firm size. That difference in perspective may also have been true on average for European industrial organization economists versus American IO economists.

[346]In commenting on international antitrust support while a law professor at George Mason University, William Kovacic indicated that the extent of DOJ and FTC activity in the area of international outreach dwindled between 1995 and 2000. See "Pitofsky Wishes Indonesia Good Luck with Ambitious New Competition Law," *FTC Watch*, October 23, 2000, p. 6. For BE, work on the international outreach and OECD fronts probably peaked in 1993 to 1994 at about 2.5 workyears annually. That level fell well below one workyear in the latter 1990s, but has risen since then, increasing to more than two workyears in 2005 through 2007. In 2009, BE inputs on various international activities were above the previous peak level, reaching 2.8 workyears, but have since fallen to about 1 workyear in 2012. Agency-wide, in 2002 international technical assistance and policy and enforcement coordination activities involved perhaps 16 dedicated staffers across the two legal bureau shops and the General Counsel's office (about two percent of FTC staff time), and much of the foreign-based training activity was funded by another agency, the U.S. Agency for International Development, which provided about $1.2 million in funding for international outreach efforts in 2002. As of 2008, which may have been a peak year, the agency-wide resources devoted to International activities were likely well over 40 workyears because the International shop itself had 24 full-time staffers and BE was asked to do a large amount of training and hosting of visitors in 2007 and 2008. Presumably, the larger bureaus were also being tasked with more such work.

and surface transportation as well as compilations of information about after-the-fact evaluations of competition policy activities.

International cooperation on the consumer protection side of the agency also bloomed during the 1990s, although it has never seemed quite as intense as it was on the competition front. The Bureau of Consumer Protection cooperates with other nations on a wide range of consumer protection issues including: cooperative anti-fraud enforcement with Canada, international searches for Internet frauds; uniform labeling within the NAFTA area on clothing, appliances; shared use of fraud databases with Australia; international harmonization of standards; and OECD papers on consumer policy issues. In later periods, a substantial effort went into coordinating various national rules for electronic commerce and privacy.[347] In early 2002, the Bureau of Consumer Protection instituted an international consumer protection division to focus on the growing multi-national component of consumer protection. The Bureau of Economics played relatively little role in many of these endeavors on the consumer protection side, although economists from the Division of Consumer Protection have taken several trips to foreign lands in conjunction with the more general program to export U.S.-style competition and consumer protection policy.[348] Much of the developed world is attempting to coordinate still further on consumer protection issues, and bills in Congress were passed to achieve that end. For example, the US Safeweb Act, which passed in late 2006, allowed for additional international law enforcement coordination.

The Bureau of Economics more fully joined the international consumer protection policy discussion by holding a conference on behavioral economics in April 2007. That particular sub-field is becoming the "next big thing" in consumer protection economics. The OECD's Consumer Protection arm developed a policymaker's toolkit for consumer protection featuring behavioral economics as a primary way to think about consumer problems. BE economists participated in many discussions regarding the production of the toolkit and BE economists took pains to comment on drafts and to rewrite it several times. That toolkit was ultimately released in early 2010, with a substantial, but reduced, emphasis on behavioral economics. The EU has also focused on behavioral economics and the EC's 2008-2009 Consumer Protection leader, Bulgaria's Meglena Kuneva, initiated a second conference on the issue in 2010.

In May 2007, a survey was conducted of BE's economists who participated in the international activities. The goal was to get some information about the time expenditure, the perceived value of the activity, and how the FTC might do things better and differently. As expected, given the selected nature of the twenty participants, everyone reported that they enjoyed the activity, although they almost uniformly noted that it increased their workload. Preparation for the international teaching

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[347]In 1992, delegates from 20 nations formed the International Marketing Supervision Network (IMSN), now called the International Consumer Protection and Enforcement Network (ICPEN), to coordinate consumer protection enforcement across borders. As of early 2007, the group consisted of members from 33 nations (mainly from North America, Europe, and Australia), and two regional organizations - the EU and OECD. By 2013, more than 50 countries were represented on the ICPEN membership rolls.

[348]Occasionally the outreach efforts seem almost bizarre. In early May 2004, BCP and BC staff commented on a draft consumer protection law for Iraq, a country the U.S. had invaded a year earlier in an effort to spread democracy, fight terrorism, and find and eliminate weapons of mass destruction. Consumer protection must have been on the agenda for the post-war revival of Iraq.

activities tended to take three times the teaching time. If the mission was for four or five days, the prep time tended to be about three weeks. The survey respondents also opined that the student nations likely obtained benefits in almost all cases; although the respondents virtually uniformly thought that longer training periods are needed to truly instill the information in a way that will allow it to be effectively used by the students. Finally, the survey revealed various tips regarding situations to avoid in future (e.g., do not send economists to nations that are moving toward socialism or despotism; and whenever possible use examples based on the student-nation's recent history in teaching rather than using general theory or US examples).

In early 2007, Chairman Majoras brought the international activities on the consumer protection and competition missions under one roof in an FTC-wide Office of International Affairs. The head of that office is part of the senior staff - equivalent to Bureau Directors and major Office heads. The melding of the various separate offices was intended to enhance coordination and raise the profile of the agency's international activities. The interaction of economists with this unified shop remained essentially the same, but the reorganization rationalized the connections, reducing the number of individual offices to coordinate with – there were no longer separate points of contact for OGC, BC, and BCP shops.

When BE reorganized itself in January 2008, the economics coordinator for international issues became connected to the newly named Office of Applied Research and Outreach (ARO). Although the changes were likely not responsible, the level of international coordination, report-writing, review, and training activity was furious in Summer 2008, as the FTC competed with the EU and others to be the world leader in providing training and policy advice. It is likely that Chairman William Kovacic's preferences had something to do with that activity level. He had always been a strong proponent of FTC international activity and an advocate for FTC intellectual leadership in the competition and consumer protection policy realms. Indeed, Chairman Kovacic was something of an international antitrust rock star – a sought after speaker and thinker for the various antitrust and consumer agencies of the world.

Two new international activities were tried in 2008/09. First, joint merger retrospective work was considered with the EC's DG Comp. The merger research did not ultimately occur because finding a suitable topic that would be of interest to both participants and on which data would be available was too difficult. A staff swap did begin with the UK as a BE economist spent four months in the UK, learning about their approach to competition policy. Such joint research and staff swaps were recommended following the FTC at 100 consultations, (see Kovacic 2009, p. 181).

By late 2009, the level of international activity at the FTC slowed a bit after Jon Leibowitz became Chairman. The activity surely remained significant, but Leibowitz would use less U.S. resources "planting trees" in the international policy orchard (less training and less cooperative interaction) than would the previous chairman, Bill Kovacic.

VIII. Congressional Opprobrium and Other Criticism of the Agency and the Bureau

The FTC and the Bureau of Economics have tried to carry out the functions of the Agency through periods of significant change in political fashions. As with most government agencies at some point in their history, the FTC has had its share of critics. Some of those critics have been Congressmen and at times the critics have been sufficiently vocal and powerful that the Agency was in some danger of being altered significantly or closed. Because government agencies seldom expire,[349] it is not obvious that the reported threats to the FTC's existence would have been carried out, but some of the written history makes that appear to be the case. In the early years of the Agency, the Economic Division was a significant part of the institution and was also a significant cause of the displeasure with the Agency. There were several instances when the criticism became sufficiently strident that the Agency had to actively respond.

A. Criticism of the Agency or the Bureau

The first period of sustained criticism occurred after the July 1918 *Meat-Packing Industry* report. That study focused on the collusive or predatory actions of the "five great packers," Swift, Armour, Morris, Cudahy, and Wilson. As a remedy for the market power allegedly held by these firms, the Commission recommended government ownership and control of the distribution levels just above and below the meat-packers - the stockyards and all refrigerated rail cars.[350] This recommendation met with hostility in some quarters. The U.S. Chamber of Commerce attacked the Commission claiming that the FTC had proceeded to tar the industry via broad accusation and innuendo. A New York Times editorialist appeared to agree, arguing on September 3, 1918 that to be useful the FTC "should be cured of its present bolshevist and propagandist tendencies."

Later, on October 20, 1919, Senator Watson of Indiana called for an investigation of the FTC focusing upon the FTC's Chicago Office, which he characterized as "a center of radicalism, a nesting place for socialists, a spawning ground for sovietism."[351] The report and the reaction to the report led to The Packers and Stockyards Act of 1921, which was passed, in part, to address the problems the FTC found, but also to get the industry out from under FTC oversight. The Agriculture Department would henceforth supervise the industry.

During the 1920s the political climate changed as Republican administrations (Harding and Coolidge)

349The demise of the Civil Aeronautics Board in 1984 and the Interstate Commerce Commission in December 1995 are leading counter-examples, but the transportation industries that these agencies regulated were mostly deregulated in the 1970s and early 1980s, so the agencies had few remaining functions. Those residual activities were transferred to other agencies, mainly the Department of Transportation.

350During this period, the Economic Division reports apparently advocated government control of assets as a remedy for the behavior found to be disfavored (e.g., grain marketing, meat-packing). The Division's reports also recommended state milk regulation. See Stevens (1940, pp. 564-66).

351 58 Cong. Rec. 7169 (1919). See Kovacic (1982, pp. 623-25). This would not be the last time that the FTC staff was accused of socialist tendencies. In 1952, then FTC staffer Earl Kintner indicated to a White House advisor that the FTC staff was "a graveyard for incompetents and cryptosocialists." Graham & Kramer (1976, p. 15).

took control of the White House. Economy in the use of resources was emphasized. The period was characterized by greater scrutiny of budgetary outlays by the newly formed Bureau of the Budget.[352] Limitations on the FTC's ability to spend money on investigations were imposed if the investigations did not allege violations of law. Because there was already a backlog of funded investigations, these restrictions, which were supported by then FTC Chairman William Humphrey, did not seriously affect the Economic Division. They were, however, a precursor to later restrictions that would be more constraining. In addition to the greater budgetary stringency, the period also saw political jousting between Progressives and pro-business Conservatives for control of the FTC. According to some, the Progressives disliked the mid-1920s conservative turn of events at the FTC sufficiently that they were threatening to dissolve it.[353] At that point, however, the Progressives likely had insufficient power to make the threat particularly credible.

Perhaps a more serious rebuke came from pro-business interests followed in reaction to the basing-point pricing cases in the cement industry from 1937 to 1943. The FTC had pursued several antitrust cases arguing that the delivered pricing schemes used by many industries had the intent and effect of reducing competition among the producers.[354] After several years of vocal criticism from business interests, the FTC issued a delivered pricing system statement on October 12, 1948 making it clear that the FTC would not challenge a basing point system unless it was willing to include a charge of collusion. This statement reportedly defused an effort by business to end the FTC's authority.[355]

A third instance of widespread criticism occurred in 1969 when the FTC as a whole faced a broad attack due to perceptions of generalized inaction.[356] First, the American Bar Association (the

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[352]Stevens (1940, p. 547).

[353]Davis (1962, pp. 437-55, especially 453.)

[354]The FTC had also produced economic reports in 1932 and 1935 regarding basing point pricing and other delivered pricing systems in the cement and steel industries. The 1932 report was begun in 1927 and was a particularly extensive graphical compilation of cement pricing information from dozens of U.S. cities. The Commission (and much of the economics profession) considered those pricing schemes to be anticompetitive and possibly evidence of tacit or explicit collusion. For the view of a large set of economists, see the *American Economic Review*, 22 (1932) statement signed by 127 economists including John Bates Clark, but not by J. M. Clark, decrying the use of basing point pricing systems. Reprinted in the FTC report, *The Basing Point System in the Steel Industry* (1935, pps. 39, 109).

[355]Based on a presentation by former FTC Commissioner Everett MacIntyre to BE about 1987. When MacIntyre was a staff attorney at the FTC in the late 1930s, he prosecuted the basing-point cases. The release of that 1948 Statement did not, however, change the FTC's opinion of delivered-pricing systems. The Statement still indicated that the systems were virtual proof of collusion, and BE Director Corwin Edwards, on many occasions, noted that basing point pricing was essentially collusive, but that the FTC had never challenged the practice without more direct evidence that collusion had occurred. See Edwards (1948).

[356]Kovacic (1982, p. 631 note 218). A threat to kill the FTC came from Senator Edward Kennedy who was a strong supporter of social and business regulation. As such, the threat may not have appeared credible, but apparently plans were in place for a change and the plans did not envision jettisoning the functions, but rather called for starting over from the bottom up. Chicago Law School professor Richard Posner, an ex-FTC staffer and future Appellate Judge, who had recently made a philosophical shift toward conservatism, also suggested terminating the FTC in a separate statement appended to the American Bar Association's review of the agency (p. 118) (reported by MacIntyre & Volhard 1970, p. 781, note 256). The argument that the FTC was insufficiently active was widespread in the 1950 and 1960s. See for example, Blair (1964, p. 524) a former BE economist and Senate Judiciary staffer, who notes that "While the Commission has occasionally displayed flashes of brilliance, ..., there is clearly a consensus that it has devoted itself with such thoroughness to the mundane and trivial that it has had little resources available for anything else." Also see Handler (1964, pp. 385-89). FTC Commissioner Phillip Elman, who fed much of the negative information to the Nader

Kirkpatrick I Commission) and then persons affiliated with consumer activist Ralph Nader complained that the Commission failed to adequately plan and that the lack of planning caused the Commission to focus costly enforcement tools on trivial problems rather than enforcing important rules and laws efficiently. There was little direct criticism of the Bureau of Economics in the ABA report, but certain suggestions for reorganization were provided.[357]

The fourth major episode of criticism took place in 1979 to 1980 concentrating on debates about regulation of advertising aimed at children ("kid-vid") and various other FTC initiatives on the frontiers of consumer protection and antitrust law.[358]

Generally, it seems that commentators considered the FTC to be too much of a crusader against the evils of business prior to 1940 (this view was often based on the work of the Economic Division).[359] In reaction to that criticism and due to increased enforcement responsibilities for various laws, the Agency became mired in enforcement and procedural minutia in the 1940s through the 1960s. The agency was rejuvenated after 1969 and it took policy planning to new heights,[360] but its forays into frontier areas in the 1970s once again led to Congressional criticism and constraints on the Agency's actions in the early 1980s. After a period of budget-cutting, retrenchment from the frontiers,[361] and

group for their 1969 report, later indicated that he may have been too harsh on the Commission and that the 1960s record of the FTC was not as dismal as he had portrayed. (BE History Roundtable, September 4, 2003, Mueller, pp. 33-35). At the FTC's 90th Anniversary symposium, Judge Richard Posner, the dinner speaker, was also less critical of the FTC than he had been in 1969, although his speech was hardly a ringing endorsement. It was more a grudging admission that the Agency was not as bad as he might have expected. For an argument that the FTC of the 1960s was actually a vigorous and important institution, see Mueller (2009).

357It is not clear that any of the 1969 ABA report suggestions for the use of economists (pp. 69-75) were implemented. The suggestions mainly involved a reorganization to allow a clearer distinction between the economists' role in antitrust casework (called "advocacy" in that report) and the economists' roles in both objective longer-term industrial organization research and providing advice to the Commission regarding cases in litigation. The ABA also suggested various ways to further upgrade the quality of the staff.

358Kovacic (1982, pp. 664-67). In addition to the children's advertising initiative, concerns were expressed about the FTC's attempt to introduce competition rules applying to medical professions, insurance industry investigations generally, and several expansive consumer protection rules. The reaction to the FTC's initiatives may also have been fueled by a growing distaste for activist government in general, rather than complaints about specific programs. Miller (1989, pp. 2, 99) indicates that certain segments of Congress were sufficiently upset by what they viewed as excesses at the FTC that they shut the agency down, requiring President Carter to restore financing for the agency.

359Milton Handler (1964, p. 387), a long time observer of the agency, noted that you could not run the agency effectively if it was seen as a "prosecuting agency at war with the forces of evil." He viewed the 1950s FTC as slow and obsessed with trivia, but recalled the earlier crusading days with distaste also. Markham (1964, p. 413) also implied that at certain times the economists might have been too zealous in their anti-business rhetoric.

360The FTC's Office of Policy Planning & Evaluation began in July 1970. See FTC Annual Report 1971, pp. 63-65. The legal Bureaus also started their own policy shops in the 1970s.

361Some critics would argue that the 1980s represented a full-blown retreat from the antitrust barricades, but that would only be true relative to the very strict 1960s antitrust standards that made non-trivial mergers virtually illegal. By the 1980s, that jaundiced view of mergers had fallen into widespread disrepute. The most controversial policies followed during this period would have included: efforts to identify and remove governmental restrictions on market-based activity (e.g., suing state or local governments for imposing entry restraints), allowing a joint venture between automakers GM and Toyota, issuing a relatively small number of second requests for horizontal mergers, the January 1985 DOJ vertical restraints guidelines (which induced dueling Guidelines from the National Association of Attorney's General (NAAG) in late 1985), and substantially reduced enforcement activity on the vertical restraints front generally. For some discussion of the 1980s enforcement levels by two economists who were there, see Langenfeld and Scheffman policy codification[362] in the 1980s; the FTC sought the "Golden Mean" in the 1990s, mending fences and actively cooperating with each potential FTC constituency, avoiding most controversial areas,[363] and projecting a balanced, yet forward-looking, forward-thinking image. While occasional outlier events occurred (e.g., the 2002-2003 dispute with the EU over the proposed GE/Honeywell merger), the "centrist" approach continued through 2008. In 2009-2012, a more activist approach was taken in the areas of non-merger antitrust (e.g., Intel monopolization via exclusion), in the challenges to health claims for traditional foods (e.g., intestinal benefits from probiotics in Dannon yogurt), and in privacy policy (e.g., defining a Privacy Framework). Those changes were important, but were not radical departures from previous long-term centrist trends.

B. Threats to the Bureau from Outside: Congress and the White House

Focusing a bit more directly on the Bureau of Economics or its predecessor Division, the 1920s saw formal Congressional efforts to constrain the Commission's economic work by restricting or eliminating funding for the Economic Division as Congressman Wood, Chairman of the House independent agency oversight committee, said that the Division's Chief Economist, Francis Walker, did little but "promulgate a lot of wild-eyed theories and idealism."[364] In 1926, riders were put in place that restricted the use of funds for economic studies unless a law violation was alleged <u>or</u> both Houses of Congress requested the study.[365] This type of restriction was imposed to reduce the likelihood that unpopular FTC reports would be forthcoming and to stop the Senate alone from having the ability to request FTC reports. The FTC Chairman at the time, William Humphrey, approved of such restrictions because he was pursuing a policy of business/government cooperation[366] that was

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(1990, pp. 82-88).

362During these years, several significant basic policy statements were issued including the 1982/84 DOJ Horizontal Merger Guidelines (and the FTC's Horizontal Merger Statement), the 1984 Deception Policy Statement, the 1984 Advertising Substantiation Statement, and the 1980/1984 Unfairness Policy Statement. These statements provided a considered approach to broad Commission enforcement areas. Enforcement policy guidelines on many narrower specific topics were produced over the next couple of decades. (e.g., environmental marketing (July 1992), food marketing claims (May 1994), intellectual property (April 1995), health care antitrust (September 1993; updates in 1994, 1996), dietary supplements advertising (1998), internet advertising disclosures (September 2000, 2013), and weight loss claims (December 9, 2003), etc.)

363Among the most high-profile activities on the antitrust side of the Agency during the 1990s, were: (1) the investigation of Microsoft in 1990-93; (2) the Staples/Office Depot merger case in 1996-1997; (3) the Toys R Us vertical restraints investigation and case in 1996-2000; (4) the McCormick Spices Robinson-Patman case in 1999-2000; and (5) the Mylan generic drug pricing case in 1999-2000, where the agency pursued consumer redress payments as part of the relief in an antitrust case. On the consumer protection side of the Agency, high profile activities from the 1990s included: (1) the investigations and litigation with R.J. Reynolds for allegedly marketing cigarettes to children (Joe Camel); (2) the Internet privacy regulation initiative beginning in 1998; (3) an array of food health claim cases; and (4) the initiation of a consumer complaint database.

364Kovacic (1982, p. 625, note 193). As Appendix C on Walker's life indicates, others were more favorably inclined toward the Economic Division's first Chief Economist. Indeed, Walker was known to have an impressive ability to deal with hostile Congressional attacks. (See Mueller (2009, p. 96) citing to former BE Chief Economist Corwin Edwards.) Wood's attack on Walker was likely a continuing adverse reaction to the FTC's meat-packing report. Also see Scherer (1990, p. 468), who indicates that in the early 1920s President Coolidge considered moving the Economic Division back to the Commerce Department, but that plan was scuttled by various populist Midwestern Senators.

365Stevens (1940, pp. 551-552); Scherer (1990, p. 468); Office of Policy Planning (1981 Appendix F, pp. 16-20).

366Mr. Humphrey was likely an advocate of the "associationalist" view of business/government relations that was common in the 1920s and 1930s. In this view, government was seen as a partner with business, rather than a regulator inconsistent with the previous FTC practice of publicity and reporting (some would have called it anti-business crusading). The rider was removed after 1928, and in any event, it would have had little effect because a study could be undertaken if a law violation was alleged and that would have been relatively simple to accomplish.

A few years later, additional efforts to restrict general investigations surfaced. In early 1933, the FTC's budget was cut in half by the House Appropriations Committee, apparently to deter the beginning of new, and costly, economic investigations.[367] That Committee cut never became effective, but new Congressionally-requested investigations were effectively limited by a rider which was put in place in 1933 just before the completion of the chain store report and utility report.[368] The rider was attached to the 1934 appropriations bill amending section 6a of the FTC Act permanently, requiring a two-House concurrent resolution to initiate a Congressionally-requested investigation. According to Stevens (1940), this rider went a long way toward eliminating investigations at the behest of Congress, since individual Houses could no longer initiate a study.[369] At the time, the restriction was important, because it was not clear that the Economic Division had any work to do if Congress did not request reports.[370]

Regardless of the precise restrictions, it is clear that certain members of Congress were interested in constraining the initiation of FTC investigative reports, and they focused upon the Economic Division for budget cuts in the 1930s and 1940s.[371] Later on, Congress imposed various restraints on spending for particular studies. For example, appropriations riders stopped a 1953 study on consumer expenditure (this report had been requested by President Truman in Fall 1952) and an early 1960s study of the products, finances, and ownership of the 1,000 largest U.S. firms.[372]

The Bureau also felt a shock wave that accompanied release of the *International Petroleum Cartel* report. This 900-page report was completed in October 1951, but due to certain sensitive material in the report and due to political unrest in the Middle East, it was withheld by the White House at the

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of business. The associationalist view would have been a key element in the later National Recovery Act period following the Great Depression. See Kovacic (1982, pp. 604-611), and Winerman & Kovacic (2011).

367Stevens (1940, pp. 552-53). According to the head of the Economic Division, this cut would reportedly have destroyed the Economic Division and stopped the massive general investigations of the utility industries and chain stores. (Hearings on H.R. 14458, Subcommittee of the Committee on Appropriations, U.S. Senate, 72nd Congress, Second Session, February 10, 1933, pp. 31, 33).

368Boyle (1964, p. 501); Stevens (1940, pp. 552-53); MacIntyre & Volhard (1970, pp. 754-55); and Office of Policy Planning (1981, Appendix F, pp. 27-31.).

369The FTC Annual Report of 1951 (pp. 30-31) notes these restraints and indicates that report initiation also required an explicit authorization of funding for the specific investigation. The funding requirement was apparently imposed as part of the Independent Office Appropriations Act of 1943, 56 Stat. 392 (1942).

370In the mid-1930s, the FTC was not accustomed to initiating its own general investigations. Stevens (1940, p. 554.)

371Office of Policy Planning (April 1981, Appendix F, pp. 27-31). In 1933, Representative Wright Patman was a key opponent of spending on investigative reports. On the other hand, Senator Shipstead indicated that, in his view, the FTC and the Economic Division had inappropriately been under budget pressure from the Congress for several years. (Hearings on H.R. 14458, Subcommittee of the Committee on Appropriations, U.S. Senate, 72nd Congress, Second Session, February 10, 1933, p. 39).

372Kovacic (1982, p. 625, esp. note 197); MacIntyre & Volhard (1970, pp. 755-56); Office of Policy Planning, Appendix F (April 1981, pp. 49-51); Boyle (1964, p. 501); and Mueller (2-2-03 memoir, p. 11) regarding the 1964 budget year rider restricting funding for the 1962 intercorporate relations study).

request of the State Department. A 378-page sanitized version of the report was later released in 1952 due to the efforts of Senator Sparkman of Alabama, who chaired the Senate Select Committee on Small Business. Even the sanitized version caused a furor.[373] One of the authors, Roy Prewitt, was later demoted several ranks, but remained with the Agency and later in the 1960s became a fixture in BE's upper management.[374]

Congress continued to deter certain economic investigations and reports in the 1970s. For example, in the mid to late 1970s, Congress made it clear that future activity on agricultural marketing orders was unwelcome, and in 1980, the FTC was explicitly restricted from studying agricultural marketing orders or investigating agricultural cooperatives.[375] The complainants likely argued that the FTC had no jurisdiction over co-ops due to the Capper-Volstead exemption to the antitrust laws, and thus argued that there was no point in our studying these joint marketing mechanisms or the government's marketing orders that relate to them. The USDA officials, teamsters, dairy interests, and various growers of fruits were strongly opposed to any actions by the antitrust agencies that might impact farmers. Thus, these groups opposed FTC or DOJ inquiries about marketing orders or the actions of agricultural co-operatives.[376]

A second restriction on economic studies involved the insurance industry. In the late 1970s, the FTC had undertaken a wide-ranging review of various insurance industry practices. This review included a

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[373] Office of Policy Planning, April 1981, Appendix F, pp. 41-45.

[374] Several economists were fired subsequent to the release of the oil cartel report. One of the authors, Roy Prewitt, thought that the firings were directly connected to the report. (James Mack Folsom, former BE top-level manager.) See BE History Roundtable, September 4, 2003, pp. 180-182. Jack Crespin (1975, p. 372) also suggested that the firings were related to the substance of the report. At least one FTC Commissioner, Steven Spingarn, believed that the economist firings were related to the substance of the oil cartel report (see House Select Committee on Small Business Subcommittee No. 1 Hearings, 84th Congress, July 1955, pp. 8 - 274, p. 207). Such a story appeared in the New York Times, "Conspiracy Denied by 3 Oil Companies: FTC's Ouster of 3 Aides Who Suggested Anti-Trust Suits Assailed by Springarn," Sept. 3, 1953, p. 31. Other information, however, is not fully consistent with a connection between the report and the firings. Sampson (1975, p. 123), for example, credits "radical economist" John M. Blair as the main author of the oil industry report and reports no direct repercussions, other than noting that even the title of the report was a red flag for the oil companies. Blair was not demoted, although he did leave the Agency for a Senate Antitrust staff position in about 1958. Longtime BE economist, Steve Nelson (3-14-01 discussion), knew about the 1950s firings and the fact that several economists were sent to work at the CIA. Based on conversations he had with economists who were in BE in the 1950s, Nelson did not think the release of the petroleum report and the firings were connected. Indeed, the firings may have simply been part of a larger set of personnel actions (RIFs in government-speak) that occurred agency-wide in 1953 when, after 20 years of Democratic hegemony, the Republican administration of President Dwight Eisenhower took control of the White House and newly appointed Chairman, Edward Howrey, began to restructure the entire agency. As part of that restructuring, sixteen economists were fired. Graham & Kramer (1976, pp. 47, 50-52; also see the NY Times story, September 3, 1953, p. 12 about the general government reductions). The firings were part of the "holocaust that swept the agency in 1953" according to Blair (1964, p. 526). For accounts of this period and the disagreements that festered among Commissioners at the time, see House Select Committee on Small Business Subcommittee No. 1 Hearings, 84th Congress, July 1955, pp. 8 - 274.

[375] In September 1975, the Bureau of Competition produced *A Report on Agricultural Cooperatives* examining the antitrust legal status of agricultural cooperatives. Alison Masson, an economist, produced an appendix for that report that went beyond individual cooperatives and focused on Marketing Orders that are run by the government. The cover of the report provided an unusually long disclaimer making it abundantly clear that the study did not reflect the views of the FTC, but it would have surely indicated substantial interest by the competition bureau in investigating the behavior of the producers of certain agricultural commodities. Also see, Office of Policy Planning (Appendix B, 1981, p. B-2).

[376] Discussion with Michael Lynch, former acting BE Director, 10-19-00.

BE/BCP study, *Life Insurance Cost Disclosure,* which concluded that traditional whole life insurance was a poor investment vehicle. Due to the controversial nature of this finding, a provision was included in the 1980 FTC Improvements Act indicating that the FTC staff could no longer study insurance absent a direct request from the Senate or House Commerce Committees.[377] Such a request was later received and the FTC staff produced three reports involving auto insurance and life insurance in late 1985.[378]

One Congressional attack on BE and the FTC was unrelated to research, but rather was related to the economists' position regarding Robinson-Patman (RP) case enforcement. As was noted previously in the antitrust section, BE consistently opposed RP cases since at least the mid-1960s. The economists' dislike of RP enforcement caused the FTC attorney staff to induce the House Small Business Committee to hold hearings in 1975 to examine the issue and to "impeach" the recalcitrant economists. Fortunately, for the economists and small business, the economists were able to provide evidence that RP Act enforcement by the FTC was mainly harming the small firms it was originally intended to help, and thus they avoided "impeachment."[379]

Congress was not alone in occasionally trying to rein-in the economists. During the 1930s, the Executive Branch entered the fray. It appears that the Economic Division of the FTC was continuously the focus of possible budget cutting during the latter part of the 1930s.[380] For example, in 1936, the Bureau of the Budget (now the Office of Management and Budget) tried to remove the Economic Division component of the FTC's 1937 budget.[381] This attempt is reminiscent of a short-lived OMB proposal from February 1981 to gradually phase out the FTC's Bureau of Competition.[382]

General concerns about the welfare of BE occasionally arose during the past 35 years simply as fall-out from across-the-board, government-wide actions. For example, in November 1981 when the President vetoed a continuing resolution, the government shut down for a day. Similar very brief shutdowns became common in the 1980s as political wrangling over the budgets continued. In the late 1980s a round of generalized budget cuts forced BE management to find alternative employment for several economists, but the Bureau avoided having to fire any economists.[383] Not too long after that episode, in August 1990, furlough (unpaid leave) notices went out to all FTC staff to fund budget cuts for the 1991 fiscal year. The furloughs were not ultimately necessary, however, as the government-wide Gramm-Rudman-Hollings budget ceilings were somehow avoided once again.[384]

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[377] Office of Policy Planning (Appendix F, 1981, pp. 70-71). Also see Bill Baer's comments at the September 2004 FTC 90th Anniversary Symposium, September 23, Tr. 90-91, and the report of that recollection in Calkins (2005, p. 1189).

[378] The mid-1980s request for the life insurance study specifically requested that a particular economist, Michael Lynch, work on the project. He had been the main author of the 1979 BE/BCP life insurance study. Discussion with Michael Lynch, former acting BE Director, 10-19-00.

[379] BE History Roundtable, September 4, 2003, Folsom, pp. 64-66, and Mueller, pp. 73-75; and Scherer (2000).

[380] Office of Policy Planning (Appendix F, 1981, pp. 27-28).

[381] Kovacic (1982, p. 629, note 214).

[382] See "Reagan Discards Plan to Cut FTC Antitrust Arm," *Wall Street Journal*, March 4, 1981, p. 12.

[383] Although no one was fired, BE lost several good staff economists in this process as they moved to other agencies. At the end of this process, on December 6, 1988, the Agency laid-off 30 people, a few of whom were support staff (temporary research assistants or computer programmers) in BE. This action was necessitated by a $1.5 to $2 million budget cut for fiscal year 1989. (*Washington Times*, 12-7-88, p. B5.)

[384] At one point it appeared that the FTC might have to endure a 31% budget cut in FY 1991. See "Bush Shuts Down

The most recent generalized "threat" occurred in November 1995, when much of the federal government shut down for more than a week due to four months of continuing disagreements between the Republican-controlled Congress and the Democratic-controlled White House about extending a Continuing Resolution to fund the government and adjusting the federal debt ceiling. This particular funding debate did not actually affect the FTC because the FTC was largely funded by merger filing fees and those fees had been accumulated, allowing the FTC to remain open during the entire period. Following that period, however, it was determined that use of merger filing fees to shield the FTC or DOJ from budget woes was not consistent with more recent legal interpretations, so the FTC would be somewhat more vulnerable to budget wars in the future.

Various other fiscal "crises" occurred every few years depending upon the state of play among the President and Congress. Running the government based upon "continuing resolutions" rather than new budgets was the norm in the early 2000s, and playing games of budget brinksmanship became commonplace from April 2011 through 2013, as several "fiscal cliffs" loomed and receded. Some of these budget bungles were taken seriously (such as those in April 8, 2011 and October 1, 2013), others were not. Planning for an agency shutdown simply wastes resources, if you are not really going to shut down.

C. Threats to the Bureau from within the Agency

> It is always hard to understand and appreciate what other people do, and why we need so many of them. For example, lawyers are the only ones who appreciate the usefulness of a million-member bar. …. I think this [staffing privacy with one economist and a boatload of lawyers] is reflective of several Commissioners' deep understanding of what lawyers do and significantly less profound understanding of what economists do.
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> - - Jeremy Bulow, Former BE Director, May 21, 2001 memo to Commission regarding Restoration of BE's Role at the FTC.

The threats to the Bureau of Economics were not always external to the agency. In 1955, at the suggestion of a management consulting firm (Robert Heller & Associates, February 1954), Chairman Howrey moved the economists who worked on mergers into the Bureau of Investigation. These 14 economists (at the time composing half of the economists in BE) then worked directly for attorney managers in the Merger Division. Two economists were also assigned to the Bureau of Litigation. As a result, the "Bureau" then consisted only of the twelve or so economists who worked on both reports and "overflow" antitrust casework. That organizational structure was later abandoned in mid-1961 when Willard Mueller became BE Director.[385]

Government," *Washington Post*, October 6, 1990. The shutdown did not, however, last beyond the Columbus Day holiday that Monday.

[385]Auerbach (1964, pp. 398-99), Bureau of the Budget (1960, pp. 31-33), and BE History Roundtable, September 4, 2003, pp. 15-33, Markham and Mueller. For Mueller's view of the re-combination of economists into one organization, see Mueller (2009, pp. 36-48).

The issue of whether economists should be in a separate Bureau or incorporated into the legal bureaus is a recurring question that arises (with varying levels of sincerity) every few years at the FTC.[386] Although the FTC started out as an investigative reporting agency, attorneys have run the law enforcement agency for the past 80 years, and attorneys typically would rather have economists working for them, than have the economists housed in a separate, semi-autonomous Bureau. Given this fact, Eisner (1991, pp. 16, 137, 151) mysteriously argues that economists would have more influence if they were not in a separate organization. That is an odd argument, given the lack of economist influence from 1955 through 1961.[387] The alternative of having economists work in the legal bureaus would more fully ensure that economists' views would be consistent with those of the lead attorney on projects. For a short time, such a structure might also facilitate technical economic input into matters where the attorneys saw a need for such input, but in the longer term it would cause a deterioration of economists' skills and would remove any evaluative or independent assessment

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[386]The most recent explicit proposal came from a group advising the Obama Presidential transition team in November 2008 (Change for America, Center for American Progress Action Fund, "Federal Trade Commission, Consumer Protection and Competition for a 21st Century Economy," pp. 413-422, esp. 419, M. Green and M. Jolin, eds.). The individuals who penned the suggestion were two previous FTC attorneys, former BCP Director, Jodie Bernstein, and former BC merger shop manager, Ann Malester. They recommended cuts in economist staffing (using the savings to facilitate hiring of outside consulting economists), and movement of the remaining economists into the legal bureaus. Whether any economist organization would be retained was unclear, but because they would not want a second opinion function at all, they probably intended to remove all vestiges of an economist organization.

[387]Jesse Markham, BE Chief Economist from 1953-1955, and David Scheffman, two-time BE Director, noted that a separate bureau was essential if economists were to have a significant voice in FTC policy. (BE History Roundtable, September 4, 2003, pp. 75-78). Similarly, Mueller (e-mail, August 13, 2003, "Re: Some BE History Questions on 1950-60" p. 1) indicated that the economists were happy to be reunited in 1961 because they had chafed at being supervised by attorneys. It is undoubtedly true that having economists work directly for attorneys would reduce the economist/attorney tensions that have always existed on both the antitrust and consumer protection sides of the agency. It would do so, however, by making economic input largely irrelevant for decision-making. It would also remove the value of BE as an occasional devils' advocate, a role that is often valuable in an organization. (Clarkson & Muris, 1981, pp. 294-95, 313).

Occasional differences of opinion between the economics staff and the legal staff in the FTC seem to have existed continuously since at least the 1950s. This discord is easiest to document on the antitrust side, but the same situation exists on the consumer protection side. In June 22, 1960 Senate Small Business Committee testimony FTC Chairman Earl Kintner noted that "....it is always difficult for lawyers and economists to agree on precise terminology, and in our agency the lawyers usually win out." For a discussion of 1970s-era tensions between attorneys and economists on the competition side and between the bureaus and a smaller group, the Office of Policy Planning & Evaluation, see Clarkson and Muris (1981, pp. 293-295). As Clarkson & Muris note, in any dispute the smaller group normally loses, and that was often true for the Bureau of Economics. Also see Katzman (1980, pp. 51, 53) for an attorney-based description of economists in the 1970s as "case killers," a view Katzman finds to be overstated. Certain attorneys in the legal shops retained the "case-killer" view of economists into the 1980s. The idea that economists and attorneys on the antitrust side of the Agency did not see eye-to-eye in the early 1990s was explicitly noted in a poll conducted by the press in early 1992. ("Staff poll reveals FTC economists, lawyers poles apart," *FTC Watch*, February 24, 1992, pp. 1-2.) That survey indicated that attorneys wanted the economists to "get out of the way" (which must have meant that they had some influence?), and the economists wanted the FTC to reverse positions on a few issues. The poll likely represented the views of the most disenchanted of the staff in both bureaus. A similar sentiment and a desire to have economists work directly for attorneys to reduce the animosity was evinced by former BCP Director Barry J. Cutler, "A New Bureau of Consumer Behavior Research? I Don't Think So," *FTC Watch*, July 10, 1995, pp. 7-10. The debates about the relative value of economist versus attorney staff will likely never end so long as a substantial number of each profession remains at the agency. For another installment in the debate see the reports of remarks by Jeremy Bulow (BE Bureau Director), *FTC Watch*, November 20, 2000, pp. 5-6; and March 26, 2001, p. 4. Disagreements between attorneys and economists occur in only a minority of cases, but it is precisely those cases that tend to be the most memorable.

function of economists at the agency. The separate bureau would provide an opportunity for an independent BE voice. No such voice would occur if the economists worked directly for attorney staff.[388]

Threats to the research function of the Bureau occur more often than threats to the entire organization. As noted in the Research segment previously, research and law enforcement are uneasy bedfellows. If research produces reports that might not support a current or potential enforcement agenda, then the law enforcers will not be happy. If the law enforcers alter the research results to make them more useful for their cause, or deter a research project altogether, then the researchers will not be happy. Both of these events have occurred at the FTC. In an older incident, BE (playing the researcher role) produced a report that supported enforcement and litigation in the antibiotics industry in 1958, but the law enforcers wanted to rewrite the results to make it even more amenable to use in a Courtroom. The BE Director at the time fought that editorial attempt and only a small segment of the report was recast.

In a related vein, a 1951 report on cartel activity in the world-wide oil industry was hidden at the President's request and only appeared in a vastly cut-down version in late 1952 when a U.S. Senator forced its release. On a number of occasions, various law enforcers or political operatives worked diligently to shroud uncomfortable research findings. Indeed, in one situation, research results were withheld for several months to ensure that the findings could not influence on-going Supreme Court deliberations on the subject of the report. The tension there is understandable, if not unavoidable, especially during the Chairmanships of those leaders who place little weight on the "marketplace for ideas."

Avoidance of inconvenient results is also one reason why research focused on the outcomes of FTC actions (i.e., policy "retrospectives") was eschewed for years at the FTC. Fear of being proven imperfect is a strong force, and many institutions, therefore, avoid evaluation of their efforts. To the FTC's credit, however, in recent years, work looking back at the outcomes of FTC actions and policy choices has been undertaken. While the specter of inconvenient results raises its head every so often, it has not blocked efforts to find out how well the agency has done its work.

On the other side of the "research versus enforcement" problem, if economists undertake research that is not of interest to the law enforcers, then the research is criticized as being insufficiently related to the FTC's mission. Thus, research had to be relevant, but not too relevant, and important, but not self-critical. Research economists at the FTC have survived in this "catch-22" world for years, by carefully choosing topics and occasionally soft-peddling their research results. BE management tried to encourage the economists to undertake interesting mission-relevant research, while hoping that it would ultimately provide information and guidance for the missions, rather than become a target for law enforcers' ire.

388For a general discussion of factors that should influence the choice of organizational form for economists in a competition agency, see Froeb, Pautler, and Roeller (2009). They argue implicitly that a separate economics organization, with strong links to the legal bureaus is the best format if the goal is to achieve well-informed decisions.

IX. The Bureau of Economics' Independent Voice and Influence on the FTC

> "The Agency's other unit that weighs in on such reviews, the Bureau of Economics, also did not see a problem with the purchase, although opinions from that office carry less clout."
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> --"FTC Expected To Approve QVC Purchase" Friday, Feb. 3, 1995, Wall Street Journal, p. B4

> I think it would be a terrible precedent for any of the three bureaus not to present its views to the Commission simply because they were not the same as another bureaus.' Just imagine if BC had reservations about a merger but was persuaded by BE not to present their views to the Commission because BE thought we should let the deal through and because we felt uncomfortable about having to deal with BC's analysis. The Commission needs full information to make decisions that vest with it and not with the bureaus.
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> -- Jeremy Bulow, Former BE Director, February 10, 2000 email to Pautler regarding an advertising case that would extend liability for deception to distributors of ads.

As noted previously, BE economists have had some influence on the economics profession and on policy via their research and report writing. After reviewing the FTC's 90th Anniversary Symposium materials, Adkinson (2005, 750-752) indicated that the ascendance of economics was one of the major factors affecting the evolution of the FTC during the previous 40 years. Beales (2005, 1062-63) argued that economics was a necessary predicate for the 1980s deception and unfairness statements. Similarly, MacLeod (2005, 945) observed that economic thought processes were a key factor tying together and appropriately limiting several 1970s consumer protection rules. Caswell Hobbs, a longtime FTC executive and observer, noted in a 1990 conference that the American Bar Association's Kirkpatrick II report on the FTC

> gives clear and explicit recognition of the great influence that the FTC's economic and antitrust bureaus have on its consumer protection mission. ..... this is the result of the commission's competitive/market-oriented approach to analyzing and addressing consumer protection problems.[389]

Recent BE Directors also thought the Bureau had a significant effect on the FTC generally. Jonathan Baker argued, for example, that the cost-benefit focus that economists bring to issues

[389]Caswell O. Hobbs III, "Kirkpatrick II: Views of a Member of the Special Committee," p. 18, in Murphy, Patrick E, and William L. Wilke eds., *Marketing and Advertising Regulation: The Federal Trade Commission in the 1990s*, University of Notre Dame, London 1990. Such a positive view of BE influence is hard to find in the Kirkpatrick II ABA report itself, but there is no reason to question Hobbs' characterization of the collective view.

pervades virtually everything the FTC does and makes the FTC different from many other government agencies.[390] A decade later, Michael Salinger, expressed similar thoughts. At an FTC weekly senior staff meeting there was a discussion of the FDA's heavy-handed regulation approach compared to the FTC's more flexible approach. Salinger told those at the meeting that the difference between FDA and the FTC is that the FTC has a Bureau of Economics. That got a laugh from those assembled, but Salinger meant what he said, and he repeated the story in his "going away" remarks (June 13, 2007).[391] So perhaps BE really does matter, but few others at the agency understand how it affects the actions and policies of the organization.

If these observers of the agency are correct, then economics in the large may have had a significant and perhaps pervasive impact on the Agency. But how extensive has economists' influence really been in their role as case evaluators? As noted earlier in the sections describing the role of economists in antitrust and consumer protection casework, economists have most often had a dual role when they worked on cases. They served as advisors and collaborators with the attorney staff (much as outside economic consultants do), and they also served as evaluators of cases for internal decision-making committees or for the Commission itself. These are two distinct and sometimes conflicting roles.[392] The legal Bureaus (on occasion) and the attorneys in those Bureaus (more often) bristled at the presence of the economists in the evaluator role. Depending upon the period, the legal Bureaus might apply pressure on BE economists (or more often on BE Directors) to modify their views or to remain silent. Many attorneys would rather have the economists play only one role - as a member of the investigation team who performs tasks and provides advice as requested by the lead attorney. The economist would then be expected to join the group recommendation at the end of the investigation.[393] That team member approach would satisfy many attorneys, but it would not provide

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[390]See Baker (1997).

[391]The senior staff meeting occurred on 1-29-07 (Salinger discussion). Salinger's view is entirely consistent with a presentation made by Pauline Ippolito at the FTC's 90th Anniversary Symposium, (Thursday, September 23, 2004) comparing the regulatory approach of the FDA to that of the FTC.

[392]As noted in the Antitrust section, BE economists have played that evaluator role within the Commission for at least the past few decades. More colloquially, BE economists have, at least since the 1980s, referred to the dual roles as the need to wear "two hats." This dual role also seems to be the norm for the antitrust economics work at the Department of Justice. [See Kolasky (June 14, 2002; p. 5)] On the consumer protection side of the agency, BE took on the evaluator role, in part, at the request of Commissioner Mayo Thompson in the 1970s. On the antitrust side of the agency, it is less clear that there was any particular stimulus for BE's case evaluation role, although it seemed that economists were generally considered useful for case development after the Agency was rejuvenated in the 1960s, and BE had a concur/oppose role on merger matters since at least the mid-1960s. (Mack Folsom e-mail, August 19, 2003). As many authors have noted, the influence of economics as a relevant discipline in antitrust has grown markedly since the 1960s. See Kovacic and Shapiro (2000), Eisner (1991), Calvani (2001), and Leary (2001). Rosch (2007, 2009) also indicates that economics matters in antitrust cases across the globe, but he tends to bemoan that state of affairs.

[393]The "independent" case and policy evaluation role of economists is one that causes tension between attorneys and economists in both the consumer protection and antitrust areas. At least one FTC legal bureau manager in the 1950s, strongly held the view that economists should be subordinate team members without a case evaluation role. See Auerbach (1964, p. 494, note 278). The underling role was also favored by Chairman Howrey in 1953-55. The "economist as subordinate" view was explicit and evident in the latter 1990s on the consumer protection side of the agency, when certain attorney managers would not allow economist participation in meetings with the respondents or with outside third-parties. Following this approach would considerably reduce the chance that alternative views about a case might reach the Commissioners' attention. Staff attorneys control most of the information flow both up and down the organization chain and therefore have the ability to control the extent to which economists are aware of the facts and events regarding a case. For example, in the 1980s, an attorney (who was not known as a sharp dressed man) needed a

the Commission with an independent economic view of a case.

The importance of the evaluator role has varied over the years as Commissioner preferences for BE input have changed (and as BE Director preferences for controversy have varied).[394] The independent case evaluator role seemed limited or nonexistent in the 1950s. Certain Commissioners, if not the Chairman, appeared to value independent input from economists in the latter 1960s. Kauper (1984, p. 121), however, implies that the Bureau of Economics had little influence on FTC policies prior to the early 1970s. In fact, he argued that the lack of impact by economists was one reason that the economics group at the Department of Justice was set up to induce stronger ties to the legal staff.

Most of the FTC Chairmen of the 1970s and early 1980s appeared to want BE input on all fronts.[395] Later Chairmen stressed litigation support and inter-Bureau cooperation (i.e., "teamwork"), with less emphasis placed upon the BE evaluation role.[396] BE managers tried to respond to that last change in preferences, although the effort was not wholeheartedly supported by the economist staff, who oftentimes viewed themselves as already providing the appropriate mix of services to the attorney staff and to the Commission.

To have an effective evaluator role, economists need direct access to the decision-maker(s).[397] Did economists always have direct access to the Commissioners and did they have actual influence on Commission decisions? Not much is written about the subject of economist access to the Commission, and the extent of actual influence would be hard to judge even if written records did exist. It appears that economists had direct access during most periods.[398] It is possible that

pair of dress shoes to wear to a meeting. The attorney borrowed a pair of dress shoes from an unsuspecting economist and the economist then wore the attorney's gym shoes home. They exchanged footwear the next day. Only later did the naive, shoe-lending economist discover that the meeting the attorney had to attend was a briefing for a Commissioner about a case to which the economist was assigned! This type of strategic behavior, while not uncommon, varies a lot across attorneys and shops. Sometimes cooperation is wonderful, but sometimes it is not.

394Although the driving force behind the vigor of BE's role at any particular time was almost surely the Chairman, certain Bureau Directors were more likely to foster a sense of independence than others and that characteristic likely determined to some extent, how aggressive BE might be in voicing contrarian views.

395Michael Pertschuk, FTC Chairman in the latter 1970s, who could not be regarded as an advocate for cost-benefit analysis, did admit to some grudging respect for economists in forcing policy-makers to think harder about the likely outcomes of their policies. See MacLeod and Rogowsky (1989, pp. 84-85).

396In taking on an attorney support role, staff economists would be asked to behave more like outside economic consultants, whose dominant role is to devote their efforts to furthering their clients' interests. As noted earlier, training sessions for economists were offered from 1996 through 1998 to advance this cause. See BE History Roundtable, September 4, 2003, Baker, pp. 103-107. After the mid-1990s, BE activity typically placed more weight on "client service" than was true previously. The client was sometimes the attorney staff and often the Chairman.

397Economists could influence the information and analysis that the attorney staff provided to the Commission if the attorneys thought that such input was useful to strengthen the case or if they considered it essential to get their case approved by the Commissioners. Whether that was ever the true in the 1950s to 1960s is unclear. Discussions with economists who were on the staff of the FTC in the 1960s did not indicate much interest in economists' views by most individual attorneys, but there may have been more interest at the Commission level.

398Director Mueller had access to the Commissioners in the 1960s. (See BE History Roundtable, September 4, 2003, Mueller, pp. 25-35, 177-179; and Mueller 2009, pp. 50-149.) Scherer (letter July 31, 2003, pp. 6-7) indicated that access to the Commissioners was easy for BE in the mid-1970s, and the Bureau used that access to "lobby" Commissioners at the pre-complaint stage of cases. The discussions by the ex-Bureau Directors at the BE History Roundtable, September economists had their greatest influence on the agency generally in the very early years of the agency when economic investigation and reporting was a primary function and the Economic Division comprised over half of the FTC, but that influence was probably derived from the investigative reporting function itself. During this period, little access to the Commission on policy or enforcement matters would have been expected. Following World War II, the role of economists in casework expanded, but the extent of their influence appears to depend largely upon the preferences of the Chairman and the non-Chairman Commissioners.[399] BE influence on the FTC was likely at a minimum from 1955 to 1961 when the Bureau of Economics was marginalized after the Heller Associates report and the move of the antitrust support economists into the Bureau of Investigation.[400]

In the post-1961 period, we know that economists have had the ability to communicate directly to the Commission on most matters and that they have, at least on occasion, had influence. The extent of the influence very much depended on the inclination of the Commissioners (particularly the Chairman) toward economic arguments.[401]

4, 2003 generally indicated that the Bureau Directors had the opportunity to discuss issues with individual Commissioners; whether that access often resulted in large effects is less clear. Ex-Director Scheffman (BE History Roundtable, pp. 15-16) argued that "whispering in the Chairman's ear," is not the source of BE influence (because Chairmen are not swayed by such advice); rather it is through the persuasiveness of the work of the staff that BE has influence.

[399]Others in the agency (particularly the heads of the legal bureaus) can have some effect on whether economists have access and influence on the ultimate decision-makers, but as in most organizations, they most often behave in a manner consistent with the perceived preferences of the ultimate decision-makers, if their own preferences to the contrary are not strong.

[400]Markham (1964, pp. 406-407, 411) implies that economists had little influence through the early 1960s for at least 3 reasons: (1) their small numbers (five to six Ph.D.s at times), (2) the fact that the Commissioners were almost always attorneys, and (3) the Courts of the time preferred legal rules tied to easily observable behavior rather than economic analysis. Auerbach (1964, pp. 396-405) implies that BE influence on any aspect of Commission activity was near zero in the 1950s. Also, the Bureau of the Budget (1960, p. 120) noted that economists and BE generally were considered outsiders in the 1950s. Mueller (8-13-03 e-mail, "Re: Some BE History questions on 1950-60,") indicated that the Bureau of Economics was thought to be the graveyard of the FTC in the late 1950s.

[401]By way of analogy, economists at the FCC reportedly had very little input into decisions in the early 1990s. When a new chairman was appointed, however, he installed a top economist advisor who was given de facto veto power over projects at the agency. Although the individual economists continued to work for attorneys, the fact that the attorneys' projects had to overcome economist review at the top of the agency meant that economists in the individual bureaus found that they had new influence. The organizational form (i.e., a separate economist bureau versus a few economists housed in each legal bureau) did not appear to matter as much as the fact that the Chairman wanted economist input and set up an incentive structure to ensure that it occurred. (DeGraba 2-2003). But, this change may not have been long-lasting. Not having instituted a separate organization, by 2004, economists at the FCC had returned to their non-influential role. (Froeb conversation with FCC chief economist Martin Perry, 11-04). In September 2003, the European Commission's antitrust agency (DG Comp) also formed a small (10 economists) independent economist group to provide litigation support and opinions regarding antitrust cases. Lars-Hendrik Roeller was the first Chief Competition Economist of that new organization. Previously, individual antitrust economists (a large number, but many without Ph.D.s) were spread out in the segments of the EU antitrust bureaucracy and that diffuse use of economists was expected to continue in conjunction with the new, independent economist shop. The Office of the Chief Economist grew to 20 PhDs by 2007. As of mid-2013, the EU has had four Chief Economists, who tend to stay on the job for a longer period than do BE or DOJ economist Directors. The unification and reformation of the EU antitrust economist input was instigated, in part, at the urging of US antitrust agencies. (See Scheffman, BE History Roundtable, September 4, 2003, pp. 77-78).

Beginning in mid-1961, BE Director Willard Mueller had some influence via direct discussions with the Commissioners (BE staff often sent memos to the Commission on various matters, but Mueller did not participate extensively on day-to-day casework and litigation, so he could be available to consult and advise Commissioners about the cases at the adjudication stage.).[402] It is not clear that economists more generally had much influence during this period, although they did substantial work on antitrust merger cases and did have concurrence rights (Folsom e-mail 8-15-03). Since the early 1970s through the mid-1980s, economists in the Bureau had a fairly strong independent voice. This was apparently so because certain FTC Chairman solicited BE input and others did not fear dissent.

Also, the Agency was generally searching for new ideas after a period of general critiques of the "do-nothing FTC" of the 1960s.[403] Perhaps the point when economists (if not BE) had the most influence was the early 1980s, when an economist was Chairman of the Agency and certain economists became managers (or assistants) in the consumer protection legal bureau. These persons were not necessarily associated with the Bureau of Economics, but they were trained as economists (some also had legal training). After 1989, this influence faded.[404]

Economists have consistently argued that the ability of economists to make independent recommendations to the Commission is important to the Agency.[405] Even when the Commission

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[402]Steve Nelson interview 5-12-00, Mack Folsom 10-23-00. Mueller sent memoranda on many subjects to the Commission, but avoided writing on the cases in litigation if he had any involvement in them at the staff level. The separation of roles was required by the Administrative Procedure Act. The FTC's approach to that Act was a major issue in the early 1960s. Mueller chose to play the role of Commission advisor and eschewed the Bureau manager role on cases for the most part. An economist could advise the FTC about cases prior to the issuance of an FTC administrative complaint, but after the complaint was issued, anyone who had prior connection to the case would be unable to serve as a Commission advisor. For a discussion of this arcane issue and how Mueller assessed it, see Mueller (2004, pp. 92-96)) and Mueller (2009, pp. 50-64).

[403]Economist Lou Silversin (5-24-00), who came to the Bureau of Economics in 1974, noted that the search for new directions was a key part of the decade of the 1970s. Also see Scherer regarding the 1970s (BE History Roundtable, September 4, 2003, pp. 40-48). Katzmann (note 2, p. 37) seems to credit the independent BE input on antitrust cases to the influence of economist Mike Glassman in about 1974, but that independence existed since at least the mid-1960s and the same tradition exists on the consumer protection side of BE which has only existed formally since 1978. So the ability of BE to make recommendations independent of the legal Bureau is not a Glassman legacy, although within the set of economists in the 1970s, Glassman was surely a particularly forceful personality.

[404]Economics in general was considered important in the 1980s during the Miller administration and that preference seemed to continue under Daniel Oliver. For discussion of Miller's efforts to more fully incorporate economic thinking into the FTC's actions, see Miller (1989 and 1994, pp. 5-13), and Gramm (BE History Roundtable, September 4, 2003, pp. 151-57). Whatever influence existed in 1989 receded during the Steiger era, although BE was still able to voice its opinions. See Harris and Milkis (1996, pp. 187-89, 316-17) citing John Peterman and James Langenfeld, BE managers during the 1990s.

[405]BE management made this argument in the letter from John L. Peterman to Professor Ken Elzinga, February 17, 1989 (Attachment 3, pp. 2, 6, and especially pp. 15-16). Auerbach (1964, pp. 493-94, note 277) puts forth a similar argument for an independent voice for economists. Also see, Clarkson & Muris (1981, pp. 293-294, 313); Baker (1997, p. 869); Markham (BE History Roundtable, September 4, 2003, pp. 75-77); Mueller (BE History Roundtable, September 4, 2003, pp. 26-27); and Scheffman (BE History Roundtable, September 4, 2003, pp. 77-78). One should not overplay the notion of BE "independence" from the chairman, the legal Bureaus, or from individual attorneys. BE economists virtually always cooperate with attorney staff (otherwise they would have very limited information), and they strive to reach consensus with the other Bureaus and the Chairman. They also try to cooperate with the non-Chairman commissioners. Sometimes BE has a voice that was truly independent of almost all outside influences, but much more

does not agree with the economists' views, the provision of those views can insulate the Commission from the criticism that it failed to take into account the economic arguments concerning costs and benefits and can help prepare the agency for dealing with these arguments should they be raised by others.

Economists' access to the Commission also increases the likelihood that a legal Bureau's recommendation to the Commission will reflect economic input. The Director or attorney staff of either legal bureau are not bound to accept the advice received from economists at any stage of matter development. But because economists have the right to go to the Commission and disagree with recommendations, and because the Commission sometimes finds the economists' arguments and evidence persuasive, the legal bureau Director and the attorney staff have incentives to consider the economists' views. Without access to the Commission through an independent economics bureau, economists' opinions would likely have considerably less impact not only upon the Commission, but also upon legal bureau decisions prior to Commission involvement.[406]

In bureaucracies with multiple decision-makers, those who wield the real decision-making power would often like to make decisions without the unrequested involvement of others.[407] The existence of an "independent" evaluator that provides information to all the decision-makers makes that somewhat more difficult, because, as the saying goes, information is power. This may mean that the

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often, it is strongly influenced by the need for viable long-term relationships with the larger, more powerful, legal bureaus and the Chairman.

406Katzmann (1980, p. 52). Economists in recent years have had significant input on many individual cases, but less input at the Bureau-level planning stage. Strategic plans are developed by the legal bureaus (at least by BCP) and they contained little if any economist input. (See FTC at 100, Chicago Tr. 89, T. Schwartz, ex-BCP Deputy Director 2009 discussing the lack of BE involvement in BCP planning and wondering why that occurred - implying that a lack of economist input was both unintentional and inappropriate.) BE has, however, has almost always had input at the smaller Office of Policy Planning and was often actively involved in the case generation efforts by that office. Economists may have been most influential in planning in the early to late 1970s, when policy planning generally seemed to be a larger function than it was thereafter.

407Due to generalized government-wide rule changes in 1950 and to FTC procedural decisions over the years, Chairmen at the FTC have more power than those at certain other independent regulatory agencies. See Harris & Milkis (1996, pp. 196-197). For an example of Chairman-induced information control at another agency, see John M. Berry, "At the Fed, a Power Struggle over Information," *Washington Post*, July 8, 1996. Reportedly, the Chairman and his three top aides limited the information flowing to the non-Chairman board members. Clarkson & Muris (1981, pp. 288- 301) discuss the incentives of the various actors at the FTC in the 1970s, but they do not focus directly on the control of information flows, perhaps because that was not a significant tactic in the 1970s. Even in the 1960s, however, economists were told occasionally not to discuss issues with non-Chairman Commissioners. (Discussions between Mack Folsom and Commissioner Elman were monitored by Chairman Dixon; Mack Folsom, e-mail, August 19, 2003, "Re: Some BE History Questions on 1950-60," p. 1. Regardless of its importance previously, the control of information became a tactic after 1980. The issue of BE independence can also be more subtle. Even if the Bureau can forward memorandums independent of the attorney bureau, are they actually independent of the Chairman? Gaskins (BE History Roundtable, September 4, 2003, pp. 58-60) indicated that during the 1970s BE took positions that were different from those of the Chairman (his example was the General Foods coffee predation case during Calvin Collier's Chairmanship), which would imply that BE had a more independent voice than existed since the mid-1990s, when BE seldom recommended a position different from that of the Chairman on important issues. At least two exceptions to this rule occurred under Director Jeremy Bulow, (see *FTC Watch*, no. 563, March 26, 2001, p. 4 discussing BE positions on the McCormick Spices Robinson-Patman case and an oil refinery divestiture in the Exxon/Mobil case). The truth seems to be that at least since 1970, most, but clearly not all, differences among the various organizations at the Commission were ironed out before recommendations were forwarded.

most powerful of the multiple decision-makers (e.g., the Chairman, a Bureau Director, or an attorney case manager, depending upon the situation) might want to control the set of information that flows up from the staff. It is in such a climate that economists have operated in the FTC over the past 45 years. It is an odd role, and one that has placed BE (and individual economists) in the middle of disputes on occasion and has caused more angst than one would wish for.[408] That is a cost that must be borne by all the members of the organization, if an effective evaluation function is to survive.

As of 2014, on the majority of matters forwarded to the Commission for its consideration, BE had an opportunity (in writing and orally at Commission meetings) to provide its assessment of proposed actions and to evaluate alternative remedies under consideration.[409] On the antitrust side of the agency, BE staff prepare memoranda to the Commission on almost all major matters, and such reports are expected by the Commissioners. The staff also write memoranda on specific aspects of smaller antitrust cases. On the consumer protection side, memoranda are sent to the Commission sporadically on major matters and very seldom on the typical fraud case.[410] Thus, written analyses are

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[408]On the antitrust side of the FTC, one can try to draw a parallel with the Department of Justice (DOJ). The economics group at DOJ provides economic advice to attorneys on antitrust matters in much the same way as Bureau of Economics economists. One used to hear in the 1980 and 1990s that the economist staff and attorney staff at DOJ do not disagree often (or that the economist staff generally wanted to pursue a more "active" antitrust agenda than did the attorneys). This contrasts with the perception that economists and attorneys at the FTC often disagree, with the economists taking the less aggressive enforcement position. Conversation with Rich Gilbert who ran the economics group at DOJ in 1993; also see the comments of Joe Farrell (DOJ head economist) and Jeremy Bulow (FTC head economist) as reported in *FTC Watch*, November 20, 2000, pp. 5-6. BE economists have occasionally wanted to pursue cases that the FTC attorneys were uninterested in pursuing, but more typically, the staffs agree, or the economists would suggest not pursuing a case favored by the attorney staff. (On the issue of accepting remedies to solve potential competitive problems, however, the economists at the FTC may have been more "activist" than the attorney staff in the early 1990s). The difference between economist/attorney relations at DOJ and the FTC may be simply incorrect perceptions (one can readily find knowledgeable opinions that there is no real difference in the FTC and DOJ situations with tensions existing always and everywhere between attorney staff and economists.) But if the difference is real, it may be due to differing incentives from a single-headed organization rather than a Commission, or due to attorney incentives that differ at the two Agencies. The DOJ staff reports to only a single line of decision makers (the Assistant Attorney General and his or her superiors), whereas the Commission has five decision makers (albeit one with much more resource allocation power than the others). This may cause the economists at DOJ to behave a bit more like outside consultants who respond to a single "client." If the client does not want to hear particular points of view, one would expect few to be forthcoming. On the other hand, a single client would have little concern about opposing views being aired, since that decision-maker would have full control over the decision process. Certain ex-DOJ economists think they had quite free reign to present their views to the decision-maker, in large part because the decision-maker was completely free to accept or reject those views without regard to subsequent actions by others. On a related point, multiple outside economic consultants reported in the mid-1990s that they preferred working with DOJ than with the FTC because: (1) the DOJ economists were more free of the attorney staff; (2) the economists did more empirical work; and (3) the attorney staff at DOJ did not tend to conceal their case or cloak their evidence to the degree that was done by the FTC attorney staff.

[409]Such instances would include a legal Bureau recommendation to use compulsory process, issue a complaint, approve a negotiated consent agreement, to commence or finalize a rulemaking, or issue a Federal Register Notice.

[410]If BE staff agree with the legal bureaus' recommendation and have nothing unique to add to the deliberations, BE merely concurs with the legal bureau recommendation. This occurs with great frequency on the consumer protection side of the agency. Although concurrences do not often result in a separate BE memorandum to the Commission, the legal bureau recommendation may nonetheless reflect a lot of behind-the-scenes effort by BE. In addition, BE sometimes provides a separate memorandum of concurrence, explaining why the Bureau concurred or supplies the Commission with an analysis of the possible risks and benefits associated with acceptance of the legal bureau's recommendation.

not routine and expected on the CP side, so forwarding a recommendation that differs in a material respect from that of the legal Bureau is more unusual and is occasionally vexing to the BCP staff/management. Although BCP may not value the economists' analyses on occasion, the Commissioners sometimes take pains to congratulate BE on its efforts in consumer protection cases, and some of those very differing reactions occur on the same case.[411]

So, BE most often had access in the decision-making process, but does BE's independent analysis alter FTC decision-making? There are certainly instances in which BE analysis mattered,[412] and instances where the Commission appeared to react to economist's comments, but the anecdotal evidence clearly indicates that BE's role and influence is secondary to that of the legal bureaus as economists played an advisory role to the attorney staff, occasionally to the Directors of the legal bureaus, and to the Commission.[413]

The closest one can come to systematic evidence of a BE effect on Commission decision-making is the examination of FTC decisions in merger cases. Coate (2000) examined the determinants of FTC merger decisions over three Presidential Administrations (about 1984 to 1996) finding that BE recommendations have a statistically significant impact on FTC actions.[414] Perhaps a search for marginal impacts on specific cases is too strict a benchmark to use to measure an effect of economists at the FTC, however. The long-term impact of advances in industrial organization economics and law and economics have had a substantial impact on Commission decision-making and that impact was surely facilitated by the presence of economists at the Agency who are actively involved in the Agency's enforcement decisions. This more ephemeral, longer-run impact of the Bureau and its economists is hard to measure, but it is almost surely substantial.[415]

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[411]BCP attorneys also praise the work of various economists on certain cases and litigations. As one would expect, this happens when the economist agrees with the staff, made a contribution that the attorney valued, and the attorney was thoughtful. No one expects anything but grief for effective dissent.

[412]Economists certainly had substantial influence in beginning the systematic collection of data at the Agency and they also participated (on both sides) in the demise of that same activity. On the casework front, the economists' arguments carried the day in the mid-1970s American Gas Association collusion case and on the Robinson-Patman case enforcement front generally in the late 1960s to mid-1970s. More recently, economic input in the form of price effects tests were an essential ingredient in the pursuit of the 1996 Staples/Office Depot office superstore merger. On the consumer protection side of the agency, the same might be said of the credit-related cases, which tend to require relatively sophisticated data analysis. Trying to document the potentially many effects of economists in antitrust or consumer protection on smaller margins of casework is difficult, although the fact that tension often arises when economists disagree in any regard with a legal bureau implies that the economists have some influence (otherwise, why would anyone care?).

[413]Indicating the relative importance of BE recommendations to the Commission, a *Wall Street Journal* writer once noted (February 3, 1995) in connection with the QVC/TCI media merger case that the Bureau of Competition had recommended no challenge to the merger. The reporter added, "The agency's other unit that weighs in on such reviews, the Bureau of Economics, also didn't see a problem [with the merger], although opinions from that office carry less clout."

[414]Also see Coate, Higgins, & McChesney (1990, esp. pp. 480-81); Coate & McChesney (1992); and Coate (2002) indicating that economists' recommendations affect the ultimate decisions, but they do not matter as much as attorneys' recommendations, based upon data for horizontal mergers from 1982 to 2000.

[415]Clarkson & Muris (1981, pp. 294 and 303) argue that while the economists role is controversial within the agency, they have nonetheless been "very influential," but measuring that impact is essentially impossible. Scheffman, a two-time Bureau Director, indicated that economists' influence at the FTC probably peaked in the 1970s with the large industry-oriented antitrust cases. After that time, economics was still important, as was evidenced by the adoption of increasingly

A. Advice to Individual Commissioners

Since at least the 1960s, some Commissioners found it advantageous to have an economic advisor on their personal staff and the Bureau of Economics often supplied economists for this purpose. Economic advisors review matters for their Commissioners, particularly those matters with significant economic content, and make recommendations concerning alternative courses of action. These advisors are available to interpret technical material for the Commissioner and for the attorney advisors in the office. At its peak in the late 1980s and early 1990s, this function might have accounted for two work-years in the Bureau.[416] The activity fell in the mid-1990s and tends to wax and wane. For example, in 2010, the economic advisor function was not used by any Commissioner. At certain points in her tenure Commissioner Harbour, in the late 2000s, had a non-BE related economist in her office, but other Commissioners had no economic advisors on their personal staffs. As of 2014, two Commissioners had economists on their advisory teams (one part-time and one full time). In addition, one of those Commissioners is, himself, an economist (and an attorney).

In addition to the day-to-day advisory role, at various times since 1980, economists might be assigned to a Commissioner's office temporarily to help with decision-writing.[417] This activity has occurred

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economics-oriented merger guidelines beginning in 1982 and the continued growth of empirical techniques in merger work. But as merger waves made merger review more the focus of the agency, the attorneys effectively used the Guidelines as a template for analysis and quickly became adept at relatively sophisticated merger analysis. This adaptation by the attorney staff reduced the need for economists on many antitrust merger cases. (BE History Roundtable, September 4, 2003, Scheffman, pp. 94-98; and Scheffman remarks at 2003 ABA Antitrust Section Spring Meetings (April 4, 2003). That view has likely lost some of its punch in the last decade, however, as data intensity has increased and as the use of sophisticated econometrics has become more common in merger cases. On the consumer protection-side of the agency, the ex-BE Directors of the 1980s and 1990s, indicated that looking over long periods from the 1970s to 2000, economist influence in the consumer protection function is obviously widespread and important (BE History Roundtable, September 4, 2003, Gramm, pp. 150-159; and Bond, pp. 140-143. Also see, MacLeod (2005) and Adkinson (2005) who each argue that economists had a substantial influence on the FTC).

416 Several Commissioners had economists as full-time or part-time advisors beginning at least with Commissioner Mary Gardiner Jones in the 1960s. Many, but certainly not all, of these economist advisors were drawn from the ranks of the BE staff. Certain Commissioners themselves also had significant economic training, including Chairman Miller (1983-1985), Commissioners Douglas (circa 1983-85), Yao (circa 1991-93), Wright (circa 2013-?), and Chairman Muris (circa 2001-2005), with the first four holding Ph.Ds.

417 Beginning in January 1980, economists were available upon request to advise Commissioners in adjudicative proceedings. In early 1982, guidelines for staff economists performing this function were released publicly. A special system needed to be devised because under the Administrative Procedure Act the economists who worked on any particular matter (in the prosecutorial stage) were not able to work on it after it reached the FTC decision-making (judicial) stage. (5 USC 554(d)). The Industry Analysis division in BE, whose staff did not normally work on cases, assigned economists to help the Commissioner's write decisions. Several economists and one marketing Ph.D. performed this function during the 1980s (Table 3 of the February 17, 1989 Peterman/Elzinga letter), but as the number of administrative litigations declined, the demand for the service waned. By the mid-1990s this system was all but forgotten because no one served in this capacity from 1987 to 2002, although one economist was held in reserve to play the Commission advisor role for a complex 1996 merger case should such help be required (it was not). In 2002 to 2012, however, the adjudicative advisory service was revived as economists, who had not previously worked on the cases, played an advisory role in the Schering (drug patents), Chicago Bridge (horizontal merger in engineered storage tanks), Rambus (standards setting activity), Evanston hospital (merger), and POM (health claims) decisions**.** The notion that the Commission might want an economist (or economists) to advise them, apart from the staff, has a long history at the FTC. There was some debate about the role that the Chief Economist might play at the FTC and whether a single

with increasing frequency since 2000.

B. Conclusion

Economists have had influence over the years, in part, because of a general trend toward increased use of economic thinking in antitrust and consumer protection, and because the ultimate decision-makers (implicitly) wanted economics to have an influential case evaluation role. Housing the economists in a separate organization (the Bureau of Economics) has likely facilitated an independent economic voice at the FTC. Without a separate economic organization, the role of economists almost surely would have been substantially more fragile as administrations shifted. With the increasing use of data to examine both antitrust and consumer policy questions over the past 20 years, one might think that economists' influence at the FTC would expand somewhat further. As of 2013, however, there is little evidence of such an expansion, although the role of economists as technicians has surely risen in those case areas where data are abundant.

X. A Graphical History of the Economic Division and the Bureau of Economics 1915-2013

In this section, I try to let the data describe the Bureau of Economics and its place in the FTC generally. The information used here is derived from FTC budget documents prepared for internal use, OMB review, or Congressional review.[418] In addition, some Congressional Hearings (particularly for the 1950s), FTC Annual reports, and personnel and telephone listings are used, along with histories listed in the bibliography. The older data are much more sparse and may be less reliable, because no living person can confirm that they appear correct. Still, I believe that the general trends revealed by the data are correct. Because the data are a bit messy (they do not always measure precisely the same thing over time and they are measured with considerable error in some cases), they cannot tell the whole story. Therefore, I provide some interpretation, but the reader ought to feel free to ignore my guidance.

Figure 1 in Appendix F takes a long view of the history of the agency indicating the size of the FTC's staff and the relative size of the Economic Division (after 1954 called the Bureau of Economics). The figure also indicates a subset of the important moments in the history of the FTC and the Bureau of Economics. Many of these important events will be familiar to those who read through the various history sections particularly those dealing with the reporting function.

Figure 2 in Appendix F presents the total number of employees at the FTC and the Bureau of Economics over time. It also depicts the number of employees who were classified as "economists" (that classification included relatively few PhDs prior to 1962). The data indicate fitful long-term growth for the FTC as a whole from 1915 to 1940, a decline in World War II followed by a return to the growth trend, spurts in growth during both the Kennedy and Nixon administrations (1961-63 and

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economist could effectively be the BE Bureau Director and simultaneously provide advice to Commissioners (or Hearing Examiners) on cases at the judicial decision-making stage. See, for example, Auerbach (1964, pp. 493-498) and Mueller (2009).

[418]The budget documents used for periodic internal budget review purposes are the most informative of these materials.

1969-74, respectively), and retrenchment during the Reagan administration (1981-88). A leveling-off (at least in numbers of employees) is apparent beginning in 1990. To put this Agency employee history in perspective, Figure 3 depicts Gross Domestic Product per FTC employee (in constant 1996 dollars). Because the FTC tends to oversee the economy generally, this calculation allows one to (very) crudely adjust employee growth for the growth in the economy over the 100 years of the Agency's existence.[419] The data indicate that following World War II through 1980, real GDP per employee fluctuated around $2.5 billion per employee, as the FTC staff grew at about the same rate as the economy generally. From 1980 to 2006, GDP per employee grew markedly to over $10 billion due to the combined effects of the decline in the number of employees during the 1980s and the growth in the economy during the entire period.[420] The growth in real GDP per FTC employee stopped in 2007 due to some employee growth from 2007 to 2011 and more importantly due to a major recession followed by a faltering, slow growth economy.

Turning to the Bureau of Economics more directly, Figure 4 in Appendix F depicts the Economic Division's dollar budget relative to that of the FTC as a whole. The main story indicated here is that the Economic Division (the original name for BE) began as a major component of the FTC and quickly declined as a percentage of the FTC until World War II. The pre-War period might be called the Congressional reporting era, because Congress and the President routinely asked for FTC economic reports on various subjects during that time. After the war, production of the Quarterly Financial Report and certain special purpose data reports became a more important task.

Merger evaluation also became a responsibility of the Bureau of Economics beginning in 1950. This altered the type of staff BE needed and the kind of investigation and reporting that could be done with the remaining staff. During this period, BE's budget bounced from a peak of 12% of FTC dollars to a low of 4% in the late 1950s and early 1960s, when the data gathering, and merger evaluation functions were moved from BE to other parts of the agency. These functions returned to BE in 1961. Since that time, BE has been a relatively stable proportion of the agency generally, accounting for about 6.5 to 8 percent of the FTC budget in the past several decades.[421]

This stability, however, hides many changes after 1961. The composition of the Bureau began to change significantly with an increase in Ph.D. economists and a relative decline in non-Ph.D.

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[419]This adjustment is crude for many reasons. First, it assumes that changes in FTC employment do not effect economic growth. Second, the FTC's functions changed over time and other federal and state government agencies and private regulators sprang up to take on additional governmental tasks similar to those of the FTC over the period (e.g., SEC, FCC, DOJ, CFPB, State Attorneys General, Better Business Bureau, etc.). In addition, government may have become more efficient at performing its functions over the past 85 years, thus requiring fewer employees to achieve the same benefits. As a result, one cannot read the data as indicating that the failure of the FTC alone to grow along with the economy indicates any particular cost (or benefit) to consumers.

[420]By historical standards the U.S. economy was particularly buoyant during the decades of the 1980s and 90s with only a minor slowing during the brief Gulf War recession beginning in mid-1990.

[421]As a percentage of the Agency, BE experienced a small rise in the Pertschuk/Miller period (1979-82) and an equally small decline during the Oliver period (1986-89) and beyond. This same general pattern is evident in the data if one examines the number of staff in BE relative to the number of total FTC staff. The Bureau had been in a very slow decline (relative to the legal bureaus) from 1986 to 2003. For a spirited recitation of these facts and an argument for a revitalization of BE, see the memorandum from Jeremy Bulow (May 2001) and attached memoranda from Pauline Ippolito (May 2001) and Jonathan Baker (July 9, 1998).

economists. In addition, economists (whether PhD's or not) became a larger percentage of the FTC staff. As Figure 5 in Appendix F indicates, the number of staff classified as "economists" relative to total FTC staff rose during the 1970s and early 1980s, peaked in 1988, and has slowly declined since that time.[422] BE also became more "economist-intensive" during this period. The effect is indicated in Figure 6 which depicts the number of economists (mainly PhD's after 1980) relative to other Bureau staff. This change in staff composition occurred due to (1) the end of data collection functions in 1981-82, (2) the growth in computing power and personal computing that made certain staff functions less valuable, and (3) increased complexity and data intensity in antitrust analysis requiring the further growth in PhD's and empirically oriented research assistants.

A more detailed picture of the recent Bureau can be obtained by examining the types of work that economists did from 1980 to 2008. Figure 7 presents these data as percentage splits for five major functions performed by the Bureau.[423] That Figure clearly indicates the large reallocation beginning in the mid-1980s toward antitrust casework,[424] and away from research and report-writing. At the peak, antitrust casework comprised almost 70 percent of the workload while report-writing and research slipped to less than 10 percent. Work on consumer protection cases and rules remained a fairly constant 15 to 20 percent of the Bureau during the entire period, beginning with work on rulemakings in the early 1980s and moving more toward cases in the latter 1980s and 1990s. Advocacy work in BE reached a peak of about 10 percent in 1986 and then began a decline that would continue through the 1990s and reach an modest equilibrium in the 2000s. Beginning in 2001, the movement of resources into antitrust casework was reversed as substantial resources were focused on mission-related "policy

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[422]The 1988 peak in FTC economist-intensity may be a bit deceiving. From 1981 to 1990 the number of BE staff declined from 204 to 89, a reduction of 56 percent (see Figure 1). During the same period, the FTC as a whole declined 46 percent from 1667 to 903 staff. The decline in BE occurred most heavily in the support-staff intensive functions (e.g., QFR and line-of-business data collection. The QFR program was moved to Census in 1982 and the LB program was terminated.) Thus, the economist component of the FTC rose relative to the rest of the FTC even though BE (as an organization) declined as much or more than the rest of the agency during the Reagan era retrenchment.

[423]These data represent the time spent on various functions by all economists who were not located in the BE Office of the Director. The data after 1995 are surely more accurate than the rest of the data. The information for the first half of the 1980s (taken from the 1989 ABA Committee report, which originally came from the February 17, 1989 Peterman/Elzinga letter) are likely the least precise. In particular, one longtime BE manager suggested that the advocacy category may be under-represented in the first half of the 1980s. I disagree, but it is hard to know how much work on regulatory studies should be recorded as "research" and how much as "advocacy." In general, that time was listed under the research category. One could easily reallocate one or two workyears from research to advocacy and do little violence to the truth, nor would it alter the general story told by the time series. As discussed in the advocacy section, there was considerable synergy between those two activities in the 1980s. Another possible error in the 1980s data is the undercounting of total economist workyears in 1982, and 1984-85, by perhaps 3 to 6 per year. Simple counts of employees from telephone listings imply that the non-Director economist full-time equivalent workyear numbers might be understated, but confirming the truth appears impossible. A significant effort was made to get the numbers right in the 1989 letter from John Peterman to Ken Elzinga, so I have no strong prior about where the truth lies. Similar data after 2008 were never compiled.

[424]Unfortunately, reliable data are not available with which to decompose the economists' antitrust efforts into subject areas or into components such as investigation support, case evaluation, and litigation support. Economists tended to follow the legal Bureau's choice of investigation areas, moving from industry-wide matters and predatory practices in the early 1980s, toward merger and horizontal restraints in the middle 1980s, and away from investigation of distributional restraints. This pattern reversed to some degree in the 1990s, but the movement back toward distribution restraints was not large. (See various FTC Operating Budgets from 1983 to 1997; after that point, the accounting categories were changed and expenditures on certain antitrust subcategories could no longer be tracked.)

R&D." The new research included an updated oil merger report, several oil merger retrospectives, numerous hospital merger retrospective studies, merger data collection, and consumer studies of fraud, privacy, credit score effects, and credit-related disclosures. At the peak, such research might have totaled 18 workyears, or almost 25 percent of the Bureau's economist workyears. (Recall this was a period of relative merger lull, so resources were not as dear as they would have been a few years earlier.)

The main observable factor that is important for understanding the allocation of resources in the Bureau over the past 20 years is merger activity and the complexity of individual mergers. Figure 8 depicts the number of mergers that were reportable under the Hart-Scott-Rodino (HSR) Act and the number of HSR second requests from the FTC over the last twenty years.[425] The variations in merger activity during the since 1980 drove most of the resource allocation decisions that were made in the last three decades.

Unfortunately, I know of no index regarding merger case complexity, so the reader will just have to believe me when I say that the larger antitrust cases have become more technically complex, more data oriented, and more resource intensive than was true prior to 1980.[426] A substantial decline in merger activity starting in early 2001 allowed more work in previously abandoned policy areas mentioned above. M&A activity revived after 2003, but much of the activity was in the form of asset purchases by private equity firms which produces proportionately less antitrust review work than "strategic" buying by firms already active in the markets. Finally, the 2008-2009 financial recession also had a significant negative impact on merger activity.

A bit more insight into the Bureau's resource allocation choices can be gleaned by noting that the resource split between the Maintaining Competition (antitrust) mission and the Consumer Protection mission across the entire agency has been roughly equal (about 50 percent each) in recent years.[427] The fact that BE allocates many more economists to the antitrust side of the agency means that the attorneys on the antitrust side see relatively more economists in their daily work. The attorney/economist ratio on the antitrust side of the agency has been about 4.5 to 1 over the past 20 years, while, in 2013, it is about 11 to 1 on the consumer protection side.[428]

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[425]The data on HSR merger activity actually understate the growth in merger activity because in April 1996 a change in reporting requirements occurred that should have reduced the number of reportable mergers by 7 to 10 percent. Beginning in February 2001, an increase in the HSR reporting threshold from $15 million to $50 million (which was also indexed to real GNP growth starting in 2005) should have resulted in a 50% reduction in reportable mergers.

[426]As of 2013, the notion that merger work has become more complex over time is not controversial. Some commentators bemoan the added complexity, thinking that it provides little benefit, but hardly anyone would deny that (for better or worse) complexity has increased.

[427]From the late 1970s to 2006, the Bureau of Competition was almost always slightly larger than the Bureau of Consumer Protection in dollar budgets. Because the FTC's regional offices are so heavily consumer protection-oriented, however, the budgets for the competition and consumer protection missions are about equal or slightly weighted in favor of consumer protection. (See Program Budget books and Operating Budget books, various years.) The competition mission seems to get most of the attention inside the agency (from Commissioners and BE managers and staff), but the consumer protection mission produces most of the publicity outside the agency, particularly since the mid-1990s.

[428]The ratio of attorneys to economists on consumer protection matters was about 15 to 1 prior to 2006, but DCP grew in the 2009-2013 period. The Bureau of the Budget (1960, p. 32) noted that the attorney/economist ratio across the entire agency had risen since the very beginning of the FTC, from 4 to 1 in the early 1920s to 10 to 1 (or more) in the

Finally, we can present a count of the externally observable portion of BE's output, or as BE Director John Peterman once described it, "the visible tip of the BE iceberg."[429] These items include economic reports, advocacy filings, and working papers. On the reports front, Figure 9 in Appendix F provides a count of FTC economic reports in five year segments covering the entire history of the Commission. The 1939 FTC Annual Report stated that the FTC undertook more than 110 inquiries that produced reports from 1915 through 1939 (an average of 4.4 per year).[430] In addition, several hundred cost reports were prepared by Commission staff for the WWI price control program, but they are not included in this graphical presentation. Pautler counted 132 reports during the 1915 to 1939 period based on a review of the listing contained in the 1968 FTC Annual Report. It would be simple to get different counts depending on how you counted separate volumes of multi-year studies, counted follow-on studies that were produced in multiple parts, counted or failed to count small reports, only counted Congressionally requested reports, etc. The precise count is unimportant in any event. The reports differed so much over time, and from report to report at a given time, that the count means little except to convey a very general idea of the vigor of the activity, which seemed to be substantial prior to 1940.

From 1940 to 1968, the Commission released about 59 additional studies (about 2 per year not counting recurring statistical reports; obviously many more (about 84 more) if Quarterly Financial Reports, QFR, were counted as four in each year since 1947). The agency also prepared several cost studies for the War Powers Board during WWII.[431] By way of comparison, from 1980 through 1989, BE produced 57 economic reports - an average of 5.7 per year. Between 1990 and 2000, the pace slowed, as twenty Bureau of Economics' reports were produced (1.8 per year).[432] Since 2001, the rate has fallen still further, with the production of 14 additional reports (1.2 per year).

The production of joint reports with other bureaus and offices has increased, so this decline is not fully indicative of the true output level of "reports" across all the sub-organizations of the FTC. In addition, since about 1990, an increasing amount of staff research has gone through the traditional

1950s based on counts of employees in those job categories. As of mid-2013, the overall ratio is 7.5 to 1. For a rough comparison on the antitrust side, the ratio of attorneys to economists in the Department of Justice's Civil Antitrust Division is about 6 to 1 and about 1 to 1 at the U.K. Office of Fair Trade in 2000, although that OFT ratio by 2006 may have been closer to 1.5 to 1 if various Global Competition Review information is correct. The UKOFT also used fewer economists with PhD's. (The UK OFT no longer exists under that name. The successor agency is the UK Competition and Markets Authority.)

[429]Letter from John L. Peterman, Director, Bureau of Economics to Professor Ken Elzinga, February 17, 1989, p. 3. Most of BE's output comes in the form of internal memoranda and activities related to investigations and litigation that are nonpublic.

[430]The Bureau of the Budget (1960, pp. 31), counted only about 77 reports during this same period (an average of 3.1 per year). Because many reports came out in multiple parts and some industries were investigated multiple times, it is easy to arrive at different counts, although 77 was too low to have been a complete inventory.

[431]The FTC general investigations and reports are listed and described in *The George Washington Law Review* (1940, pp. 708-730). A later listing and description of these and subsequent reports that provides less detail about each report may be found in the FTC Annual Report 1968, pp. 75-101. This was the last such listing of reports in the FTC Annual Reports.

[432]For a list of Economic Reports, Working Papers, and Miscellaneous Studies produced by the Bureau of Economics, see the listing at https://www.ftc.gov/about-ftc/bureaus-offices/bureau-economics/research-bureau-economics. Although the production of BE-specific reports fell, the production of joint legal/economic reports rose after about 1998.

academic research outlets (*i.e.*, books and journals) after obtaining Bureau Director approval for release. Thus, lists of BE/FTC research with the FTC logo undercount the "real" research output.

Moving to more recent data, Figure 10 in Appendix F lists the economic reports, advocacy filings, and working papers over the last twenty years. As noted earlier, the economic report-writing function went through several distinct periods, with the 1990s showing a downward trend. Several of the reports and advocacy filings have already been described in detail in the text and that discussion will not be repeated. The main fact to observe is that the counts of these outputs have been holding at a relatively low level for the past 22 years (1.5 reports and 18 advocacy filings annually) after falling from much higher 1980s levels.

Advocacy work, which was largely focused on electricity regulation from 1995 through 2001, was expanded in 2001 to include a more diverse set of topics with more emphasis on markets characterized by government supported entry restrictions, especially those in health care. In the last decade, work measuring the extent of consumer fraud and ID theft, and policy-related work on credit disclosures, the use of credit scores to price insurance, advertising claims for foods, oil mergers, hospital mergers, and drug industry practices helped insure that something significant remained of the "visible tip of the BE iceberg."[433]

XI. Conclusion

The Bureau of Economics' role in FTC decision making and policy implementation has evolved over time. This evolution has not been linear, since there have been cyclical changes as a result of changes in the role of the Bureau, in the preferences of key decision makers (particularly the FTC Chairman), political and case pressures, and changes in legal requirements particularly those related to the provision of empirical evidence. Despite cyclical changes, since at least the 1960s, the Bureau has provided a largely independent voice that has contributed significantly to case selection, litigation efforts, and the evolution of FTC policies.

BE has acted as a quasi- independent reviewer (a "second set of eyes") that, while not always popular, has helped the Commissioners make informed decisions. In particular, the Bureau provides the Commission with a perspective that it cannot expect to obtain from its legal bureaus whose major functions are case development, law enforcement, and litigation. Economists bring a broader perspective on policy and a differing perspective on evidence collection and evaluation for individual cases.

The focus on broader policy issues in the long-run has made the Agency more aware of the economic consequences of its actions, and that deeper understanding of both the benefits and costs of various policy choices has arguably made the Commission a more rational law enforcer and policy maker. For

433Private professional publications that were never released via the report or working paper mechanisms became more common after 1990. Because they do not carry the Agency logo in any form, it is hard to count them as output of the organization, but they are output of agency staff, sometimes produced with significant agency support. In addition, lists of those publications are not systematically maintained, although they appear in the staff publications list contained in the annual economist recruiting material. As noted in the research section, in the 1990s, several major projects were introduced into the literature in this fashion.

the economists, the case evaluation part of the job is not always pleasant, but it is one that is essential if the Commission is to remain an agency that is thoughtful about its actions.

On the competition front, the day-to-day job has changed from mostly accounting-intensive investigative reporting on industries during the first 40 years to econometrically sophisticated analysis of competition topics and mergers today. Growth potential exists in the continuing search for better and more accurate tools to predict the outcomes from mergers. Bringing systematic and objective evidence to bear of the outcome of FTC actions (or the actions of other agencies) should also provide room for productive growth.

Consumer protection economics grew up at the FTC since the mid-1970s. Starting from work on various rule initiatives, the economic analysis of consumer protection issues grew to include case support, litigation support, and case evaluation in addition to undertaking research on consumer topics. That latter activity has provided policymakers with important information on occupational licensure, optimal advertising policy, food health claims, credit issues, and appropriate financial disclosures, to name a few. The potential exists for more growth as new approaches to consumer search and consumer decision-making are further developed and tested.

The research efforts of the bureau have been data oriented since the beginning, but the data in the early days was accounting information and interviews with businessmen. For at least the past 40 years, the research has been less accounting oriented and more an examination of market outcomes with increasingly detailed information about firms and markets. As the world (especially the law) continues to become more data intensive, the Bureau will be increasingly called upon to supply the type of systematic evidence that will be required for case development and litigation. That may require even closer ties between the bureau's economists and their legal colleagues. The past indicates that the relationship between economics and the law may be a bit bumpy; the combination of perspectives helps to produce outcomes that have made the Federal Trade Commission one of the best institutions of its kind. (Kovacic, FTC at 100).

Appendix A: The Bureau of Economics Organization over Time

The form of an organization tends to follow its functions over long time periods. You can see the FTC and BE functional changes by looking at the organizational form, sub-divisions, etc. You cannot tell how efficiently anything is done, but you can often tell where the emphasis (or de-emphasis) is.

Before discussing the rise and fall of the Economic Division's budget and the specific sub-organizations within the Bureau of Economics, it is useful to discuss in broad terms the changes in functions that occurred over time for the Bureau. From 1915 to 1941, the Bureau had one major function - economic investigation and reporting in response to Congressional requests.[434] This was accomplished with one chief economist who would assign investigations to one of three assistant chiefs. From 1947 to 1953, the Bureau had three functions - investigative reporting, antitrust case support, and financial data collection. These roles were covered using a three-division set-up. From 1954 to 1961, the Bureau returned to one predominant (though weakened) economic reporting function, as the antitrust economists, accountants, and financial reporting functions were moved to other organizations within the FTC.

In 1962, the Bureau returned to a broader set of functions as financial reporting and antitrust analysis were again housed in BE and the antitrust and reporting components were both reinvigorated. A fourth function - consumer protection analysis – grew up in the mid-1970s. This led to four active divisions in the Bureau. In 1982, the Bureau lost one function - financial data collection,[435] but added another - regulatory analysis (and the related competition advocacy effort). By 1995, the Bureau had de facto returned to two and one-half functions as regulatory analysis had withered and economic reporting was in decline. These were partially replaced by international activities that began in 1990, but no significant organizational changes were made to incorporate that function.

One can get an idea of how quickly the Agency moved from a dominant economic reporting function toward a law enforcement function by examining changes in salary budgets for the legal entities versus economics and by noting how the Economic Division is discussed in the Annual Reports. What one finds is that the economic division dominated the FTC budget in the very early period, but quickly faded into a clearly subsidiary role. The explanation for this evolution was, in part, that the Agency was working to define the boundaries of its new law enforcement powers. As its ability to bring cases became more clear, its expenditures on direct law enforcement functions grew.

The Economic Division's salary budget was larger than that of the legal groups from the 1915 start of the FTC until about 1922 when the salary budgets were approximately equal (FTC Annual Reports 1917 to 1922, p. 15). The legal groups (then called Chief Counsel and Chief Examiner) continued to

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[434]There may have been a small amount of antitrust casework done in this era, but it likely was done as direct litigation support, rather than case evaluation. In addition, accounting work was important in the very early years of the agency and during the two World Wars.

[435]Some of the data collection functions were terminated in the early 1980s and one, the QFR program, was transferred to the Department of Commerce's Census Bureau in January 1983.

grow much faster than the Economic Division and by 1939 the legal groups' salary budgets were three times that of the Economic Division ($820,000 versus $268,000). The Economic Division also shrank in absolute size from 1917 to 1940.[436]

The same trend away from economic investigation and reporting is implied by the changes in the placement and discussion of economics in the FTC Annual Reports over the decades.[437] Economics tended to start in the front of the book and get significant attention in the early 1920s, when the investigation and reporting function was considered important. While there was always variation in emphasis from year to year, a significant focus on economic reporting remained through 1941. In succeeding years, the number of pages devoted to economic activities declined and the placement of those pages moved farther back in the volume, with a major exception in 1951, when the reporting function was featured.

The prominence of the role of economics in the FTC Annual Reports declined after 1955, reaching a nadir in the 1959 to 1961 Reports, where the Bureau of Economics is almost invisible (1.5 main body pages out of 81). Beginning in 1962 and continuing through the mid-1980s, BE got a good bit of attention in the Annual Report if only to report information about the pre-merger notification reporting program or statistics about merger activity that had been collected by the Bureau. In the late 1990s, BE again became almost invisible in the reports (e.g., BE is never mentioned at all in the section on the Consumer Protection Mission), but the formats and headings were responsible for much of the de-emphasis because "Economic Analysis and Legal Support" and "Advocacy" got 2.75 out of 29 main body pages (FTC Annual Report 1998).

A. The Bureau of Economics and Its Component Parts

The Bureau of Corporations (1903-1914) was created in February 1903 by the Act establishing the Department of Commerce and Labor. The Bureau was formed to study American business and industry following a recommendation by the United States Industrial Commission in 1903 and prodding by Theodore Roosevelt. (Stevens 1940, p. 546; and Winerman 2003, p. 2.) Recall that this was a period of unprecedented industrial consolidation (the largest proportionate merger wave in U.S. history occurred around 1900). It was also a period of general movement of Americans off the farms and toward the cities as farming became more efficient and cities were the places to get industrial jobs.

In the early years of the FTC, the Economic Division (1915-1941) handled a great deal of accounting work particularly during wartime periods. The FTC was a repository of accounting expertise and was the government's "cost finding" agency in World War I.[438] The Division was run by a Chief Economist (Francis Walker) and between one and three Assistant Chiefs depending on the year and workload. During the non-War periods, the typical work would involve Congressionally-initiated investigations that would be assigned to one of the Assistant Chiefs, who would assemble the staff of

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[436] Stevens (1940, p. 554) indicated that in 1940, the Bureau employed 84 persons, the lowest level since 1917.
[437] Although the details in the Annual Reports are not always accurate, the trends apparent in the FTC reports are generally consistent with other histories of the Agency, and reflect a trend from a broad investigating and reporting function toward a law enforcement focus.
[438] See Scherer (1990, p. 469).

accountants, clerks, and examiners to conduct the investigation and write the resulting report.[439] The last year for the "Economic Division" title was 1941 (See FTC Annual Report 1941, p. 15 vs 1942).

The title of the Bureau changed in the early 1940s to the Division of Accounts, Statistics, and Economics (1942 to 1947) and the group produced numerous studies of materials costs and prices during World War II. Early in 1947 it became the Office of Industrial Economics and by October 1947 it was known as the Bureau of Industrial Economics. It kept that name until 1954 when it became known as the Bureau of Economics, a name it has retained through 2015.

The oldest single-purpose division within the Bureau of Economics may have been the Division of Financial Statistics, which collected data and produced data reports. The group existed since at least the 1940s, and someone in the Economic Division had the title of Chief Statistician as far back as 1927. The data collection functions of the FTC were clearly in full swing in the latter 1940s, when a good deal of merger and industry concentration data across industries were collected for special reports.

The systematic (annual and multi-industry) collection of corporate data did not begin in earnest until the late 1940s with the advent of the formal Quarterly Financial Reporting (QFR) program, although an early version of QFR began in about 1939. The Division was part of the Bureau of Economics for most of its life, excepting a brief period (1958 to 1962) when it was housed in the FTC Comptroller's office. The Financial Statistics Division housed the QFR program (1947-1982), and the Line of Business program (1974-1983). In 1960, at a time when QFR data collection was the sole task of the Division, the group consisted of 36 employees including statisticians, statistical clerks, accountants, and clerical staff.[440] The QFR program later housed about 41 staffers in August 1979.[441] From the mid-1970s to 1980, the Line of Business program employed anywhere from 10 to 25 persons.[442]

So in total, at the height of FTC data collection activity in the late 1970s, the Financial Statistics Division might have numbered 60 to 65 persons. Another small data collection group called the Merger Unit (employing 5 or 6 statistical clerks who collected data on corporate mergers from 1969 to 1981) existed outside the Financial Statistics group. The Division expired in 1982, when the QFR program and its staff were transferred to the Census Bureau at the Department of Commerce.[443] At about the same time, collection of the line-of-business data was terminated, and compilation of merger information was discontinued. At that point, the Bureau, and the Commission, had effectively exited the data collection industry.

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[439]See Stevens (1940, pp. 555-556).

[440]Bureau of the Budget (1960, p. 140). Phonebook records indicate that the staff of the Financial Statistics Division numbered at least 33 in 1980. This included all the Line of Business and Merger unit staff, but it did not include the staff that worked on the QFR program, which at that time would have been an additional 35 to 40 persons. The QFR employees were housed separately from the economics staff from at least 1958 to 1982.

[441]Listing from August 21, 1979 FTC phone book.

[442]Based on BE phone listings from 1977 through 1985. Because the line of business data were confidential, the staff in that division were housed apart from the rest of the Bureau, behind locked doors in the basement of the Gelman Building, at 21st and L St.

[443]About 40 workyears were transferred to Census when this move was made.

In 1952, the Bureau of Industrial Economics had four components: Economic Reports, Economic Evidence, Accounting, and Statistics and Financial Reports. Beginning in 1954 significant changes were made. A management consulting firm (Robert Heller & Associates, report dated February 1954) suggested that economists become part of the legal Bureaus. In response, the antitrust economists were placed in a special merger task force and soon thereafter, in 1955, were moved into the Bureau of Investigation.[444] The Economic Evidence and Economic Reports groups were combined in name, but there was less of an economic evidence "shop" in what was then called the Bureau of Economics, because the staff working solely on mergers had been moved. The remainder of the Evidence and Reports division still worked on antitrust matters of one type or another, however, and they were not specialized in report-writing. The Accounting group was moved to the Bureau of Investigations in 1954 (later called the Bureau of Restraint of Trade, and later still, the Bureau of Competition).[445] The data collection group, Statistics and Financial Reports, was moved to the newly formed FTC's Office of the Comptroller in 1958 and back to BE again in 1962).

As of 1959, the changes had left the Bureau of Economics with only those economists who were assigned primarily (but not exclusively) to research duties. By 1960, the number of economists in BE was 14 with about another 14 economists housed in the legal Bureaus. In 1960, the Bureau of Economics had a staff 14 professionals and 17 clericals and was "a relatively isolated unit in the FTC, almost totally divorced from operations."[446] Mueller (e-mail 8-13-03) would later describe BE in the late 1950s as the "graveyard of the FTC."

By most accounts, the Bureau of Economics and the Commission were relatively inactive from the late 1940s to the early 1960s, although the Bureau may have been even less lively than the rest of the Commission.[447] Auerbach implies that the mid-1950s experiment with economists working in the legal bureaus had been a failure and had further eroded any economic input into antitrust work. This

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[444]Two economists were also moved into the Bureau of Litigation. These changes are described in Auerbach (1964, pp. 398-99), Bureau of the Budget (1960, p. 31), and Graham & Kramer (1976, pp. 48-52). Also see BE History Roundtable, September 4, 2003, pp. 18-20, 28-29, 75-78. These moves were a follow-on to a larger reorganization of the entire FTC (some called it a "reign of terror") that took place under Chairman Edward F. Howrey (who had been appointed in April 1953). That period saw the firing of about forty FTC staff. Sixteen of the 40 were economists and three of those had worked on the controversial 1952 oil cartel report). Later, FTC Chairman Earl Kintner, in a July 28, 1960 letter to Senator Hubert Humphrey, confirmed that economists were assigned directly to work in the Bureaus of Litigation and Investigation. At that time, all the Bureaus were overseen by the Executive Director's Office.

[445]The accounting group remained in the competition legal bureau up through 2001, but moved back to the Bureau of Economics in early 2002. In the 1950s, the accountants spent the bulk of their time on cost analyses required for Robinson-Patman litigations. See Bureau of the Budget (1960, pp. 83-84). In more recent times, they function mainly in litigation support for the Bureau of Competition, examining issues related to (1) the financial viability of merging firms, and (2) claims of merger efficiency.

[446]Auerbach (1964, p. 398); Bureau of the Budget (1960, pp. 119-120). As the Bureau of the Budget (p. 120) described the situation in BE, "The Bureau's economists and statisticians, as well as their colleagues working in the Bureau of Investigation and Bureau of Litigation, seem to have resigned themselves to being something of outsiders."

[447]During this period, the Bureau produced several data reports on market concentration and corporate profitability. It also released two relatively important reports on the international oil industry (1952) and antibiotics manufacturing (1958). The lack of perceived activity at the FTC generally may have been due to efforts to pursue cases that were seen to be important to Congress (e.g., Robinson-Patman cases, Textile Act cases, textile and garment labeling, etc.), but were not important to others. On the general lack of activity at the FTC during this period, see Handler (1964) and Graham & Kramer (1976). By many accounts, the FTC was unable to please any of the people any of the time during the years from 1945 through 1969.

situation began to change in mid-1961 when all the economists in the Agency were reunited in the Bureau of Economics. The reunited economists were organized in the previous three-division format with Economic Evidence (antitrust casework), Economic Reports (studies), and Financial Statistics (data collection and reporting) being the three divisions in the Bureau.[448]

Not all the "economists" were happy about being reunited. William Levin, the head of the Financial Statistics division that produced the Quarterly Financial Reports (QFR), wanted to remain effectively divorced from any other economic or legal bureau activities. He argued that the separation would enhance the precision and alacrity with which the QFR data could be compiled. That division actually had few, if any, economists and it gathered data that were seldom used by the FTC.[449]

The separation of the reporting and case support functions in 1962 was perceived to signal a return to a stronger data gathering and economic reporting function - functions that had been de-emphasized in the 1950s.[450] In 1964, the Economic Reports division was renamed Industry Analysis. This was an appropriate name change because the Bureau reports became a bit more analytical after the mid-1960s, as the staff became more highly trained in economic analysis and quantitative methods.

Economic analysis of antitrust cases and economic support for antitrust litigation were handled predominantly by one or two divisions since 1962. A single division called Economic Evidence (comprised of 20 to 45 economists) handled the work until about early 1982, when it was divided into two largely identical divisions - Competition Analysis and Antitrust. Each of these divisions would have contained about 15 to 20 economists who handled merger and non-merger antitrust cases. These divisions were later renamed Antitrust I and II and no one, other than perhaps the folks who toiled there, could ever recall which name applied to which group. The two shops were recombined in mid-1996 and then were once again divided into separate divisions in February 1999.[451] They have remained separate through at least 2014.

The Division of Consumer Protection (DCP) was formed mainly from staff in the Industry Analysis division in 1978.[452] That division remained unified and roughly the same size (13 to 18 economists) from its inception through 2006.[453] By mid-2013, however, the group had grown to 23 economists, roughly paralleling the growth of the consumer protection mission. DCP provides economic analysis, assessment of scientific evidence, and statistical analysis that is applied to rule and case development, project and policy evaluation, and to litigation. Economists in the division also conduct surveys, and

448See Boyle (1964, p. 504, note 45).
449Auerbach (1964, pp. 403-404). BE Director, Willard Mueller, is quoted as saying that "the data had never been useful or even accessible to the rest of the Commission staff." Scherer (1990, p. 481) would note, however, that the QFR data were later used by certain economists in the 1970s.
450Boyle (1964, p. 504). Also see, Office of Policy Planning (April 1981, Appendix F, p. 47). During 1955 to early 1960s, the antitrust economists worked directly for the legal bureaus, but even economists remaining in the Bureau of Economics spent a good deal of their time on antitrust case-related matters. See FTC Annual Reports (1962, p. 75 and 1955, p. 57).
451Since the late 1980s, a third division, the Division of Economic Policy Analysis (DEPA), was also responsible for some antitrust work. This began as "overflow" case-coverage in about 1988, but over time, the vast bulk of the staff in DEPA began to have antitrust work as their primary occupation.
452Letter from John L. Peterman to Professor Ken Elzinga (February 17, 1989, Attachment 3, p. 8).
453Based upon a review of BE phone listings for various dates from 1978 to 2006.

studies related to the consumer protection mission. On occasion, economists housed in the division worked on antitrust case matters, particularly during the 1990s merger boom.[454]

Beginning in February 1982, the Division of Regulatory Analysis was formed when advocacy, international trade restraints, and studies of regulated industries were of substantial interest. The staff of this division numbered between 15 and 20, with economists comprising three-fourths of the group. The substantive work of the Division provided the basis for arguments made in the advocacy program filings. The staff for Regulatory Analysis were either hired directly for that function or were drawn from differing divisions, especially Economic Evidence, and Industry Analysis. The Division existed independently until September 1986, when it was folded into a more diverse group, the Division of Economic Policy Analysis.

The Division of Economic Policy Analysis (DEPA) was formed in September 1986 by combining the staffs from Regulatory Analysis and Industry Analysis. At the outset, this group had 25 to 30 staff members including economists, research assistants, computer experts, secretaries, etc. The group included those in-house economists who were still conducting research using the line-of-business data, although that was a small and declining activity. Outside economists who wanted access to the LB data were also accommodated through DEPA.

The staff economists in DEPA initially engaged in economic research, provided the economic analysis for the Commission's competition and consumer advocacy program, and provided support for a few antitrust and consumer protection investigations. In addition, DEPA economists provided "consultant" services to staff economists from the other three divisions in the Bureau and to other offices within the Commission when complex statistical and econometric issues arose. This was mainly due to the fact that the most highly trained econometricians, who specialized mainly in applied research, were housed in the division.

By 1988, shrinking resources and increased merger activity combined to require that antitrust investigations be staffed by DEPA economists. DEPA essentially became the "overflow" shop for antitrust cases.[455] DEPA economists, like those from the other divisions, were called upon to provide expert witness services for the Commission during litigation. Since the merger wave crest of 1988, the Commission has encouraged the legal staff to utilize "in-house" economic experts, presumably due to the substantial financial savings from doing so and to the possible efficiencies derived from having the expert so accessible to the legal team. This antitrust casework focus of DEPA continued to grow throughout the 1990s, with 25 percent of DEPA staff time going to antitrust casework in 1994 and about 80 percent going to such casework in 2000.

The economic input into the Commission's competition and consumer advocacy program was also centered in DEPA. That activity was substantial in 1987, comprising perhaps 20 to 30 percent of DEPA workyears at that time, in part because it included time spent on studies of economic

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454 One economist housed in DCP worked on antitrust matters most of the time from mid-1995 through 2003 and various others worked on cases as the workload and their theoretical or empirical skills warranted.

455 The first big merger case handled in DEPA was KKR's purchase of RJR/Nabisco (at the time an unprecedentedly large $25 billion leveraged buyout involving horizontal product overlaps in ketchup, shelf-stable Chinese food, and packaged nuts). That transaction was allowed in February 1989.

regulation. As that program declined in the 1990s, however, and became very heavily focused in one area, electricity industry restructuring, the amount of time spent on advocacy issues diminished. During the advocacy decline, the FTC-wide coordination of the Advocacy program was moved from a separate FTC Office of Competition and Consumer Advocacy to BE in 1994, where it remained until 1997 under the watchful eye of attorney, Michael Wise.[456] In addition, after about 1994, the Assistant Director for DEPA also became responsible for coordinating and managing the Bureau's effort in international outreach activities.[457]

In August 1987, DEPA housed 23 economists and the functional split of DEPA's time was as follows: Studies 54%, Advocacy 19%, Casework 5%, expert witness work for antitrust cases 4%, other 18% (some of this other category could reasonably be considered research - working papers, speech writing for Commissioners, etc.). By fiscal 1994, DEPA was half its former size and the functional split of DEPA's time was as follows: Studies 49%, Advocacy 10%, Casework 26%, expert witness work for antitrust cases 3%, international outreach 4%, other 8%.[458] The last economist who had specialized in doing research left the division in 1997. By 2001, DEPA housed 10 economists and its workload was 80% antitrust casework which was, naturally, managed by the Antitrust Assistant Directors. That antitrust proportion expanded still further by 2005, as certain senior staff economists who had been active in the advocacy area left the division. As a result, from 2005 to 2007, the Assistant Director and one research analyst were the only "non-antitrust" resources in the Division.

In October 2007, after a series of information-gathering lunches with the BE staff, the Bureau Director, Michael Baye, decided to try to boost the prominence of research among the Bureau's activities. This was an effort to respond to the preferences of various staff economists and to enhance recruiting of new Ph.D.'s. Soon thereafter, a long-time manager of DEPA announced his pending retirement from the FTC, so the time was ripe to alter the Division that had not truly been a staffed division for at least a decade. The change was announced at a bagels gathering on December 5, 2007.

From the outside, the revision likely seemed larger than it really was - little changed, other than an attempt to elevate the status of internal research and to provide more "support" for such research. The Division was renamed the Office of Applied Research and Outreach (ARO). The five antitrust staff economists who had nominally been in DEPA for the past decade were reassigned to the antitrust groups for whom they actually worked. The office consisted of a newly appointed Assistant Director and housed two economists (one with a Deputy Assistant Director title) and one research assistant. The office was responsible for coordinating advocacy and international inputs from BE, as had been largely true of DEPA for several years. The coordination of international matters and

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456 The advocacy coordination function moved from the BE Director's Office to Policy Planning in 1998. It has remained in the FTC policy shop since then, with a minor split with attorneys in the General Counsel's policy office, who handled electricity and pharmaceutical subjects.

457 When the particular economist holding the title of Assistant Director shifted to running an antitrust shop in 1995, he retained the international coordination role for two years, but when he left the agency, the function again reverted to the DEPA Assistant Director in September 1997. From 1996 to 1997, Michael Wise, an attorney working in BE, also played a major role in the international outreach efforts.

458 By 1994, DEPA would have housed about 11 economists. James Langenfeld, a prior BE Deputy Director for DEPA, recalled (9-15-00 conversation) that in the late 1980s and 1990, DEPA time would have been more heavily weighted toward studies, with perhaps 75 to 80 percent of staff time going to that function.

competition advocacy were each to be handled as a part-time activity by an economist who would undertake those tasks for one to two years stints. The over-riding function of the Office, however, was to foster staff research The staffing for any major advocacy or international tasks would be drawn largely from the three major divisions, as it had been since the late 1990s. This reorganization also made one BE Deputy Director more explicitly and directly responsible for research in the Bureau.

Without any fanfare, in April 2002, a small, four-person, accounting group was moved from the competition bureau (where it had resided since 1954) back into the Bureau of Economics. It was called the Division of Accounting and Financial Analysis. In December 2002, Bureau Director David Scheffman noted that the move occurred in the hopes of making financial analysis a more important component of merger work at the Agency.[459] That Division was still part of BE in 2014, but its work was tied to requests for financial analysis from the attorney staff, rather than to work associated with the BE economist staff.

For those who prefer a picture depicting the organizational changes, even if it requires some work to decipher, Figure 11 in Appendix F provides a dynamic organization chart showing the sub-components of BE over time and the changes in the size of those components. The width of each box indicates the number of staffers that were housed in the respective divisions of the Bureau. Little is known about the details of the organization of the Economic Division in the pre-World War II era. During that period, two or three Ph.D.'s, under the Direction of the Chief Economist, divided the reporting work and assembled staffs of investigators, accountants, and clerical staff to produce the various reports.[460] Beginning in the 1950s some data are available giving the size of the subdivisions of the Bureau. The near demise of BE in the mid to late 1950s is evident as the Bureau lost many of its functions and many of the economists were transferred to other organizations in the FTC. Following the 1962 revival of the Bureau, the organization reached a peak of slightly more than 200 staffers in 1981. After that point, BE staff declined in size as data collection activities were terminated, antitrust resources were trimmed, and economic reporting functions dimmed temporarily.

As a final bit of organization/administrative trivia, since at least the 1960s, the Bureau of Economics was located in the FTC Headquarters building at 6th St. and Pennsylvania Avenue in the 1960s (on the 2nd and 7th floors), and was moved three miles away from the Main FTC Building to the Gelman Building at 21st and L streets in May 1971 as the Agency made room for the new cigarette testing lab in the FTC Headquarters building. The QFR staff were never housed with the main contingent of BE (at least in recent memory) and the Line-of-Business (LB) data staff were also segregated from the main BE contingent.

The LB team was located behind locked doors in the basement of the Gelman building. The Bureau remained in the Gelman building until 1986, when the various FTC divisions that were not located in the Headquarters building were reunited in the 601 Pennsylvania Building adjacent to the FTC Headquarters building. Uniting the agency in adjacent buildings was a valuable efficiency enhancing move. The BE Director had an secondary office on the fourth floor of the FTC building starting in

459 December 10, 2002, Bureau Director Scheffman, on the second day of the Roundtable entitled "Understanding Mergers: Strategy & Planning, Implementation, and Outcomes," transcript, p. 3.
460 Stevens (1925, 1940).

1982 and the Bureau obtained a 2nd floor corner of the main FTC building for its upper management when the bulk of the Bureau moved into the 601 Pennsylvania Building in 1986.[461] In late 2002, most of the BE staff (and half of the FTC staff more generally) were moved from the 601 Pennsylvania Building to 601 New Jersey Avenue, eight blocks from the main FTC building. This unfortunate separation immediately reduced personal interaction and communication between the BE front office and the BE staff. As the FTC's consumer protection mission grew in the 2000s, more space was needed and so office space in a third downtown building was acquired for a few years. One BE merger division, Antitrust I - the oil shop - was moved to the new space in February 2010 along with the BC oil shop, and the BCP enforcement group.

The agency moved out of the 601 New Jersey building in 2014, to the "old" DOT building, now refurbished and called Constitution Center, at 7th and D St. S.W. The Bureau of Economics staff, however, was not moved with the attorney staff, but was housed on the 2nd floor of the FTC Headquarters building, where BE's Office of the Director had been located since the 1980s. One Congressman (Mica, R- FL) has been working for a decade to move the FTC out of the main Headquarters building to provide the space for the National Gallery, located across Pennsylvania Avenue. The FTC Commissioners have resisted that transfer mightily. If that ever occurs, the entire agency may once again be unified (that consolidation will be a silver lining around a black cloud).

On occasion questions arise regarding the manager/staff ratio in various organizations. In the Bureau of Economics as of July 2013, the number of individuals with management titles was 19, the number of total staff (including managers) was 109, the number of economists was 82, and the number of accountants was 5. Not all the individuals with "management" titles were actually managers. One had a title, but no staff. The number of persons having real line management functions was close to 18, but how one counts such things is always subject to some dispute. Counting all the "real" line managers and all staff, the ratio of managers to non-manager staff was 18 : 91 or 1 :5. The number of titled managers and the manager/staff ratio was similar in early 2000, but may have been closer to 1:6.

461Chairman James Miller had intended to incorporate economics more fully into the work of the agency and the physical relocation of the Bureau was part of that effort. See Miller (1994, p. 11).

Appendix B: Changes in the Bureau's Staff Mix and Skill Mix 1915 to 2013

Data on the staff composition of the early FTC is hard to obtain. Early annual reports tend not to list economists at all and that job classification in the government in the early 1900s would have included those who would not have been considered "economists" by the profession (e.g., bachelor's degree recipients). In the earlier years of the Economic Division and the Bureau, the number of graduate school trained economists would have, at times, been fewer than five.[462] Individuals classified as economists, however, might have numbered 25 to 30.[463]

During the years when data collection was a principal function of the Bureau, statistical clerks, who would record and transcribe accounting data, would have been a substantial and essential portion of the Bureau staff and secretarial help would have been much more common than it is today. In 1939, the Economic Division had 86 total staff, the smallest the group had been since 1917.[464] This group might have been composed of 30 persons classified as economists and many classified as accountants, investigators, and clerical staff. From 1930 to 1951 the number of economists declined from about 33 to 18.[465]

While economists comprised 10 percent of the FTC staff in the late 1920s, from 1937 to 1950 they never exceeded 3 percent.[466] In 1960, the Bureau of the Budget (later the Office of Management and Budget, OMB) counted 28 economists at the FTC, with 14 housed in the Bureau of Economics.[467] Since about 1980, graduate-trained economists have tended to comprise about 6 to 8 percent of the FTC staff (numbering in the 60 to 80 range), and the Bureau of Economics staff in total has been 9 to 10 percent of the FTC staff (representing 7 to 10 percent of FTC dollar expenditures). The percentages have tended to remain fairly constant. As the agency downsized in the 1980s, BE shrank a bit more than proportionately, from a peak of 204 total employees in 1981 to 89 in 1989.[468]

In every period since 1917, a few Ph.D. economists existed in the Bureau and they provided the leadership for the organization. A major alteration in BE staff composition began in the early 1960s when incoming BE Director Willard F. (Fritz) Mueller began upgrading staff skills; and the upgrading continued and accelerated in the 1970s under Directors Mann and Scherer. The 1970s upgrading was

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462Markham (1964, p. 406).

463Stevens (1940, p. 557) indicated that the FTC had a highly expert staff, but he gave no indication of academic training levels. By "expert," Stevens appeared to mean that the staff had substantial experience in conducting large-scale general economic investigations of various industries and business practices at the Bureau of Corporations and at the Economic Division of the FTC.

464Stevens (1940, p. 554).

465The 1951 FTC Annual Report, p. 31.

466The 1951 FTC Annual Report, p. 31.

467Auerbach (1964, p. 398).

468Of this 115 workyear decline, about 50 to 60 workyears could be attributed to the transfer of the Quarterly Financial Report program to the Census Bureau and the demise of the Line of Business program.

part of a very general FTC-wide staff improvement precipitated by the 1969 Nader/ABA critiques of the FTC.[469] In 1971, 38 percent of the persons classified as economists had Ph.D./ABD degrees.[470] By 1987, that value had risen to 94 percent and remained at or above that level through 2013.[471] The alteration in staff composition was consistent with a change in the types of reports done by the Bureau from data intensive purely descriptive reports to analytical reports containing empirical analysis of data.[472]

Since the mid-1970s, the economics staff of the FTC has been composed largely of individuals who have had substantial training in industrial organization and related sub-fields of economics. In addition, applied econometricans were pursued, and the intensity of that search has increased as the empirical component of antitrust analysis has grown. Often, economists with labor economics backgrounds had developed substantial expertise in econometrics, and BE sought those people to work on both consumer protection (discrimination) cases and antitrust issues.

It is difficult to characterize the quality of the economics staff at the FTC. Perhaps the best objective evidence is to examine the publication record of the staff. Finding a comparison for that output is difficult however, because the main job of economists at the FTC (as opposed to a research University) has not been to publish. Indeed, publication is often done for professional development reasons rather than as a specific part of the job.[473] It is probably fair to say that the highest average staff quality existed around 1981 when research and idea-generation peaked, and the quality level declined throughout the 1980s and hit a plateau in the 1990s. How the staff quality compares to that of university faculty is debatable, especially given the large difference in incentive structures facing the two groups. Perhaps average quality of economists in BE currently rivals that of economics departments rated, say, number 45 to 70 in the nation, but without the one or two star publishers that those departments often attract.

From 1995 to 2014, the Bureau of Economics tried harder than ever before to attract candidates from the "top ten" graduate departments. This was often done via personal outreach by the Director. That effort was not always successful, but the late 1990s Bureau Directors had a stronger bias toward hiring only from the top schools than did previous Directors. The Bureau had not tried to recruit at regional economics meetings in the past decade in any event (if the Southern Economic Association meetings were held in Washington, a few interviews with candidates would likely be scheduled). Most job candidates come to the American Economic Association meetings, so covering the regional meetings

[469]Those critiques had focused on the argument that the FTC was inefficient generally and spent most of its time on very unimportant cases and issues. See Kovacic (1982, p. 649); and Clarkson & Muris (1981, pp. 2-6). These critiques were not new. They had been common since the 1940s. For some comments regarding the quality of the BE staff in the 1950s and 1960s, see BE History Roundtable, September 4, 2003, Folsom and Mueller, pp. 19, 29-30, 37-38.

[470]Eisner (1991, p. 166) implies that the percentage of economists with Ph.D.'s was 20 percent in 1970, but by the mid-1970s about one-half of the economists had Ph.D.s and most of the rest were doctoral candidates (ABDs).

[471]Letter from John L. Peterman, BE Director, to Professor Ken Elzinga, February 17, 1989, p. 3. Ph.D. intensity in recent years is based on BE recruiting records and staff resumes.

[472]See Scherer (1990, pp. 470-471) and Lou Silversin discussion 6-00.

[473]It is, however, true that doing research enhances human capital that can then be used in casework. (This and related arguments were listed in FTC at 100, circa January 2009.) Those economists who are capable researchers are among the most inventive and technically sophisticated analysts on cases. For a listing of the published work of the economics staff, see the annual recruiting materials, Bureau of Economics Profile (various years).

would not have added a large number of candidates. In December 2007, the Bureau sent out its first recruiting/outreach spam from Director Mike Baye to about 1800 university professors and department heads.

In a moment of brutal frankness, Katzmann noted that for the most part the "Division of Economic Evidence economist is on the government payroll because he was unable to secure an attractive academic position."[474] Having said that, it is also true that several economists have left BE for academe over the years (over 20% of all employees leaving BE (including retirements) went to academic appointments in the years from 1986 through 2005 and that percentage was even higher from 2003 to 2012).[475]

A second, less dramatic, shift in employee mix was a move from statistical clerks (who tended to focus on data compilation tasks) toward research assistants (RAs), who tended to have more computer skills and could help manipulate and present data. Part of this shift in input types was due to technology changes as enhanced computer software called for a different set of skills and differently-trained workers and part was due to a change in the Bureaus' work as systematic data collection was ended in 1981 to 1983 (e.g., Line of Business data termination, merger and acquisition data collection termination, Quarterly Financial Report transfer to the Census Bureau).[476] In 1992, an informal survey of private economic consulting firms indicated that BE was much less RA-intensive than even the least RA-intensive private economic consulting firm, which tended to have one RA for every two Ph.D.'s.[477]

As of 2006, the transition toward a more RA-intensive staff had been accomplished, but BE never moved anywhere near the RA-intensity of even the least RA-intensive private consulting firm.[478] Perhaps one reason for this state of affairs is that the personnel rules and government budgetary regime prior to the mid-1990s provided little incentive to hire an optimal (i.e., cost minimizing) staff mix. The incentive structure was improved some in the 1990s, but it was never altered sufficiently to induce optimal choices in hiring.

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[474]Katzmann (1980, p. 38).

[475]See the annual FTC/BE Profile books used in economist recruiting.

[476]This shift in type of employee and type of work is evidenced by alterations in the number and ratio of statistical clerks and secretaries in BE over time. For example, in 1978, BE had about 76 economists and 115 support staff (including the QFR data gathering group). By 1994, BE had 68 economists and only 20 support staff - a three-to-one ratio. These data taken from phone books for Bureau of Economics. In 2005, most of the remaining secretaries and statistical/clerical staff were united in a support team under the direction of the BE Administrative Officer. By 2007, BE had 70 economists and 8 administrative support personnel in an organization of 104 total employees. Those ratios remained fairly constant through 2013. The last assistant, who had been hired in the 1970s to collect statistical data, retired from BE in December 2006. Because the vast bulk of BE's systematic data collection efforts ended in the 1980s, that individual had been handling other tasks, including idiosyncratic data gathering.

[477]For many years, the least RA-intensive economic consulting firm had an RA/Ph.D. ratio of about 0.50. Including both statistical clerks and research assistants, the support staff to economist ratio for the Bureau of Economics in 1992 was about 9 to 73 or 0.12. By 2000, this ratio had risen to 13 to 70, or about 0.19. By January 2006, it was 21 to 70 or 0.30. In 2012, the RA/Ph.D. ratio was 18/82 or 0.22. The RA to economist ratio is determined in large part by how efficiently economists can use RAs. No one gains when RA's are not well utilized. In addition, government hiring rule changes in 2006 made it more difficult to recruit and retain skilled research assistants.

[478]Between fourteen and twenty-one research assistants were on the roles in BE from December 2002 to October 2012. That compares with only eight to ten over the prior several years.

In October 2012, the Bureau of Economics had 114 total permanent staff composed of 82 PhD economists, 2 ABDs or Master's degree-level economists, 5 accountants/financial analysts/CPAs with various credentials, 18 research analysts (some of whom have Master's degrees), and 7 administrative/secretarial staffers. This general type of staff composition has been typical for the past 10 years. In recent years (1995 to 2012), the number of Ph.D./ABD economists has varied between 63 and 82. The number of secretarial staff has slowly declined due to technology changes since the 1980s, and such staff have mostly been consolidated in an administrative group since early 2005.

During the 1980 to 2004 period, turnover among the economist staff was normally in the 5 to 15 percent annual range. Staff leave the Bureau to go to a variety of endeavors. Opportunities in private antitrust consulting began in the 1970s and continued through 2000, accounting for a sizeable percentage of the movement. A substantial portion of the staff were also lost to academic pursuits. From 2003 to 2012, the distribution of post-BE employment for the 34 non-retiring economists was as follows: consulting 29%, academic 32%, government 21%, business 6%, and other 12%. As the FTC staff ages, retirements become a larger portion of attritions.[479]

[479]See FTC/BE Profile 2012.

Appendix C: Francis Walker: The First FTC Chief Economist[480]

Dr. Francis Walker, was the first Chief Economist of the Economic Division of the FTC and served in that capacity from 1915 until he retired in 1941. I include a brief biography and description of some of his work for two reasons: (1) the nearly annual Chairman's Excellence in Economics award given to an outstanding BE economist is named for Dr. Walker, and (2) because he was the first and longest tenured Director of the Bureau.

Who's Who notes that Walker was born in 1870, received a B.S. from MIT in 1892, and a Ph.D. from Columbia in 1895. Walker taught at Colorado College and then became professor of economics at Western Reserve University. He studied and did research in Europe, publishing books and articles on the German coal and steel industries in the *Quarterly Journal of Economics* in 1905 and 1906. In addition, he published a book entitled Double Taxation in the United States (1895). In 1904 Walker became a special examiner at the U.S. Bureau of Corporations, a predecessor of the FTC, and he became Deputy Commissioner of Corporations between 1912 and 1915. After the FTC was created, Walker became its Chief Economist and served in that role from 1915 until his retirement in 1941. During the First World War he oversaw the Commission's work on "cost-finding" for price regulation by the War Industries Board and later he oversaw studies of the gas and electric industries, among others. Francis Walker died in 1950.

In addition to his articles about the German coal and steel industries, the American Economic Association periodicals index through 1924 showed that Walker published an article in the *Economic Journal* in 1906 entitled, "The 'Beef Trust' and the United States Government". In the article Walker notes that the meat-packing industry, then popularly known as the "Beef Trust," had been accused by cattlemen of manipulating cattle prices and by consumers of monopolizing the sale of fresh meat. Walker then presents data collected by the Bureau of Corporations. The data show that the total proceeds to meat-packers from slaughtering in 1904 amounted to $49.01 per beef carcass. Out of this amount the Bureau of Corporations estimated that between $.82 and $.99 were profits. Walker notes:

> The conclusion of the report on the matter of profits was, that a profit of $1.00 per head on cattle, or of one-quarter of a cent a pound for dressed beef, though large, was not an undue profit for the packers . . .[481]

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[480]This biography of Francis Walker (1870-1950) is drawn, largely verbatim, from a memorandum written by Ron Bond with the aid of Karen Richards (August 8, 1991). The FTC's first Chief Economist came from a long line of top-notch academics. Francis Walker's father, Francis Amasa Walker (1840-1897), was a brevetted brigadier general who served in the Union Army during the Civil War. He was also President of the Massachusetts Institute of Technology, President of the American Statistical Association, and the first President of the American Economic Association. Francis Walker's grandfather, Amasa Walker (1799-1875), a New England businessman, taught at Oberlin and Amherst and was the outstanding American economist of his time, according to the International Encyclopedia of the Social Sciences, vol. 16, pp. 438-39; and Who's Who in Economics, p. 389. Also see, The National Cyclopedia of American Biography, pp. 341-42. See also Dunbar, Charles F., "The Career of Francis Amasa Walker," QJE, 11(4), July 1897, 436-448.

[481]Walker's profit data appear largely consistent with that published 12 years later as part of the FTC's Meat-packing Investigation, where profits of the five great packers were said to be between two and three percent of sales and in the range of 13% return on equity (compared to 17% for the smaller packers). (See *Meat-packing Industry*, Part V, FTC, 1918,

Walker continues:

> The report of the Bureau was received with great incredulity by a large part of the Press, and by a majority of the people. The glamour of the "Beef Trust," which exercises a great power throughout the West, was so great that authentic figures were of little avail to dispel the belief that the profits of the packers were of a phenomenal size. The critics of the report not only refused to accept the computations of the Bureau, but proceeded to make crude estimates and wild guesses of what the profits were.

Walker's *Economic Journal* article also discusses the sanitary conditions that had been the subject of a great public outcry due to Upton Sinclair's then recent book, *The Jungle*. With regard to the latter, Walker compares Sinclair's allegations with observations made by government investigators. Walker concludes that the governmentally collected evidence did reveal that there were examples of shockingly unsanitary conditions. But he also notes that such conditions were not necessarily those that prevailed widely, and that in general conditions were quite a bit better than those described by Sinclair. Finally, Walker outlines the provisions of the meat inspection law passed by Congress in 1906. Walker concludes:

> One encouraging thing was demonstrated by this meat scandal and that is, that the Government and the people of the United States are not dominated by purely commercial interests (as is often asserted), and that when an abuse clearly appears and an adequate remedy is found, reform will be made as quickly as possible. The haste with which the packers have attempted to meet the new requirements of the law, in view of their vaunted power, is a striking evidence of the commercial influence of public opinion. An equally encouraging sign is the Government's independence of uninformed public opinion, or prejudice, and the impartiality of its administration......

Walker also authored a memoranda from 1920 discussing the economics of "the Guaranty against Decline". Apparently the Commission had held hearings on the practice by some manufacturers of offering wholesalers a guaranty against future declines in price. In Walker's words the Commission had received "a large body of opinion of men in a great variety of trades," and Walker wrote his memorandum to analyze the evidence that had been presented.

In his memorandum Walker evaluates 20 different arguments on the record. Some of the arguments concluded that the practice was efficient, and some concluded that the practice was anticompetitive. One "catch-all" category that Walker lists was that of "general denunciations":

> There are a good many general denunciations of the guaranty which are interesting, even though not always supported by reasons. Thus one declares that the guaranty amounts to "gambling", another says it is a “malicious” practice, a third that it is

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pp. 15, 94).

> “discriminatory”, a fourth, that it is “a rebate and unfair”, a fifth that it is an “evil custom” and finally one, apparently with a less temperamental disposition, is satisfied to say that it is not “sound business.” Where there is smoke, there is generally fire, so the assertion of another, that it imposes a “hardship on nobody”, may be regarded with skepticism. But many people are put out of business by fair methods of competition, as well as by unfair methods.

At the end of his memorandum Walker concludes that although it might be possible that a guaranty could become an unfair method of competition under some circumstances, no examples of such situations appeared in the record. Walker notes:

> From such examination as the undersigned has been able to give the subject it appears (1) that the practice of giving a guaranty against decline is a method of determining selling prices which arises normally in certain lines of trade, but particularly in seasonal trades; (2) that the motives or inducements thereto are unobjectionable; (3) that the practice is not apparently one which works to the injury of competitors or others in the trade any more than other ordinary competitive methods; (4) that the considerations of general social welfare do not indicate any special objection to it; and, (5) that there are certain arguments which may be made in favor of it on the basis of economy and efficiency which have at least some force.

Like many of his successors (at least through the 1970s), Walker advocated the collection and publication of economic data by the government. Speaking before the forty-fifth annual meeting of the Academy of Political Science, Walker presented a paper entitled, "The Government's Function in Collecting Business Information." At the conclusion of his paper Walker recommended that:

> ...the Government should collect, compile, and publish currently, with respect to the basic industries, information regarding production, cost of production, capacity, stocks, sales, prices, orders, and other such related data as may be necessary to show the general conditions of supply and demand in such industries.

Apparently also an early champion of line-of-business reporting, Walker further suggested that:

> ...the Government should compile and publish annually by industries and trades comprehensive information regarding investment and the rate of profit in different branches of business.

Appendix D: Bureau of Economics Chief Economists, recent FTC Chairmen, and U. S. Presidents

(Certain biographical information and later affiliations of BE Directors)

Francis Walker	1915-1941	(see the biography by Ron Bond in Appendix C)
Willis J. Ballinger	1937-1947	Ballinger was not a Bureau Director, but he seemed to hold a particularly specialized and influential position in the Agency. He was a special consultant to the Commission housed in the Economic Division (See 1939 FTC Annual Report, p. 12). Mr. Ballinger was an advocate of Robinson-Patman enforcement who specialized in that area of endeavor and also oversaw the economic reports done by the FTC for the Temporary National Economic Committee from 1937-1941.
William H. England	1941-1947	
Corwin D. Edwards	1948-1953	Edwards published widely, particularly on problems caused by conglomerate enterprise. He is likely best remembered for pressing the notion of "mutual forbearance" among large competitors which in more modern terminology would be considered an effect of "multi-market contact." In 1959, he also wrote a book noting various deficiencies in the Robinson-Patman Act. Over his career beginning in 1926, Edwards taught at NYU, Northwestern, Cambridge, UVA, and Chicago (business and government). His final academic slot was as Professor of Economics at the University of Oregon from 1964 to 1971. He held several government positions from 1940-1950 and was Vice President of the American Economic Association in 1951. He retired in Lewes, DE, but remained professionally active until his death in Dallas, TX in 1979.
Jesse W. Markham	1953-1955	Markham was a Vanderbilt University Professor prior to taking the helm as Chief Economist at the FTC. He later taught at Princeton and Harvard. He was the author of a several well-known 1950s papers on

		workable competition, price leadership, and oligopoly. Markham appeared as an expert witness for the cereals companies in the FTC's 1970s, shared monopoly case and also for Ethyl Corp. in the FTC's 1979 facilitating practices litigation. Markham died in Nashua, NH on June 21, 2009.
Simon N. Whitney	1956-1960	Whitney was on the faculty at NYU and was the Twentieth Century Fund's research director before coming to the FTC. He published a history of antitrust in twenty industries in 1958. An emeritus professor at NYU, Whitney died in Scarsdale, NY in 1982.
Willard F. Mueller	1961-1969	University of Wisconsin-Madison. Mueller wrote a memoir of his time in Washington, Fighting for Antitrust Policy: The Crucial 1960s (2009) that sheds light on Washington and the FTC during the 1960s.
Harrison F. Houghton	1968 (acting)	A longtime FTC staffer and manager.
Roy A. Prewitt	1969-70 (acting)	Longtime FTC/BE employee and an author of the Petroleum Cartel Report in 1952. Prewitt died in 1976.
H. Michael Mann	2/71- 8/73	Boston College. Mann died in 1985 at the age of 51.
James Mack Folsom	1973-74 (acting) one month in 1976	Deputy Director and "rudder of the BE ship"
Frederic M. Scherer	10/1974 to 6/1976	De facto start date was 7/1974 as a consultant, but Watergate uncertainties caused the formal action to occur in October. Kennedy School of Government, Harvard University; and later Princeton University. Author of the leading IO textbook in the 1970s and 1980s. Emeritus Professor at Harvard University.
Darius W. Gaskins, Jr.	6/1976 - 3/1978	Economics Director at Civil Aeronautics Board; Deputy Assist. Sec. Department of Energy; Interstate Commerce Commission Chairman; Burlington Northern Railroad; a Boston Bank; Norbridge Inc.
James Mack Folsom	4-78 to 8-78	Glassman-Oliver Economic Consulting

	(acting)	
William S. Comanor	9/1978 - 8/1980	University of California, Santa Barbara.
Michael P. Lynch	1980-81 (acting)	Federal Energy Regulatory Commission; seller of rare books.
Robert D. Tollison	1981-83	George Mason University, University of Mississippi, and Clemson University.
Wendy L. Gramm	2/1983-10/1985	Chairman of the Commodity Futures Trading Commission; later Director for Regulatory Studies, Mercatus Center at George Mason University.
David T. Scheffman	10/1985 - 10/1988	Vanderbilt University and later LECG consulting and Cornerstone Consulting.
John L. Peterman	10/1988 - 9/1993	LECG consulting
Ronald S. Bond	9/93 - 4/95 (acting)	LECG consulting
Jonathan B. Baker	4/1995 - 11/1998	Washington College of Law at American University; FCC Chief Economist 2010; consulting.
Jeremy I. Bulow	1/1999 - 6/2001	Stanford University
David T. Scheffman	6/2001 - 8/2003	LECG consulting & Vanderbilt University and Cornerstone Consulting
Luke M. Froeb	8/2003 - 6/2005	Vanderbilt Univ Owen B-School & consulting
Michael A. Salinger	7/2005 - 6-30-07	Boston University & CRA consulting
Michael R. Baye	7/01/2007 - 12-22-08	Indiana University; Kelley Business School, NERA Consulting
Pauline M. Ippolito	12-22-08 - 6-1-09 (acting)	Deputy Director of BE
Joseph V. Farrell	6-1-09 - 06-30-12	UC Berkeley, Bates-White Consulting
Howard A. Shelanski	07-01-12 - 07-09-13	OIRA in OMB (Exec Office of the President);

		Georgetown University Law
Pauline M. Ippolito	07-10-13 - 09-30-13 (acting)	Deputy Director of BE
Martin Gaynor	10-01-13 -10-01-14	Heinz B-school, Carnegie Mellon Univ.
Michael G. Vita	10-1-14 to 11-1-14 (acting)	Deputy Director in BE
Francine Lafontaine	11-1-14 -?	Stephen Ross B-school, Univ. of Michigan

Recent FTC Chairmen or Chairwomen and U.S. Presidents

James M. Mead	1950 - 1953
Edward F. Howrey	4/1953 - 1955
John W. Gwynne	1955 - 1959
Earl W. Kintner	6/1959 - 3/1961
Paul Rand Dixon	3/1961 - 1/1970
Caspar Weinberger	1/1970 - 8/1970
Miles W. Kirkpatrick	9/1970 - 2/1973
Louis A. Engman	2/1973 - 12/1975
Paul Rand Dixon	1/1976 - 3/1976
Calvin J. Collier	3/1976 - 4/1977
Michael Pertschuk	4/1977 - 3/1981
David A. Clanton	3/1981 - 9/1981
James C. Miller III	9/1981 - 10/1985
Terry Calvani	10/1985 - 4/1986
Daniel Oliver	4/1986 - 8/1989
Janet D. Steiger	8/1989 - 4/1995
Robert Pitofsky	4/1995 - 6/2001
Timothy J. Muris	6/2001 - 8/15/2004
Deborah Platt Majoras	8/16/2004 - 3/30/08
William E. Kovacic	3/31/2008 - 3/01/09
Jon D. Leibowitz	3/2/2009 - 3/2/13
Edith Ramirez	3/4/2013 - ?

Harry S. Truman	1945 - 1953
Dwight D. Eisenhower	1953 - 1961
John F. Kennedy	1961 - 1963
Lyndon B. Johnson	1963 - 1969
Richard M. Nixon	1969 - 8/1974
Gerald R. Ford	8/1974 - 1977
James E. Carter	1977 - 1981

Ronald W. Reagan	1981 - 1989
George H. W. Bush	1989 - 1993
William J. Clinton	1993 - 2001
George W. Bush	2001 - 2009
Barack H. Obama	2009 – 2016?

Appendix E: Historical Data Table on BE and FTC 1915-2012

BE/FTC Data Appendix (Part 1 / 2)
Various Bureau of Economics / FTC Data 1915-2012

Year	Number of Economists or econ FTEs in BE	Total FTC staff with Commission	FTC $ Expenditure (000)	BE $ Expenditure (000)	BE FTE	BE Reports	BE $ bgt as a % of FTC $ bgt	Econs as a % of FTC staff	BE FTE as % of FTC FTE	Econs as % of BE FTE	BE (5 s
1915		143	100								
1916		224	394			6					
1917		193	472		84	9					
1918		640	1423	934	420	9	65.6		65.6		
1919		367	1506	924	225	11	61.4		61.4		
1920		418	1036	441	178	13	42.6		42.6		
1921	82	315	880	338	121	9	38.4		38.4		
1922		318	901	300	106	7	33.3		33.3		
1923	30	308	971	269	90	7	27.7	9.7	29.2	33.3	
1924	30	314	979	207	90	4	21.1	9.6	28.7	33.3	
1925	32	314	1009	263	90	5	26.1	10.2	28.7	35.6	
1926	29	317	995	232	90	2	23.3	9.1	28.4	32.2	
1927	26	293	961	230	90	5	23.9	8.9	30.7	28.9	
1928	29	349	968	249	90	4	25.7	8.3	25.7	32.3	
1929	40	380	1159	361	118	4	31.1	10.5	31.1	33.8	
1930	44	450	1465	544	167	1	37.1	9.8	37.1	26.3	
1931	34	546	1848	686	203	2	37.1	6.2	37.1	16.8	
1932		511	1779	703	202	3	39.5		39.5		
1933	24	404	1399	490	142	4	35.0	5.9	35.0	17.0	
1934		584	1314	303	135	6	23.1		23.1		
1935		535	1956	426	117	9	21.8		21.8		
1936		571	1821	485	152	5	26.6		26.6		
1937		577	1894	365	111	4	19.3		19.3		
1938		590	1942	292	90	2	15.0		15.3		

Year	Number of Economists or econ FTEs in BE	Total FTC staff with Commission	FTC $ Expenditure (000)	BE $ Expenditure (000)	BE FTE	BE Reports	BE $ bgt as a % of FTC $ bgt	Econs as a % of FTC staff	BE FTE as % of FTC FTE	Econs as % of BE FTE	BE (5 su
1939	19	692	2197	300	86	2	13.7	2.7	12.4	22.1	
1940		673	2275	268	84	0	11.8		12.5		
1941		699	2226	231		1	10.4				
1942		636	2339	124		0	5.3				
1943		492	2133	348		7	16.3				
1944		468	1957			1					
1945		456	1997	122		2	6.1				
1946		518	2151	161		4	7.5				
1947		608	2860	275		7	9.6				
1948		605	2948	306		5	10.4				
1949		604	3581	347		1	9.7				
1950		654	3715	368		4	9.9				
1951	19	689	3772	401	66	1	10.6	2.8	9.6	28.8	
1952	25	677	4307	503	83	4	11.7	3.7	12.3	30.1	
1953	26	647	4177	515	82	0	12.3	4.0	12.7	31.7	
1954	27	601	4046	384	62	1	9.5	4.5	10.3	43.5	
1955	19	589	4126	364	59	1	8.8	3.2	10.0	32.2	
1956	19	646	4548	487	83	0	10.7	2.9	12.8	22.9	
1957	23	749	5550	499	85	1	9.0	3.1	11.3	27.1	
1958		743	6185	475	84	1	7.7		11.3		
1959		737	6491	285	40	0	4.4		5.4		
1960	19	787	6840	289	33	1	4.2	2.4	4.2	57.6	
1961	12	860	8003	312	39	0	3.9	1.4	4.5		
1962	35	1131	10014	494	89	1	4.9	3.1	7.9	39.3	
1963	45	1183	11456	898	124	1	7.8	3.8	10.5	36.3	
1964		1148	12207	961	124	2	7.9		10.8		
1965		1180	13410	1007	117	1	7.5		9.9		
1966		1150	13671	1054	123	7	7.7		10.7		
1967		1170	14305	1128	123	6	7.9		10.5		
1968		1244	15280	1206	131	6	7.9		10.5		

Year	Number of Economists or econ FTEs in BE	Total FTC staff with Commission	FTC $ Expenditure (000)	BE $ Expenditure (000)	BE FTE	BE Reports	BE $ bgt as a % of FTC $ bgt	Econs as a % of FTC staff	BE FTE as % of FTC FTE	Econs as % of BE FTE	BE (5 su
1969		1165	16805	1274	131	6	7.6		11.2		
1970		1316	20889	1392	131	2	6.7		10.0		
1971	47	1385	22490	1564	131	3	7.0	3.4	9.5		
1972	53	1390	25189	1897	154	3	7.5	3.8	11.1		
1973	56	1530	28974	1970	173	1	6.8	3.7	11.3		
1974	66	1560	32496		166	2		4.2	10.6		
1975	67	1569	38983	2915	187	6	7.5	4.3	11.9	35.8	
1976	73	1638	47199			3		4.5			
1977	73	1668	54680			2		4.4			
1978	81	1650	62100	5250	191	4		4.9	11.6	42.4	
1979	78	1746	65300	5714		0	8.8	4.5			
1980	80	1719	66059	6249	200	6	9.5	4.7	11.6	40.0	
1981	92	1667	70774	6861	204	3	9.7	5.5	12.2	45.1	
1982	98	1491	68774	7228	202	3	10.5	6.6	13.5	48.5	
1983	89	1310	66871	6337	154	3	9.5	6.8	11.8	57.8	
1984	87	1238	64150	6520	142	8	10.2	7.0	11.5	61.3	
1985	91	1201	65761	6657	144	3	10.1	7.6	12.0	63.2	
1986	78	1107	62683	6208	130	11	9.9	7.0	11.7	60.0	
1987	74	1007	64700	6112	110	7	9.4	7.3	10.9	67.3	
1988	72	986	66240	5867	109	6	8.9	7.3	11.1	66.1	
1989	65	894	66243	5319	94	7	8.0	7.3	10.5	69.1	
1990	79	903	70273		89	3		8.7	9.9	88.8	
1991	78	926	76451		98	2		8.4	10.6	79.6	
1992	79	939	82700	6463	95	2	7.8	8.4	10.1	83.2	
1993	72	953	86870	6905	95	0	7.9	7.6	10.0	75.8	
1994	67	933	92568	7378	90	2	8.0	7.2	9.6	74.4	
1995	65	944	102928	7672	90	1	7.5	6.9	9.5	72.2	
1996	65	939	100870	7668	89	3	7.6	6.9	9.5	73.0	
1997	66	928	102375	7829	88	1	7.6	7.1	9.5	75.0	
1998	64	965	106775	8191	86	1	7.7	6.6	8.9	74.4	

Year	Number of Economists or econ FTEs in BE	Total FTC staff with Commission	FTC $ Expenditure (000)	BE $ Expenditure (000)	BE FTE	BE Reports	BE $ bgt as a % of FTC $ bgt	Econs as a % of FTC staff	BE FTE as % of FTC FTE	Econs as % of BE FTE	BE (5 su
1999	64	964	117377	8208	87	2	7.0	6.6	9.0	73.6	
2000	68	985	124978	9199	91	3	7.4	6.9	9.2	74.7	
2001	69	1007	146037	10117	90	0	6.9	6.9	8.9	76.7	
2002	77	1054	156000	11700	101	1	7.5	7.3	9.6	76.2	
2003	77	1051	177000	13341	108	1	7.5	7.3	10.3	71.3	
2004	74	1057	186000	13492	103	3	7.3	7.0	9.7	71.8	
2005	70	1019	205000	13342	97	1	6.5	6.9	9.5	72.2	
2006	68	1007	211000	13834	101	0	6.6	6.8	10.0	67.3	
2007	72	1061	211000	14827	101	4	7.0	6.8	9.5	71.3	
2008	73	1094	241370	16067	102	0	6.7	6.7	9.3	71.6	
2009	74	1107	259200	16599	103.5	1	6.4	6.7	9.3	71.5	
2010	79	1136	292000	19205	108.3	2	6.6	7.0	9.5	72.9	
2011	80	1160	291000	18804	110.8	0	6.5	6.9	9.6	72.2	
2012	81	1131	263574	18133	109.5	1	6.9	7.2	9.7	74.0	

BE/FTC Data Appendix (Part 2 / 2)
Various Bureau of Economics / FTC Data 1915-2012

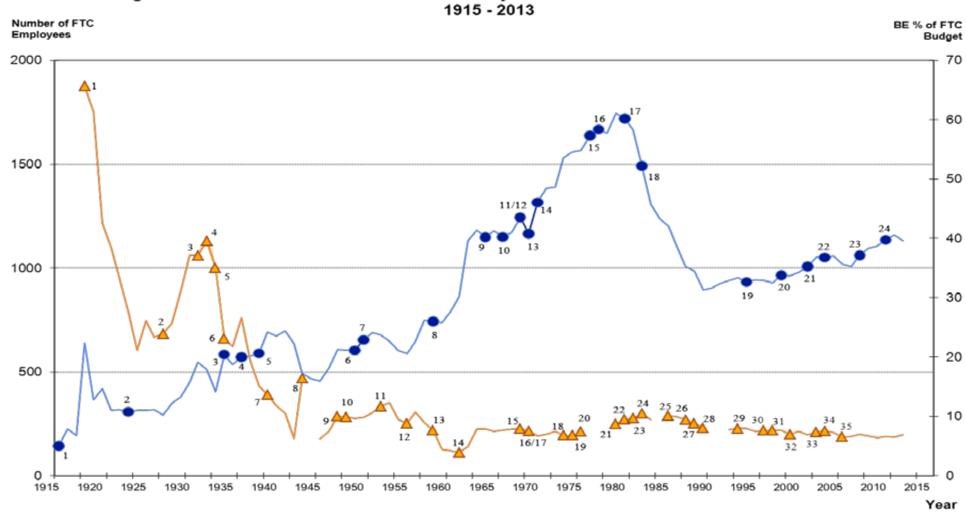
Year	BE Competition FTE	BE Cons Protect FTE	HSR Transactions	HSR billable filings (New System)	FTC HSR 2nd requests	BE Working Papers Cal Yr	BE Miscl Reports	Research papers released by BE Dir (not WPs)	FTC Advocacy filings web count Cal year	Advocacies with significant BE input	Economist Advocacy Workyears	International & OECD W
1977						7						
1978						6						
1979	68		861		63	8						
1980	79	15	784		31	30					3.8	0.0
1981	77	27	996		34	5	10				4.2	0.0
1982	67	27	1203		39	30	25		18		6.1	0.0
1983	70	30	1093		12	25	12		44		7.4	0.0
1984			1340		25	19	7		63		5.4	0.0
1985			1603		24	12	10		78		6.1	0.0
1986			1949		32	16	13		64		8.1	0.0
1987			2533		18	10	11		102	26	6	0.0
1988			2746		39	9	3		33	11	5.2	0.0
1989			2883		35	9	11		79	25	2.7	0.2
1990	67	22	2262		55	4	5		40	19	3	0.5
1991	72	26	1529		33	14	2		19	13	2.9	1.0
1992	66	29	1589		26	6	3		22	11	2.7	1.5
1993	67	28	1846		40	3	2		20	4	1.8	2.5
1994	66	24	2305		46	6	0		16	7	1.8	2.5
1995	64	26	2816		58	1	0		11	7	1.5	2.0
1996	66	23	3087		36	4	0		13	5	1.3	1.5
1997	64	24	3702		45	1	0		7	2	1	1.0
1998	61	24	4728	2126	46	6	0		28	19	1	0.4
1999	58	23	4679	2247	45	8	0		16	9	1	0.4
2000	70	22	4926	2527	43	6	0	10	12	7	1	0.7
2001	67	23	2376	2237	27	9	0	17	10	5	1	0.5
2002	76	26	1187	1142	27	8	0	14	27	13	1.5	0.7
2003	81	27	1014	968	15	14	0	17	24	11	2.1	0.9

Year	BE Competition FTE	BE Cons Protect FTE	HSR Transactions	HSR billable filings (New System)	FTC HSR 2nd requests	BE Working Papers Cal Yr	BE Miscl Reports	Research papers released by BE Dir (not WPs)	FTC Advocacy filings web count Cal year	Advocacies with significant BE input	Economist Advocacy Workyears	International & OECD W
2004	74	29	1428	1377	20	8	0	15	24	14	1.5	1.1
2005	67	29	1675	1610	25	6	0	14	29	7	1.3	2.0
2006	70	30	1768	1746	28	5	0	24	23	5	1.3	1.9
2007	70.5	30.5	2201	2108	31	5	0	21	22	7	1.3	2.2
2008	74	26.5	1726	1656	21	2	0	20	20	7	1.5	2.6
2009			716	684	15	5	0	22	13	6	1.2	2.8
2010	73.1	33.8	1166	1128	20	9	0	21	17	11	0.5	1.8
2011	75.2	33.2	1450	1414	24	2	0	18	15	8	0.7	1.5
2012	73.7	33.4	1429	1401	20	4	0	19	12	11	0.7	1.1

Count of "economists" in BE. Early data are body counts, post-1995 data are closer to (full-time equivalent) FTE values. Data are from various FTC Annual Reports (1923-31; 1951, p. 31), Auerbach (1964, pp. 398-99), Jesse Markham, Bureau of the Budget (for 7 years, 1960, p. 32), and Bob Brogan's search of Congressional Hearings (1951-1957). Data for 1971-1985 are from BE records (Hurdle or Zirkel). Few staff "economists" held Ph.D.s until the early 1960s. By 1989, 95 percent of "economists" held Ph.D.'s."economists" had Ph.D.s.
Data for 1986-1995 are from the BE attrition database counting economists as of Dec 31 (Mae Schwarz). The 1989-1990 increase appears too large, but it is true. BE brought in 15 new net economists between May and December 1990.
Data for 1996-2005, and 2007 are from semi-annual BE economist allocation data adding back economists located in the Office of the Director. A CPA, Marketing PhD, & Financial Analyst and BE accountants are not included.
Data for 2006 are Pautler's estimate since a BE allocation was not done. 2008 number from Ippolito 1-09. The 1921 and 1961 data are from Mueller (2009, pp. 37-38); 2008 through 2012 data are from telephone records in September.
Total FTC FTE from FTC Annual Reports (1915-1966; body counts), US Government Budget, Appendix (1967-1978: permanent employment), FTC Internet Website (1979-2010: FTE Utilized). Post 2010 data are from operating budget books.
FTC dollar expenditure comes from FTC Annual Reports various years (esp 1952, p. 87 except where that has typos); FTC Appropriation History retained by Bill Rosano of BE (1970-1988); various FTC Executive Director budget memoranda by Bob Walton (1989-1997); and other budget materials and FTC website "appropriation" history and FTC operating budgets when available.
BE dollar budget expenditures are from annual reports (1915 to 1945?), OMB Budget Justifications 1954-1976, and internal operating or OMB budget materials and Executive Director memos (1979-2000); and FTC annual operating budget books 2001-2008 ("actual" spending used where available). In some instances a breakdown by "organization" did not exist. At times, Agency accounting was done mainly by "missions" and organization figures were hard to find or were unavailable in the budget material.
Data were only used if the source clearly indicated that they applied to the organization and not to a "mission". Do not trust the 1918/1919 data - wartime data are odd.
BE FTE includes estimates using dollar budget ratios and FTC FTEs 1918-1938. BE FTE for 1951-1963 are from Brogan's Congressional records. BE FTE for 1960 are close to the Bureau of the Budget 1960, p. 119. BE FTE 1964-1973 are "OMB positions" taken from annual Justification books. BE FTE for 1974 to 2000 are from BE records of Bill Rosano or Fred Zirkel (12-29-88) or Agency Budget Review books, especially July 31, 1989 Review, App. B, providing data for 1983 to 1988. Data for 1996-2003 from BE Admin Officer Carol King 2-5-04 & 2004-12 from FTC FY Operating Budget books and other "official" budget materials via Pauline Ippolito. As newer data appeared older (or planned) data were replaced. BE, BC, BCP, and Regional Office FTE in various missions are also from FTC Operating Budget books of various years supplemented by an Executive Director data compilation for 1990-2000, 1-26-01 (Judy Bailey).
For FTC & BE dollar budget and economist & total FTE data, Bob Brogan's data for 1950 to 1963 taken from various 1950s-60s era Congressional Hearings were used. These data matched well with other sources (where overlaps exist), and they filled in a number of holes.
The count of BE REPORTS does not include the frequently recurring financial reports such as QFR and LB. Nor do they include hundreds of WWI and WWII product cost reports.
For some years (1968 to 1994) the count of Reports, Working Papers, and Miscellaneous Papers is taken from lists maintained by DEPA secretaries Breanda Person or Tangela Roundtree. For prior years (1916 to 1968) from a count of studies listed in the FTC Annual Report 1968. Own-time research papers released by the BE Director not including Working Papers are from Denis Breen's (12-10-07) list for FY00-07 & David Schmidt's count in Calendar 2008-12. The data do not match those listed in Bureau of the Budget (1960, p. 31), which significantly undercount the number of reports.
Since 1995 the list is calendar year counts of reports and issues papers from the BE part of the FTC Website (and will not include joint atty/econ reports).
The count of pre-1982 BE working papers is from the lists maintained by Brenda Person, then Tangela Roundtree, and since 1995 from the FTC website by calendar year. The count of advocacy filings for 1982-86 are from a document retained by Denis Breen and from Mike Wise's records for 1987 to 1994; Calendar year 1995 to 2012 data are from the FTC website counts. Earlier counts are almost surely fiscal years (Oct - Sept). Pautler or Schmidt decided which filings had significant (well beyond review) BE input.
The 2005 list had lots of odd AMC entries and could be 17 rather than 29. Own-time research papers released by the BE Director not including Working Papers are from Denis Breen's (12-10-07) list for FY00-07 & Dave Schmidt's count in Calendar 2008-12.
BE advocacy and International workyears are from various Bureau records and from 1995 to 2007 from BE semi-annual (April and October) resource allocation documents.
Dave Schmidt (BE's ARO Manager) was the source of both the international and advocacy FTE numbers since 2008.

Appendix F: Figures Displaying Changes in BE and the FTC Over the Years

Figure 1 - FTC and Bureau of Economics History: Number of FTC Staff and BE Relative Size
1915 - 2013



BE Timeline

FTC Timeline

1. 1918 Meat Packing Industry report
2. 1927-35 Utility Corporations report
3. 1931-34 Chain Stores report
4. 1932 Report on Basing-Point Pricing in the Cement Industry
5. 1933-34 Congressional threat to reduce economic budget to zero
6. 1934 Congressional resolutions for reports must come from both Houses of Congress
7. 1939 First attempts at systematic financial data collection, Quarterly Financial Reports
8. 1943 Congressional resolutions for reports must be funded prior to initiation
9. 1947-49 Reports on corporate merger activity
10. 1948 FTC Delivered Pricing Statement (collusion allegation required)
11. 1952 International Petroleum Cartel report; RIFs 1953/54
12. 1955-61 Antitrust economists work directly for the Bureaus of Investigation and Litigation
13. 1958 Antibiotics Manufacture report
14. 1961 Bureau of Economics rejuvenation begins
15. 1968 Conglomerate merger peak
16. 1969 Pre-merger notification program begins (precursor to Hart-Scott-Rodino reporting in 1978)
17. 1969 Systematic merger data collection begins
18. 1973 Line-of-Business data collection begins
19. 1974-78 Economists' role in the consumer protection mission begins
20. 1975 Evidence Standards for Major Rules: Magnuson/Moss Warranty-FTC Improvements Act
21. 1979 Life Insurance Cost Disclosure report
22. 1980 Report on Advertising and Commercial Practice in Optometry
23. 1981-82 End of systematic data collection by the Bureau of Economics
24. 1982-83 End of several major trade regulation rules
25. 1985 Start of microdata empirical techniques in antitrust analysis
26. 1987 Competition Advocacy Program peak
27. 1988-89 Merger peak era of (bust-up takeovers ends in 1989 with the United Airlines funding failure)
28. 1989 Report on Health Claims for High Fiber Cereals
29. 1993 Start of another merger wave (reconsolidation and "strategic" mergers)
30. 1996 Staples/Office Depot merger blocked
31. 1997 Last full-time research economist reassigned to other duties, November 1997
32. 1999 Corporate mergers plateau at an unprecedented level, before falling significantly in 2001-2002
33. 2002 Accountants move back to BE after 48 years in the legal bureau
34. 2002-2008 Hospital merger retrospective studies alter the enforcement landscape
35. 2004, 2007 Mortgage disclosure reports begin the process of federal disclosure modification

1. 1915 FTC opens its doors
2. 1923 The Radio Industry report
3. 1934 FTC transfers 115 staffers to begin the SEC
4. 1936 Robinson Patman Anti-discrimination Act
5. 1938 Wheeler Lea Amendments ("deception" is added to the FTC's arsenal)
6. 1949 Hoover Commission Report
7. 1950 Celler-Kefauver Act closing loophole in sec 7 of the 1914 Clayton Act
8. 1958 Textiles Labeling
9. 1964 FTC requires cigarette disclosure (Congress intervenes)
10. 1966 Fair Packaging & Labeling
11. 1968 Truth in Lending Act (credit disclosure law)
12. 1968 Auto warranty reports done by attorney staff (led to Magnuson-Moss Warranty Act)
13. 1969 FTC rejuvenation begins (following American Bar Assn./Nader critiques) and the agency is reorganized around its two main missions
14. 1970 Fair Credit Reporting Act
15. 1976 Hart-Scott-Rodino Act (strengthened pre-merger reporting)
16. 1977 Continental TV vs GTE-Sylvania vertical restraints ruling
17. 1980 Congressional ire with FTC's expansive agenda and Ronald Reagan presidency
18. 1982 Horizontal merger guidelines (first revision)
19. 1994 Telemarketing and Consumer Fraud and Abuse Prevention Act
20. 1998 Beginnings of the Internet as a commercial medium
21. 2001 The technology stock bubble bursts
22. 2003 National Do Not Call list initiated
23. 2007 The housing bubble bursts and credit crisis ensues August 2007 and Sept 2008
24. 2010 The Consumer Financial Protection Bureau is formed at the Fed in July 2010

Figure 2 - FTC and Bureau of Economics Number of Employees 1915-2013

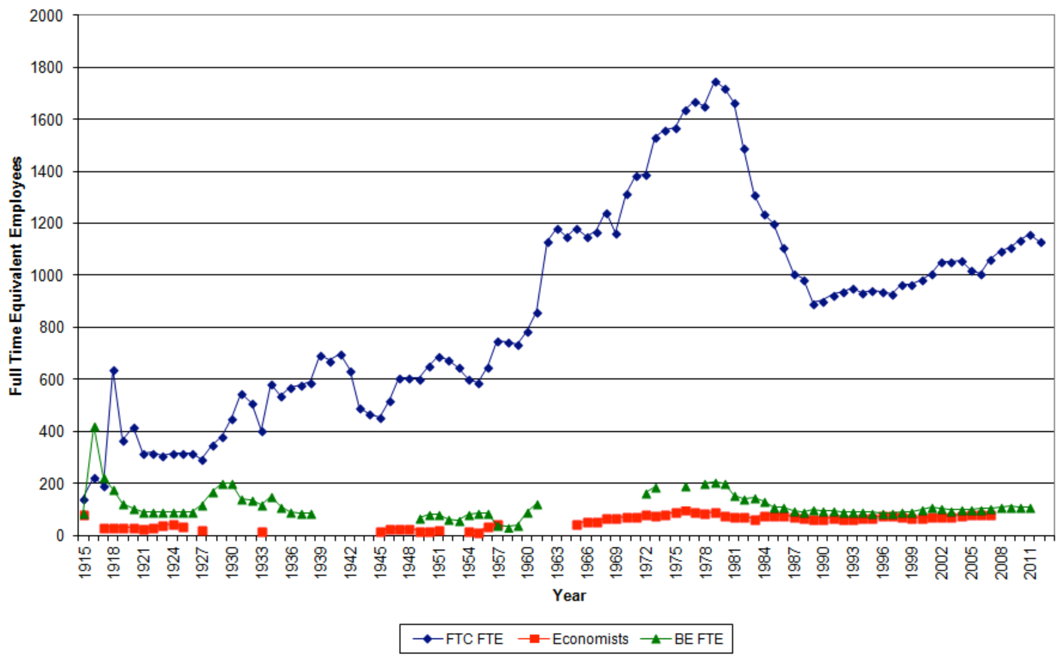


Figure 3- Real Gross Domestic Product per FTC Employee 1929-2013

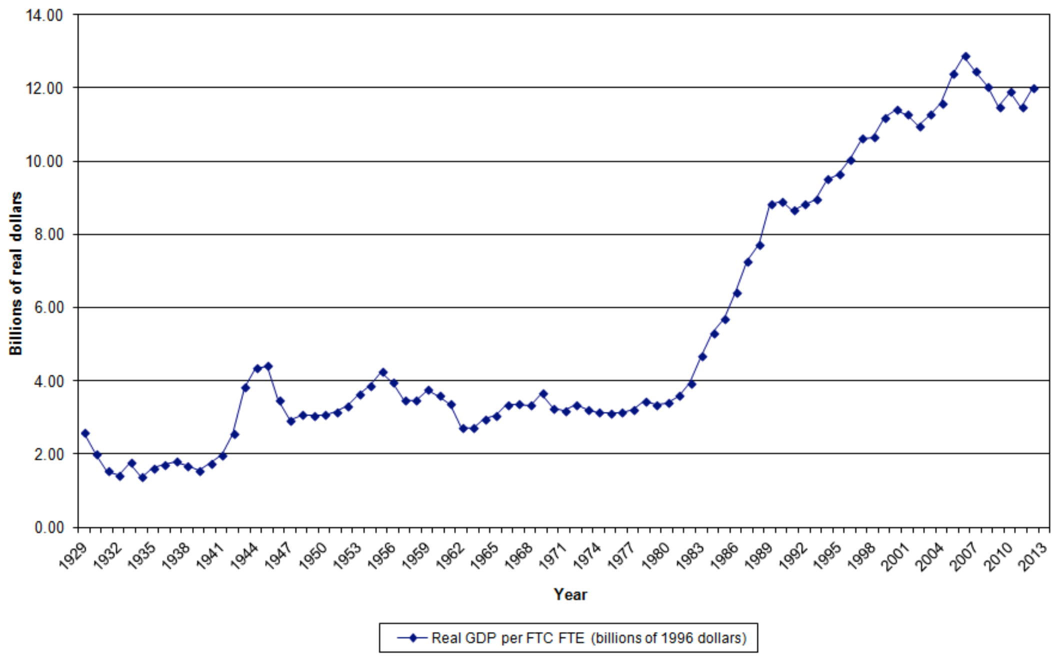


Figure 4 - Bureau of Economics as a Percentage of the FTC 1918-2013
(based on dollar budgets)

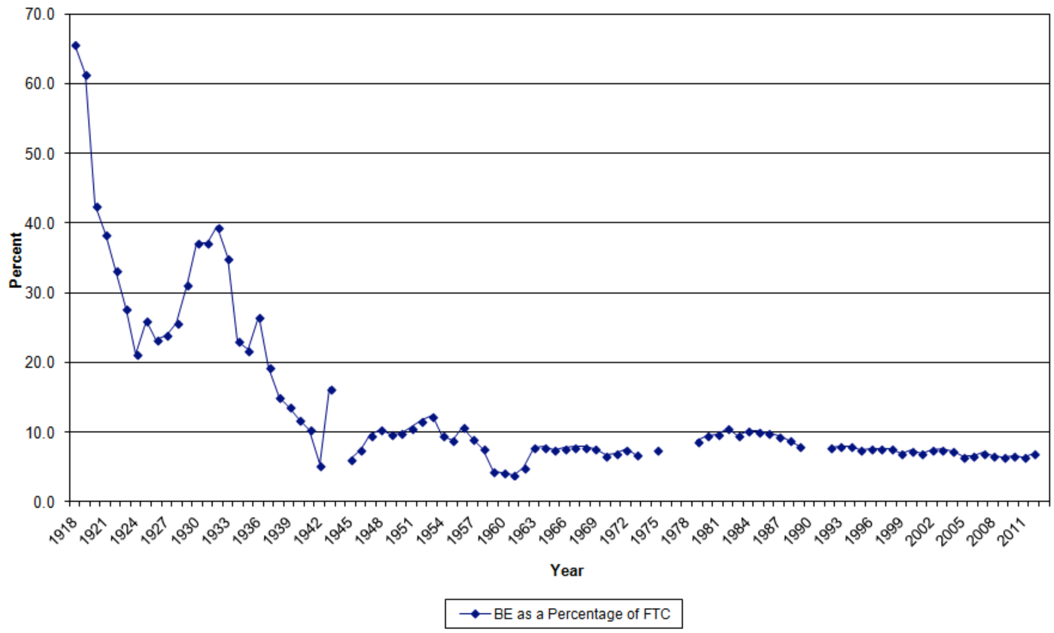


Figure 5 - "Economists" as a Percent of FTC Staff 1971-2013

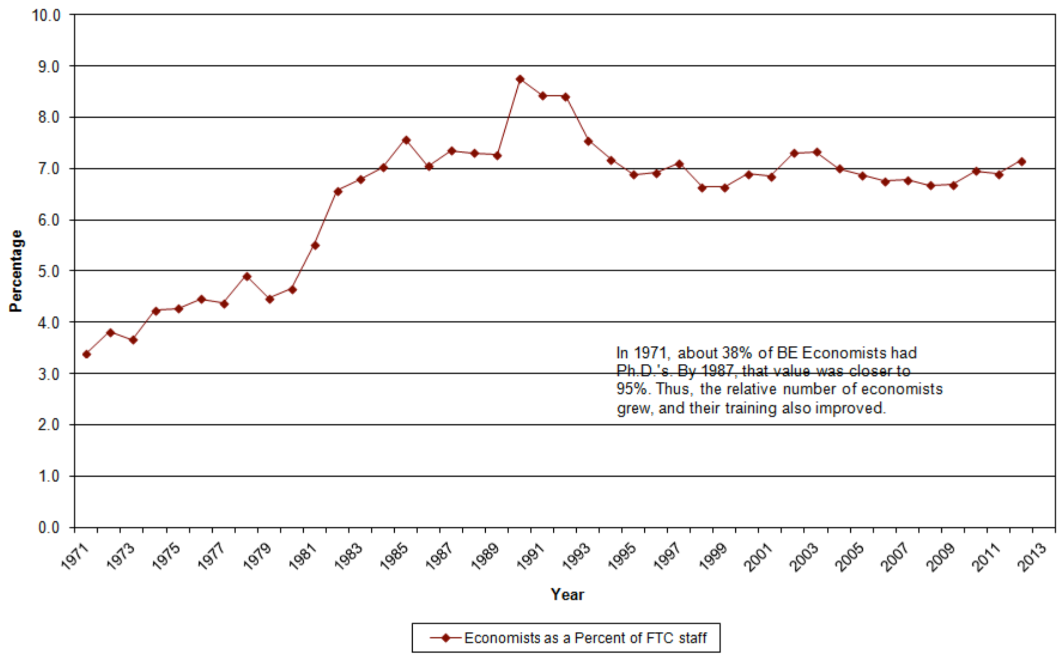


Figure 6 - Economists as a Percentage of Bureau of Economics Total Staff 1923-2013

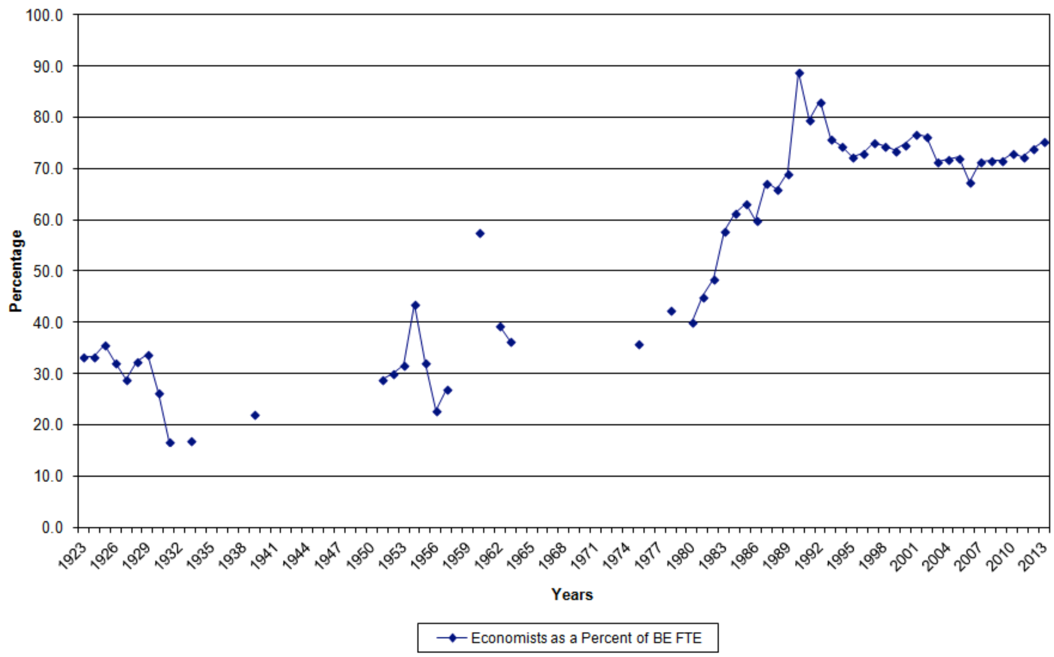


Figure 7 - Percentage Allocation of Economist Time for Five Major Functions 1980-2008

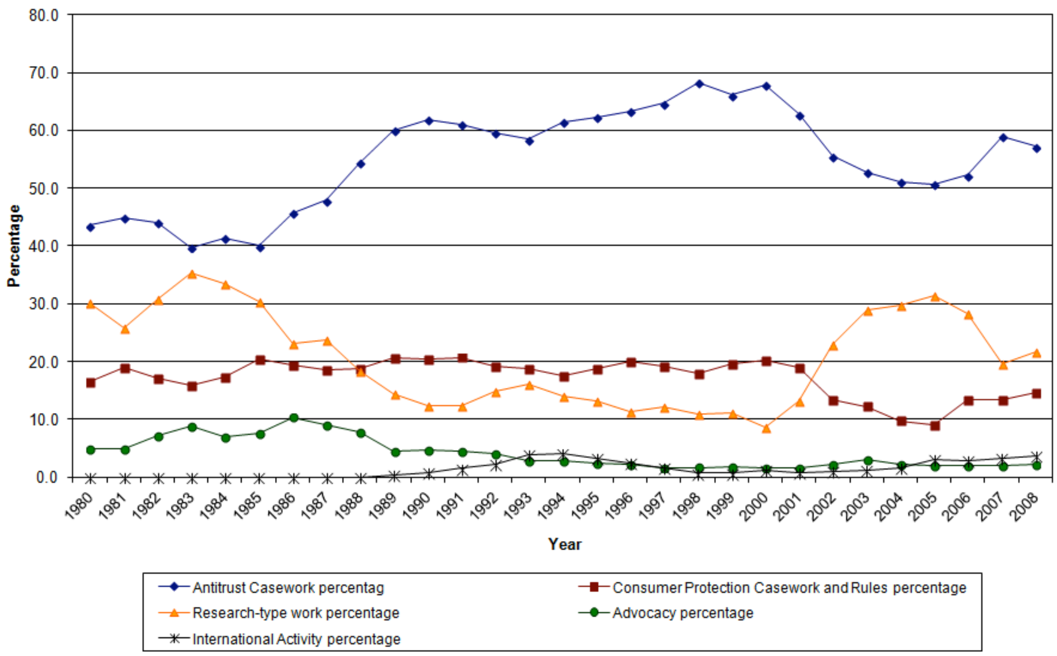


Figure 8 - Merger Activity for Fiscal Years 1979 to 2013
(Hart-Scott-Rodino transactions and second requests for information)

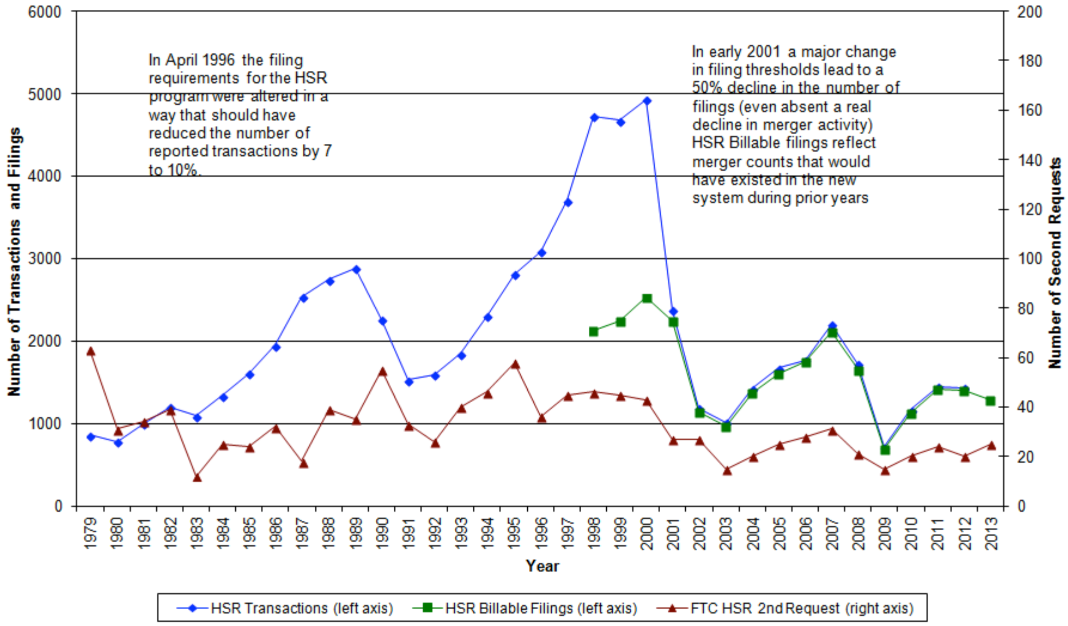


Figure 9 - Bureau of Economics Reports 1915 to 2013
(5 year sums)

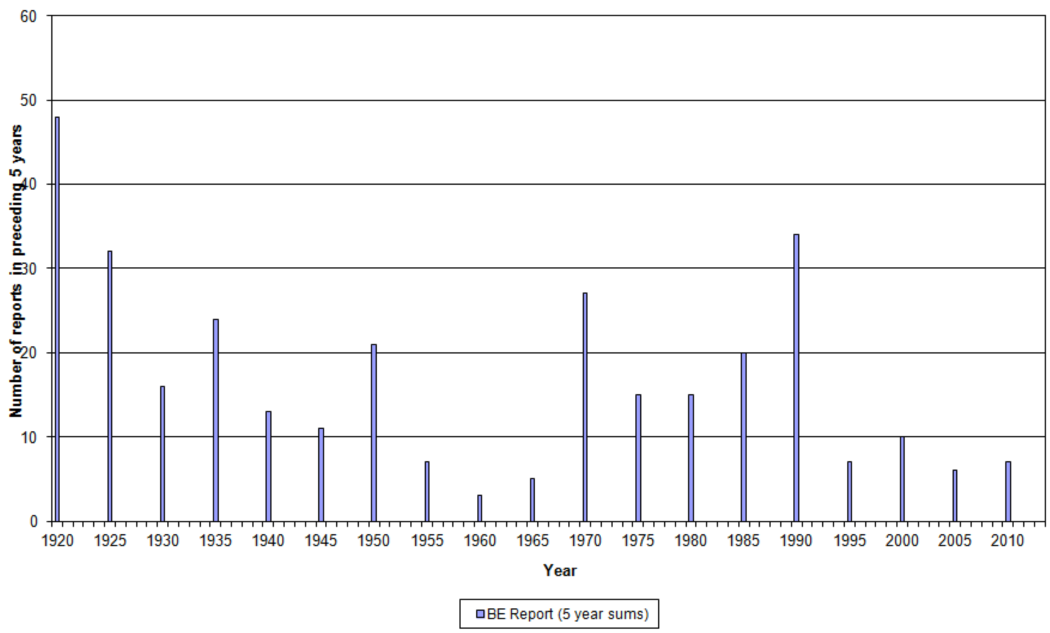


Figure 10 - Reports, Working Papers, and Advocacy Filings 1975-2013: The Visible Tip of the Bureau of Economics Iceberg

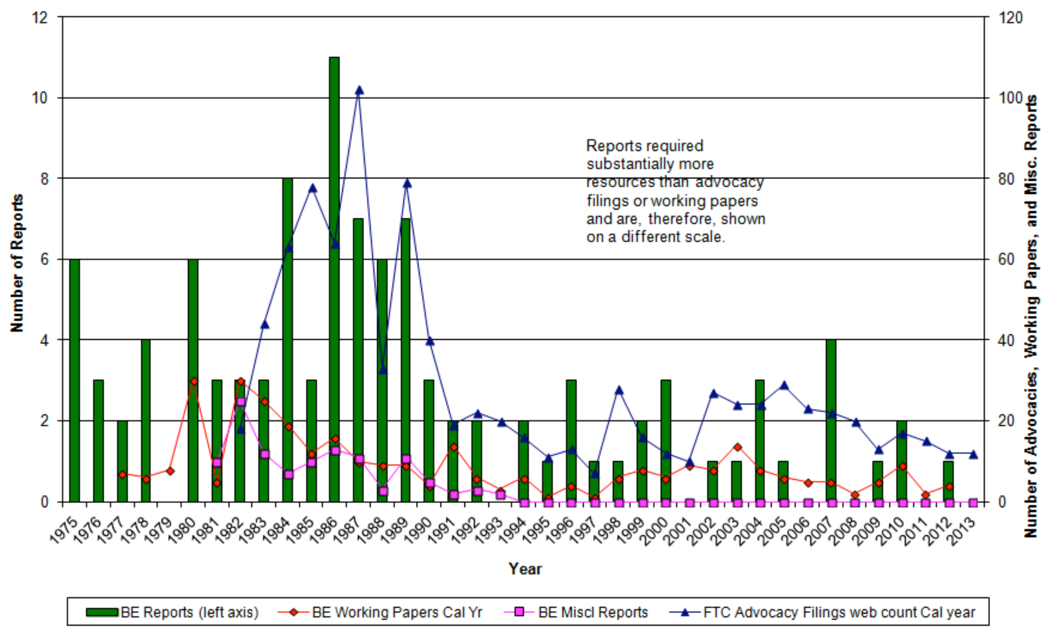
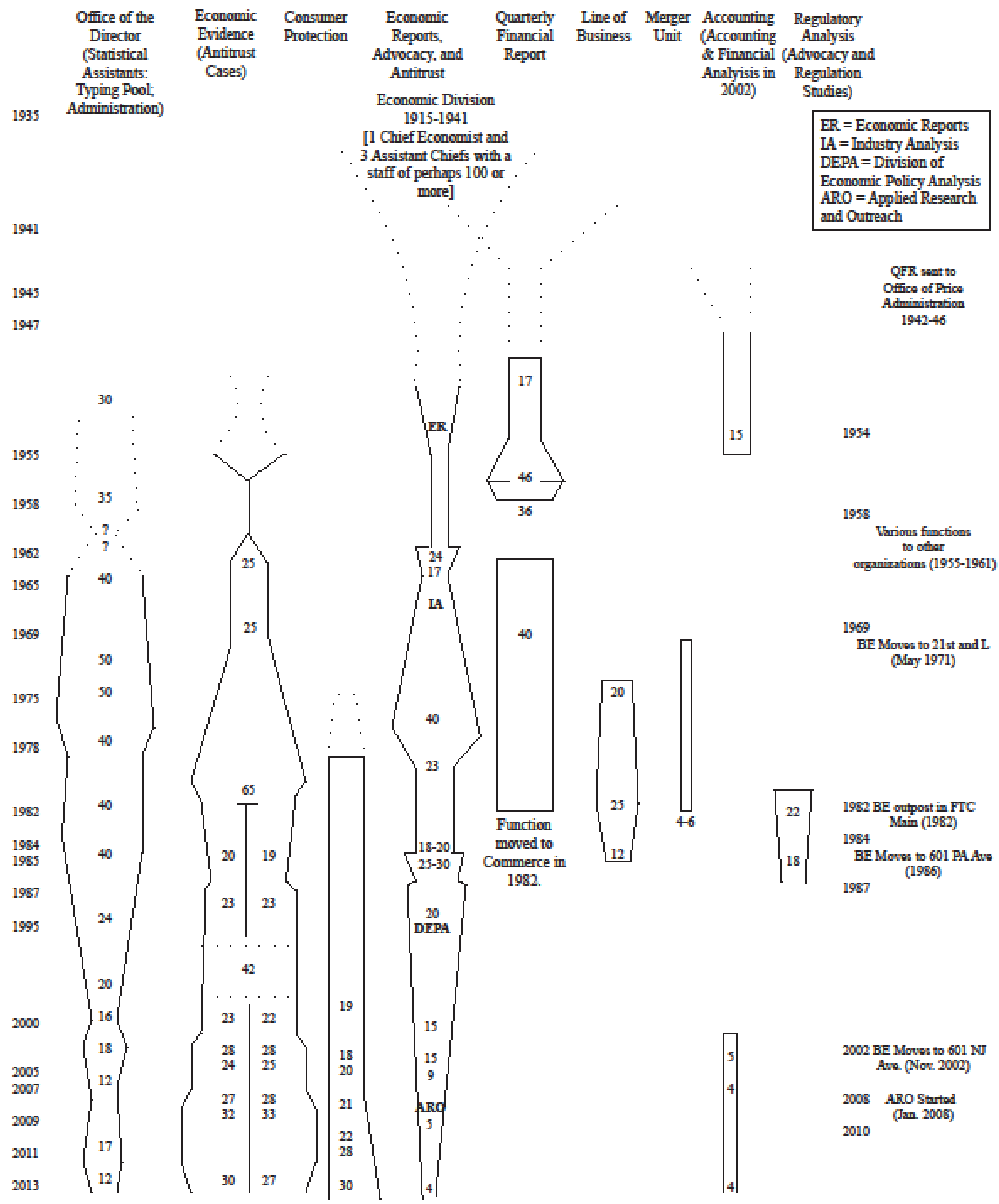


Figure 11 - Bureau of Economics History: Organization, Structure, and Number of Employees 1915 - 2013



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