

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

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Hearing #1 on Competition and  
Consumer Protection  
in the 21<sup>st</sup> Century

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Docket ID FTC-2018-0074

**COMMENT OF  
FEDERAL TRADE COMMISSIONER  
ROHIT CHOPRA**

**September 6, 2018**

**Introduction\***

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

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

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

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\* This comment reflects my views alone and not those of the Commission. I want to thank Lina M. Khan, Legal Fellow in my office, for providing invaluable assistance in drafting and preparing this comment. I am also grateful to C. Scott Hemphill, William Kovacic, Fiona Scott Morton, Nancy Rose, Jonathan Sallet, Carl Shapiro, Joshua Wright, and members of the FTC staff for helpful input and conversations.

We should approach this inquiry with three goals in mind:

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

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

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

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

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

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<sup>1</sup> Hon. Richard D. Cudahy & Alan Devlin, *Anticompetitive Effect*, 95 MINN. L. REV. 59, 87 (2010). See also Maurice E. Stucke, *Does the Rule of Reason Violate the Rule of Law?*, 42 U.C. DAVIS L. REV. 1375 (2009).

<sup>2</sup> C. Scott Hemphill, *An Aggregate Approach to Antitrust: Using New Data and Rulemaking to Preserve Drug Competition*, 109 COLUM. L. REV. 629, 674 (2009).

<sup>3</sup> *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877, 917 (2007) (Breyer, J., dissenting) (“One cannot fairly expect judges and juries in such cases to apply complex economic criteria without making a considerable number of mistakes, which themselves may impose serious costs.”).

<sup>4</sup> See, e.g., *Leegin*, 551 U.S. at 916 (2007) (Breyer, J., dissenting) (“How easily can courts identify instances in which the benefits are likely to outweigh potential harms? My own answer is, *not very easily*.”); *FTC v. Actavis*, 570 U.S. 136, 173 (2013) (Roberts, C.J., dissenting) (“[T]he majority declares that such questions should henceforth be scrutinized by antitrust law’s unruly rule of reason. Good luck to the district courts that must, when faced with a patent settlement, weigh the ‘likely anticompetitive effects, redeeming virtues, market power, and potentially offsetting legal considerations present in the circumstances.’”).

<sup>5</sup> Thomas A. Piraino, Jr., *A New Approach to the Antitrust Analysis of Mergers*, 83 B.U. L. REV. 785, 807 (2003) (arguing rule of reason has “become so confusing that it precluded antitrust practitioners from advising their clients as to the legality of particular conduct”).

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

Decades ago, former Commissioner Philip Elman observed that case-by-case adjudication may “simply be too slow and cumbersome to produce specific and clear standards adequate to the needs of businessmen, the private bar, and the government agencies.”<sup>7</sup> Relying solely on case-by-case adjudication means that businesses and the public must attempt to extract legal rules from a patchwork of individual court opinions. Since antitrust plaintiffs bring cases in dozens of different courts with hundreds of different generalist judges and juries, simply understanding what the law is can involve piecing together disparate rulings founded on unique sets of facts. All too often, the resulting picture is unclear. This ambiguity is compounded when the Supreme Court assigns to lower courts the task of fleshing out how to structure and apply a standard, potentially delaying clarity and certainty for years or even decades.<sup>8</sup>

The current approach to antitrust also makes enforcement highly costly and protracted. In 2012, the American Bar Association published the report of a task force that sought to “study ways to control the costs of antitrust litigation and enforcement.” The task force, the authors explained, was “a response to concerns” about both “the costs imposed on businesses by the American system of antitrust enforcement” and “the length of time required to resolve antitrust issues both in litigation and in enforcement proceedings.”<sup>9</sup>

Former Commissioner Joshua Wright has noted that generalist judges may be ill equipped to independently analyze and assess evidence presented by economic experts.<sup>10</sup> Because determining the legality of most conduct now involves an elaborate balancing exercise, courts have effectively “delegate[d] both fact-finding and rulemaking to courtroom economists,” making courtroom economics “not just inevitable but often dispositive.”<sup>11</sup> In fact, paid expert testimony now is often “the ‘whole game’ in an antitrust dispute.”<sup>12</sup>

Paid experts are a major expense. Some experts charge over \$1,300 an hour, earning more than senior partners at major law firms.<sup>13</sup> Over the last decade, expenditures on expert costs by public enforcers have ballooned. In a system that incentivizes firms to spend top dollar on economists

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<sup>6</sup> *FCC v. Fox Television Stations*, 567 U.S. 239, 253 (2012). A lack of fair notice raises constitutional Due Process concerns. As the Supreme Court has explained, fair notice concerns arise where a law or regulation “fails to provide a person of ordinary intelligence fair notice of what is prohibited, or is so standardless that it authorizes or encourages seriously discriminatory enforcement.” *Id.* (citations omitted).

<sup>7</sup> Philip Elman, *The Need for Certainty and Predictability in the Application of the Merger Law*, 40 N.Y.U. L. REV. 613, 621 (1965).

<sup>8</sup> *See, e.g., Actavis*, 570 U.S. at 160 (2013) (“We therefore leave to the lower courts the structuring of the present rule-of-reason antitrust litigation.”).

<sup>9</sup> American Bar Association, Section on Antitrust Law, *Controlling Costs of Antitrust Enforcement and Litigation* (Dec. 2012), [https://www.americanbar.org/content/dam/aba/administrative/antitrust\\_law/2013\\_agenda\\_cost\\_efficiency\\_kolasky\\_authcheckdam.pdf](https://www.americanbar.org/content/dam/aba/administrative/antitrust_law/2013_agenda_cost_efficiency_kolasky_authcheckdam.pdf).

<sup>10</sup> Michael R. Baye & Joshua D. Wright, *Is Antitrust Too Complicated for Generalist Judges? The Impact of Economic Complexity and Judicial Training on Appeals*, 54 J. OF L. & ECON. 1 (2011).

<sup>11</sup> Rebecca Haw, *Adversarial Economics in Antitrust Litigation*, 106 NORTHW. U. L. REV. 1261, 1263 (2012).

<sup>12</sup> *Id.* at 1261.

<sup>13</sup> Jesse Eisinger & Justin Elliott, *These Professors Make More Than a Thousand Bucks an Hour Peddling Mega-Mergers*, PROPUBLICA (Nov. 16, 2016), <https://www.propublica.org/article/these-professors-make-more-than-thousand-bucks-hour-peddling-mega-mergers>.

who can use ever-increasing complexity to spin a favorable tale, the eye-popping costs for economic experts can put the government and new market entrants at a significant disadvantage.

Another component of the burden is that antitrust trials are extremely slow and prolonged.<sup>14</sup> The Supreme Court has criticized “interminable litigation” and the “inevitably costly and protracted discovery phase,” as “hopelessly beyond effective judicial supervision.”<sup>15</sup> That it can easily take a decade to bring an antitrust case to full judgment means that by the time a plaintiff gets a remedy, market circumstances are likely to have outpaced it.<sup>16</sup> The same 2012 American Bar Association report suggested that lengthy, costly litigation may be contributing to reduced government enforcement efforts over time, relative to the expansion of the US economy.

Lastly, in many respects, the status quo lacks adequate democratic participation. The almost singular reliance on case-by-case adjudication leaves broad swaths of market participants watching from the sidelines, lacking an opportunity to contribute their perspective, their analysis, or their expertise, except through one-off amicus briefs.<sup>17</sup> Rules established by courts may fail to reflect the perspective of nascent firms, since they do not compose a very large portion of the parties represented in litigated matters.

There is a great deal of heterogeneity in the preferences and experiences of firms and consumers in our economy. Enforcement and regulation of business conduct can more successfully promote competition when it incorporates more voices and evidence from across the marketplace.

The ambiguity of the laws, the burdens of enforcing them, and the exclusivity of the process can advantage incumbents and suppress market entry and innovation. For example, when courts disagree with one another on the legality of particular conduct, new entrants are likely to eschew the practice, since the threat of litigation can lead to potential liability that is difficult to value. Incumbents, by contrast, will be more likely to conduct a cost-benefit analysis of engaging in a potentially unlawful practice, since they are likely to have higher tolerance for protracted litigation and deeper pockets to fund it. Lawyers, economists, and lobbyists can also extract rents from the lack of clarity.

Our hearings should seek to surface ways for the FTC to advance predictability, efficiency, and participation. Below I lay out one way that the Commission can bring these values to bear.

## **II. The Case for Rulemaking Under “Unfair Methods of Competition”**

Legislative history is clear that Congress sought to advance competition law outside the courts as well as through them. Two decades into enforcement of the federal antitrust laws, Congress was

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<sup>14</sup> See, e.g., Kevin Caves & Hal Singer, *When the Econometrician Shrugged: Identifying and Plugging Gaps in the Consumer Welfare Standard*, GEO. MASON L. REV. (forthcoming 2018), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3205518](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3205518) (documenting how long it takes to litigate a Section 2 case to judgment, compared to administrative complaints reviewed by the FCC).

<sup>15</sup> Stucke, *supra* note 1, at 1378 (quoting, in part, *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007)).

<sup>16</sup> See, e.g., Jonathan M. Jacobson, *Tackling the Time and Cost of Antitrust Litigation*, 32 ANTITRUST No. 1 (2017) (describing a case where the final remedy was issued twenty years after the underlying conduct had taken place, impeding the efficacy of the remedy).

<sup>17</sup> For a detailed explanation of how the current antitrust system lacks adequate democratic participation or oversight, see Harry First & Spencer Weber Waller, *Antitrust’s Democracy Deficit*, 81 FORDHAM L. REV. 2543 (2013).

frustrated with the slow pace and fact specificity of antitrust litigation.<sup>18</sup> In particular, lawmakers worried that the case-by-case approach to enforcement was yielding a body of law that was inconsistent, unpredictable, and unmoored from congressional intent. The solution, lawmakers decided, was the creation of new expert administrative agency: the Federal Trade Commission.

Congress established the Federal Trade Commission to supplement the authority of the Attorney General. While both institutions were tasked with enforcing the antitrust laws, lawmakers designed the FTC with two distinct features: one, delegated authority to interpret and prohibit “unfair methods of competition,” as established by Section 5 of the FTC Act<sup>19</sup> and two, extensive authority to collect confidential business information and conduct industry studies, as established by Section 6(b) of the FTC Act.<sup>20</sup> This *supplementary* role is critical.

By designing the Commission this way, Congress sought to create a structure that was both rigorous and vigorous, where the law would develop not just through judicial courts but also through an expert agency. Congress envisioned that the Commission’s data collection from market participants would ensure that the agency stayed abreast of evolving business practices and market trends, and that it would use this expertise to establish market-wide standards clarifying what practices constituted an “unfair method of competition.” This unique role would complement adjudication pursued by the Attorney General, state attorneys general, and private parties.<sup>21</sup> Indeed, Congress expected that federal judges and other policymakers would defer to the Commission on competition matters because it would “serve as an indispensable instrument of information and publicity, as a clearinghouse for the facts by which both the public mind and the managers of great business undertakings should be guided.”<sup>22</sup> It would, in other words, be “unusually expert.”<sup>23</sup>

The Commission, at times, has drawn on its expansive information collection authorities to follow market trends and establish expertise on industry practices. For example, in the 1970s the FTC ordered 450 of the country’s largest domestic manufacturing firms to report certain

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<sup>18</sup> Daniel A. Crane, *Debunking Humphrey’s Executor*, 83 GEO. WASH. L. REV. 1835, 1859 (2015).

<sup>19</sup> Judicial decisions that have reviewed the legislative history confirm that the Commission enjoys flexibility in determining which specific acts or practices constitute “unfair methods of competition.” Francis Newlands, the statute’s chief Senate sponsor, said Section 5 would “have such an elastic character that it [would] meet every new condition and every new practice that may be invented with a view to gradually bringing about monopoly through unfair competition.” 51 Cong. Rec. 12,024 (1914). *See also*, e.g., *Atlantic Refining Co. v. FTC*, 381 U.S. 357, 367 (1965) (“The Congress intentionally left development of the term ‘unfair’ to the Commission rather than attempting to define ‘the many and variable unfair practices which prevail in commerce . . .’ In thus divining that there is no limit to business ingenuity and legal gymnastics the Congress displayed much foresight.”); *FTC v. Standard Educ. Society*, 86 F.2d 692, 696 (2d Cir. 1936) (“The Commission has wide latitude in such matters; its powers are not confined to such practices as would be unlawful before it acted; they are more than procedural; its duty in part at any rate, is to discover and make explicit those unexpressed standards of fair dealing which the conscience of the community may progressively develop.”).

<sup>20</sup> Section 6(b) of the Federal Trade Commission Act authorizes the Commission to require corporations to file informational reports regarding the company’s “organization, business, conduct, practices, management, and relation to other corporations.”

<sup>21</sup> Ahead of the passage of the FTC Act, President Wilson explained that the Commission could “provide clear rules and direction for business that courts had been incapable of providing.” Crane, *supra* note 18, at 1859 (quoting President Woodrow Wilson, *Address to a Joint Session of Congress on Trusts and Monopolies*, AM. PRESIDENCY PROJECT (Jan. 20, 1914), <http://www.presidency.ucsb.edu/ws/?pid=65374> (“And the business men of the country desire something more than that the menace of legal process in these matters be made explicit and intelligible. They desire the advice, the definite guidance and information which can be supplied by an administrative body, an interstate trade commission.”)).

<sup>22</sup> Crane, *supra* note 18, at 1859.

<sup>23</sup> William E. Kovacic, *The Quality of Appointments and the Capability of the Federal Trade Commission*, 49 ADMIN. L. REV. 4 (1997).

financial information. The Commission used this data to identify uncompetitive areas of the economy and to guide industry-wide investigations into potential antitrust violations.<sup>24</sup> More recently, the FTC has used this 6(b) authority to study the business practices of patent assertion entities and data brokers, as well as the efficacy of the FTC’s merger remedies.

As a whole, however, the Commission has fulfilled its mandate to promote competition by functioning less as an expert agency and more as a generalist adjudicator.<sup>25</sup> This is not to say the agency lacks expertise – indeed, our work with particular markets has provided indispensable insights into the marketplace. But, on competition matters, the agency has rarely used this expertise to affirmatively identify what conduct or practices constitute an “unfair method of competition.” Instead, the Commission has sought to define “unfair methods of competition” on a case-by-case basis.

Former Commissioner Wright has observed that relying exclusively upon adjudication has “thus far proved incapable of generating any meaningful guidance as to what constitutes an unfair method of competition,” resulting in a “boundless standard.”<sup>26</sup> He has described this “failure to identify what precisely comprises an unfair method of competition” as “an unfortunate and persistent black mark on the Commission’s record.”<sup>27</sup>

I agree that relying solely on adjudication to define the substance of Section 5 has generated persistent ambiguity. However, relying on courtroom battles to create precedents that set expectations for the marketplace is not the only vehicle by which the Commission can establish what conduct constitutes an “unfair method of competition.” The Commission has in its arsenal a far more effective tool that would provide greater notice to the marketplace and that is developed through a more transparent, participatory process: using rulemaking to define “unfair methods of competition” through processes established by the Administrative Procedure Act (APA).<sup>28</sup>

There is an enormous body of literature on the choice between adjudication and rulemaking, and this comment does not seek to fully address all of these nuances. Instead, my goal is to reflect on the current state of enforcement and consider ways to address the ambiguity, burdens, and democratic deficiency that I discuss above.

“Rulemaking” often evokes the idea of government imposing some inflexible prescription upon the marketplace. This is not what I am suggesting. As former Commissioner Elman rightly noted, rulemaking can also be related to “standards, guidelines, pointers, criteria, or presumptions.”<sup>29</sup> Rules come from courts, legislative bodies, and agencies. While they were not promulgated as agency rules, certain elements of the merger guidelines eventually came to serve

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<sup>24</sup> Fed. Trade Comm’n, *Line of Business Survey* (1975).

<sup>25</sup> Crane, *supra* note 18, at 1839 (“The FTC functions primarily by enforcing the antitrust and consumer protection laws as a plaintiff, no more expert than the executive branch agencies doing the same thing.”).

<sup>26</sup> Jan M. Rybnicek & Joshua D. Wright, *Defining Section 5 of the FTC Act: The Failure of the Common Law Method and the Case for Formal Agency Guidelines*, 21 GEO. MASON L. REV. 5, 1304 (2012).

<sup>27</sup> *Id.* at 1288.

<sup>28</sup> We are not the first to suggest that the Commission engage in competition rulemaking. *See, e.g.*, C. Scott Hemphill, *An Aggregate Approach to Antitrust*, *supra* note 2; Justin Hurwitz, *Chevron and the Limits of Administrative Antitrust*, 76 U. PITT. L. REV. 209, 262 (2014); Sandeep Vaheesan, *Resurrecting ‘A Comprehensive Charter of Economic Liberty’: The Latent Power of the Federal Trade Commission*, 19 U. PENN. J. BUS. L. 645 (2017).

<sup>29</sup> Philip Elman, *Rulemaking Procedures in the FTC’s Enforcement of the Merger Law*, 78 HARV. L. REV. 385, 385 (1964).

as rules once courts had adopted them. The merger guidelines provide enormous value to market participants, by transparently advancing certainty about merger law. Agency rulemaking could do the same.

I see three major benefits to the FTC engaging in rulemaking under “unfair methods of competition,” even if the conduct could be condemned under predecessor antitrust laws. As I describe above, the current approach generates ambiguity, is unduly burdensome, and suffers from a democratic participation deficit. Rulemaking can create value for the marketplace and benefit the public on all of these fronts.

First, rulemaking would enable the Commission to issue clear rules to give market participants sufficient notice about what the law is and is not, helping ensure that enforcement is predictable.<sup>30</sup> The APA requires agencies engaging in rulemaking to provide the public with adequate notice of a proposed rule. The notice must include the substance of the rule, the legal authority under which the agency has proposed the rule, and the date the rule will come into effect.<sup>31</sup> An agency must publish the final rule in the *Federal Register*, at least 30 days before the rule becomes effective.

These procedural requirements promote clear rules and clear notice. As the Supreme Court has stated, a “fundamental principle” in our legal system is that “laws which regulate persons or entities must give fair notice of conduct that is forbidden or required.”<sup>32</sup> Clear rules also help deliver consistent enforcement and predictable results. Reducing ambiguity about what the law is will enable market participants to channel their resources and behavior more productively, and will allow market entrants and entrepreneurs to compete on more of a level playing field.

Second, establishing rules could help relieve antitrust enforcement of steep costs and prolonged trials. Establishing through rulemaking that certain conduct constitutes an “unfair method of competition” would obviate the need to establish the same through adjudication. Targeting conduct through rulemaking, rather than adjudication, might lessen the burden of expert fees or protracted litigation, potentially saving significant resources on a present-value basis.<sup>33</sup> Moreover, establishing a rule through APA rulemaking can be faster than litigating multiple cases on a similar subject matter. For taxpayers and market participants, the present value of net benefits through the promulgation of a clear rule that reduces the need for litigation is higher than pursuing multiple, protracted matters through litigation. At the same time, rulemaking is not

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<sup>30</sup> Notably, rulemaking would address criticisms that the FTC uses Section 5 to extract favorable settlements using “strong-arm” tactics without even defining what Section 5 is. *See, e.g.,* Hurwitz, *supra* note 28, at 262 (“The FTC has shown an alarming willingness in recent years to threaten litigation under Section 5 without feeling the need to define its understanding of Section 5’s contours. It has leveraged the uncertain bounds of Section 5 to demand extrajudicial settlements from numerous firms, especially in high-tech industries.”).

<sup>31</sup> 5 U.S.C. § 553(b)-(c). The requirement under § 553 to provide the public with adequate notice of a proposed rule is generally achieved through the publication of a notice of proposed rulemaking in the *Federal Register*. The APA requires that the notice of proposed rulemaking include “(1) the time, place, and nature of public rulemaking proceedings; (2) reference to the legal authority under which the rule is proposed; and (3) either the terms or substance of the proposed rule or a description of the subjects and issues involved.” 5 U.S.C. § 553(b)1-3.

<sup>32</sup> *FCC v. Fox Television Stations*, 567 U.S. 239, 253 (2012). *See also* *FTC v. Colgate Palmolive Co.*, U.S. 371, 392 (1965) (noting that FTC orders “should be clear and precise in order that they may be understood by those against whom they are directed.”).

<sup>33</sup> To be sure, the agency may face litigation challenges to the rule itself, though these risks can be mitigated through the development of a clear record of empirical evidence.

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

And third, rulemaking would enable the Commission to establish rules through a transparent and participatory process, ensuring that everyone who may be affected by a new rule has the opportunity to weigh in on it. APA procedures require that an agency provide the public with meaningful opportunity to comment on the rule’s content through the submission of written “data, views, or arguments.”<sup>35</sup> The agency must then consider and address all submitted comments before issuing the final rule. If an agency adopts a rule without observing these procedures, a court may strike down the rule.<sup>36</sup>

This process is far more participatory than adjudication. Unlike judges, who are confined to the trial record when developing precedent-setting rules and standards, the Commission can put forth rules after considering a comprehensive set of information and analysis.<sup>37</sup> Notably, this would also allow the FTC to draw on its own informational advantage – namely, its ability to collect and aggregate information and to study market trends and industry practices over the long term and outside the context of litigation.<sup>38</sup> Drawing on this expertise to develop standards will help antitrust enforcement and policymaking better reflect empirical realities and better keep pace with evolving business practices.

Given that the FTC has largely neglected this tool, some may question the Commission’s authority to issue competition rules and the legal status these rules would have. Indeed, a common misconception is that this authority is extremely limited, since FTC rulemaking is subject to the extensive hurdles posed by the Magnuson-Moss Warranty Federal Trade Commission Improvements Act.<sup>39</sup> In reality, Magnuson-Moss governs only rulemakings interpreting “unfair or deceptive acts or practices.” For rules interpreting “unfair methods of competition,” the FTC has authority to engage in participatory rulemaking pursuant to the APA. Several antitrust scholars have affirmed this authority, and the Appendix lays out further background on and discussion of it.<sup>40</sup>

Others acknowledge the authority exists, but assert that antitrust law is ill suited for rulemaking because antitrust is a “common law” enterprise. It is true that, as a descriptive matter, antitrust enforcement has proceeded exclusively through adjudication. But the idea that this approach is

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<sup>34</sup> American Bar Association, *supra* note 8.

<sup>35</sup> 5 U.S.C. § 553(c).

<sup>36</sup> Those affected by the rule may challenge it on grounds of its being: (a) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (b) contrary to constitutional right or power; (c) in excess of statutory jurisdiction or authority; or (d) without observance of required procedures. 5 U.S.C. § 706(2).

<sup>37</sup> In adjudication, outside observers may be limited to participation through the filing of amicus briefs.

<sup>38</sup> C. Scott Hemphill, *supra* note 2, at 633.

<sup>39</sup> Magnuson-Moss Warranty—Federal Trade Commission Improvements Act, Pub. L. No. 93-637, 88 Stat. 2183 (1975) (codified at 15 U.S.C. §§ 2301–2312 (2012)).

<sup>40</sup> *See, e.g.*, Crane, *supra* note 18; Hurwitz, *supra* note 28; Vaheesan, *supra* note 28.

normatively desirable is neither clear nor persuasive. Indeed, relying *solely* on adjudication has certainly not delivered a system with sufficient clarity, efficiency, or transparency.<sup>41</sup>

Others question how Section 5 rulemaking would intersect with existing Sherman Act jurisprudence, and whether it would conflict with or undermine the Justice Department's authority. My colleague Commissioner Maureen Ohlhausen, for example, has expressed concern that using Section 5 to "supplant" the Sherman and Clayton Acts could weaken the Justice Department's hand in some cases, or create a situation where firms engaged in the same conduct would face different liability standards based on which agency conducted the investigation.<sup>42</sup> Notably, however, these concerns are responding to the prospect of advancing – through adjudication – interpretations of Section 5 that go beyond the bounds of the Sherman Act. It is less clear that these concerns are as salient in the context of Section 5 rulemaking. In other words, it is worth considering whether the choice of institutional process mitigates concerns about diverging substantive standards. In some ways, this question raises a deeper issue around whether the Commission and the Attorney General should be playing supplementing, rather than overlapping, roles.<sup>43</sup>

Lastly, it is worth noting that FTC rulemaking can also be used to define what is *not* an unfair method of competition, which may address concerns from some critics about the bounds of the law. Because promulgated rules would give notice as to what constitutes an "unfair method of competition," the need to articulate overarching standards and limits would become less pressing.

### **III. Potential Considerations to Motivate FTC Rulemaking**

Rulemaking would serve to advance clarity and certainty about what types of conduct constitute – or do not constitute – an "unfair method of competition."<sup>44</sup> Commission studies of specific industries and business practices would guide which practices the FTC should use rulemaking to address. Indeed, as an enforcer and regulator across industries, the Commission is uniquely positioned to identify practices that it determines are anticompetitive. Below I offer two other considerations that could motivate the FTC to pursue rulemaking.

*The existence of an extensive enforcement record.* A robust record of enforcement to address a particular anticompetitive practice may not eliminate the practice altogether, especially when the conduct is highly profitable or can evolve in ways that do not precisely mirror prior application. Here, rulemaking might be a useful tool.

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<sup>41</sup> Notably, other agencies do engage in competition rulemaking. See Tim Wu, *Antitrust via Rulemaking: Competition Catalysts*, 16 COLO. TECH. L.J. 33 (2017).

<sup>42</sup> Maureen K. Ohlhausen, Remarks Before the U.S. Chamber of Commerce (July 25, 2013), [https://www.ftc.gov/sites/default/files/documents/public\\_statements/section-5-principles-navigation/130725section5speech.pdf](https://www.ftc.gov/sites/default/files/documents/public_statements/section-5-principles-navigation/130725section5speech.pdf).

<sup>43</sup> This question echoes concerns raised by Commissioner Elman in 1967, when he noted that "the Congress of 1914 intended the Commission to supplement, and not to duplicate, the work of the courts and the Department of Justice in antitrust enforcement." See Philip Elman, Remarks at the First New England Antitrust Conference (Mar. 31, 1967).

<sup>44</sup> It is worth noting again that rulemaking can also serve to provide certainty about the bounds of Section 5 in a manner that is more durable than FTC Enforcement Policy statements, such as the one adopted by the Commission in 2015. See Fed. Trade Comm'n, Statement of Enforcement Principles Regarding "Unfair Methods of Competition" Under Section 5 of the Federal Trade Commission Act, 80 Fed. Reg. 57,056, 57,056 (Sep. 21, 2015).

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

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

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

*Areas where private litigation is unlikely to discipline anticompetitive conduct.* Relying on adjudication as a primary way of developing legal rules and standards is most sensible when there is a rich body of disputes. When conduct has anticompetitive implications, but is unlikely to be challenged by private litigants, adjudication is not a reliable means of targeting the anticompetitive practice. Here, rulemaking may also be a useful tool.

Section 5 does not provide for a private right of action. This means that actions by the Commission – be it through adjudication or rulemaking – are the only vehicles for developing legal standards under “unfair methods of competition.” Legal issues that only the government can pursue are not likely to effectively evolve and develop through common law. This is because the body of disputes on that issue will be much smaller. For this reason, anticompetitive practices that lie beyond the reach of the antitrust laws are a particularly good candidate for being the subject of rulemaking.

Anticompetitive practices that are reachable under the other antitrust laws but that private litigation is unlikely to target may also be ripe for rulemaking. Take, for example, restrictive noncompete clauses in employment contracts. These agreements prevent employees from working for rival firms for a period of time after they leave. As recent studies show, these agreements – which now cover roughly 60 million Americans – deter workers from switching employers, weakening workers’ credible threat of exit and diminishing their bargaining power.<sup>47</sup>

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<sup>45</sup> *Generic Drug Entry Prior to Patent Expiration: An FTC Study* (July 2002), <https://www.ftc.gov/reports/generic-drug-entry-prior-patent-expiration-ftc-study>.

<sup>46</sup> Hemphill, *supra* note 2, at 674 (explaining that courts have struggled to understand and apply the agency’s deep expertise in this area, while a rulemaking would likely provide clearer guidance).

<sup>47</sup> Alexander J. S. Colvin, *The Growing Use of Mandatory Arbitration*, ECONOMIC POLICY INSTITUTE (Sept. 27, 2017), <https://www.epi.org/publication/the-growing-use-of-mandatory-arbitration/>.

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

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

Given the paucity of private litigation challenging noncompete agreements as antitrust violations, the FTC might consider engaging in rulemaking on this issue. A rule could remove any ambiguity as to when noncompete agreements are permissible or not. Pursuing this through rulemaking might be far speedier – and fair – than engaging in enforcement activities.

#### **IV. Conclusion**

The choice between adjudication and participatory rulemaking is not categorical. The Federal Trade Commission can pursue each in the appropriate circumstances. As the Commission undertakes a period of reflection in a time of scarce agency resources, I urge interested parties to explore whether and how rulemaking might lead to antitrust policy that is more predictable, efficient, and participatory.

There are several areas where further commentary would be particularly useful:

1. The FTC Act specifically exempts certain entities from Section 5, and Congress has delegated the authority to prohibit unfair practices to other agencies, including the Department of Agriculture and the Department of Transportation. These authorities were modeled after the FTC Act. Are there examples of competition rules promulgated by other agencies that have led to noteworthy results?
2. Are there other examples at the federal or state level where agencies have sought to develop competition laws or standards through rulemaking? What factors have defined whether these rules were successful at promoting competition?
3. What data exist to capture the amount of time that the antitrust law governing particular conduct has been unclear due to diverging views among courts?
4. How might FTC studies and rulemaking reduce the reliance on high-cost paid experts required for litigation?
5. What are potential topics for rulemaking that might specifically help to reduce the length and burden of antitrust litigation?
6. How would FTC rulemaking impact enforcement actions brought under state “little FTC Acts”?

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<sup>48</sup> Earlier this year, a 5-4 majority of the Supreme Court upheld the validity of class action waivers in employment contracts. *See Epic Systems Corp. v. Lewis*, 138 S.Ct. 1612 (2018).

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

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

By passing the Sherman Act, Congress tasked the Justice Department with targeting anti-competitive conduct through punishing bad acts. Enforcement was to proceed through litigation in federal courts, and courts, in turn, soon began offering their own interpretations of the law, a trend that troubled Congress. A key inflection point was *Standard Oil Co. v. United States*, where the Supreme Court replaced the absolute prohibition on restraints of trade with a prohibition on only those restraints found to be “unreasonable” in the context of a particular case.<sup>49</sup>

The day after the Supreme Court announced its decision, members of Congress began recommending new legislation to take back power from the courts. Senator Francis Newlands said the key issue was whether Congress would allow future administration of “these great combinations” to “drift practically into the hands of the courts,” subjecting questions about the legality of a restraint of trade “to the varying judgments of different courts upon the facts and the law.”<sup>50</sup> He introduced two bills providing for the federal registration of corporations, creating an interstate trade commission, and introducing “an elastic concept of unfairness.”<sup>51</sup> The bills also authorized the Commission to “revoke and cancel the registration of any corporation” upon a finding of violation of any operative judicial decree rendered under the Sherman Act, or upon the use of “materially unfair or oppressive methods of competition.”<sup>52</sup>

While neither bill became law, the effort led Congress to hold hearings on the need for new antitrust law. After three months of testimony, the Committee issued the “Cummins Report.” Echoing Senator Newland’s view, the report criticized the *Standard Oil* decision, noting that “whenever the rule [of reason] is invoked, the court does not administer the law, but makes the law.”<sup>53</sup> The report stated that it was “inconceivable that in a country governed by a written Constitution and statute law, the courts can be permitted to test each restraint of trade by the economic standard which the individual members of the court may happen to approve.”<sup>54</sup> This approach, they noted, did not create adequate predictability or uniformity of outcomes.<sup>55</sup> The

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<sup>49</sup> 221 U.S. 1 (1911).

<sup>50</sup> 47 Cong. Rec. 1225 (1911).

<sup>51</sup> Neil W. Averitt, *The Meaning of “Unfair Methods of Competition” in Section 5 of the Federal Trade Commission Act*, 21 B.C.L. REV. 227, 231 (1980).

<sup>52</sup> *Id.*

<sup>53</sup> S. REP. NO. 1326, 63d Cong., 3d Sess., xii (1913).

<sup>54</sup> *Id.*

<sup>55</sup> The report stated: “There are many forms of combination, and many practices in business which have been so unequivocally condemned by the Supreme Court that as to them and their like the statute is so clear that no person can be in any doubt respecting what is lawful and what is unlawful; but as the statute is now construed there are ... many other practices that seriously interfere with competition, and are plainly opposed to the public welfare, concerning which it is impossible to predict with any certainty whether they will be held to be due or undue restraints of trade.” *Id.* at xiv.

weaknesses in the current system, the report concluded, called for new legislation “establishing a commission for the better administration of the law and to aid in its enforcement.”<sup>56</sup>

This set the scene for the creation of the Federal Trade Commission. Most notably, the authorizing statute declared “unfair methods of competition” in commerce unlawful. The committee report explained the reason for including such a broad term:

The committee gave careful consideration to the question as to whether it would attempt to define the many and variable unfair practices which prevail in commerce and to forbid [them] ... or whether it would, by a general declaration condemning unfair practices, leave it to the commission to determine what practices were unfair. It concluded that the latter course would be the better, for the reason ... that there were too many unfair practices to define, and after writing 20 of them into the law it would be quite possible to invent others.<sup>57</sup>

In other words, Congress would leave it up to the new Commission to define and identify practices that constituted “unfair methods of competition.” Indeed, the FTC would be especially suited to this task, given that Congress was designing the agency to gather and develop expertise in business practices and industry trends.<sup>58</sup>

These aspects of the FTC’s design speak to Congress’s intent for the new agency to alter the institutional structure of antitrust enforcement. By passing the Sherman Act, Congress had adopted a crime-tort model – which prohibited certain bad acts – rather than a corporate regulatory model, which would have created a regulatory regime for policing the capital-concentrating effects of incorporation laws.<sup>59</sup> By creating the Federal Trade Commission, Congress was adopting an expert-agency model alongside the crime-tort model. A key aim, of course, was for legislators to recover the power to steer antitrust law and policies back from the courts. As Senator Albert Cummins expressed, “I would rather take my chance with a commission at all times under the power of Congress, at all times under the eye of the people ... than ... upon the abstract propositions, even though they be full of importance, argued in the comparative seclusion of the courts.”<sup>60</sup>

In order to equip the FTC to fulfill this institutional mission, Congress endowed the Commission with the authority to “make rules and regulations for the purpose of carrying out the [FTC Act’s] provisions.”<sup>61</sup> In the parlance of *Chevron*, this means “Congress delegated authority to the agency generally to make rules carrying the force of law,” and agency interpretations made

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<sup>56</sup> *Id.*

<sup>57</sup> S. REP. NO. 597, 63d Cong., 2d Sess. 13 (1914).

<sup>58</sup> “[The FTC] was created with the avowed purpose of lodging the administrative functions committed to it in a ‘body specially competent to deal with them by reason of information, experience, and careful study of the business and economic conditions of the industry affected,’ and it was organized in such a manner, with respect to the length and expiration of the terms of office of its members, as would ‘give to them an opportunity to acquire the expertness in dealing with these special questions concerning industry that comes from experience.’” *FTC v. R.F. Keppel & Bro., Inc.*, 291 U.S. 304, 314 (1934) (citations omitted).

<sup>59</sup> DANIEL A. CRANE, *THE INSTITUTIONAL STRUCTURE OF ANTITRUST ENFORCEMENT* (2011); Daniel A. Crane, *Antitrust Antifederalism*, 96 CAL. L. REV. 1 (2008).

<sup>60</sup> 51 Cong. Rec. 13047 (1914).

<sup>61</sup> 15 U.S.C. § 46(g) (2012).

pursuant to that authority fall within the domain of *Chevron*.<sup>62</sup> In light of confusion around whether “unfair methods of competition” applied only to practices that harmed competitors, Congress in 1938 passed the Wheeler-Lea Amendment, adding the proscription against “unfair or deceptive acts or practices.”<sup>63</sup>

In 1973, the D.C. Circuit clarified that the FTC did, indeed, have the authority to promulgate *substantive* rules, not just procedural ones.<sup>64</sup> The court observed that the “use of substantive rule-making is increasingly felt to yield significant benefits to those the agency regulates” and that “[i]ncreasingly, courts are recognizing that use of rule-making to make innovations in agency policy may actually be fairer to regulated parties than total reliance on case-by-case adjudication.”<sup>65</sup>

Two years later, Congress enacted the Magnuson-Moss Warranty – Federal Trade Commission Improvement Act.<sup>66</sup> The law granted the Commission authority to promulgate industry-wide rules under “unfair or deceptive acts or practices” and introduced heightened procedural requirements for rulemaking made under that provision. Legislative history documents that a House proposal would have subjected *all* FTC rulemaking to the new procedures, but this version of the bill was rejected for one that spoke only to “unfair or deceptive acts or practices.”<sup>67</sup> The final statute contains a provision limiting its effect to “unfair or deceptive acts or practices,”<sup>68</sup> and the conference report, too, states that the legislation “does not affect any authority of the FTC under existing law to prescribe rules with respect to unfair methods of competition.”<sup>69</sup>

In 1980, Congress passed the FTC Improvements Act, which added procedural requirements to rulemaking governed by Magnuson-Moss and stripped FTC of rulemaking authority on specific issues. The 1980 Amendments, like the 1975 Act, applied only to the FTC’s authority over “unfair or deceptive acts or practices.” The Commission’s “unfair methods of competition” rulemaking authority was not subjected to the new procedures. It remains governed by the Administrative Procedure Act, and FTC interpretations of “unfair methods of competition” are subject to *Chevron* deference.

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<sup>62</sup> *United States v. Mead*, 533 U.S. 218, 234-35 (2001).

<sup>63</sup> Wheeler-Lea Amendment, Pub. L. No. 447, 52 Stat. 111 (1938).

<sup>64</sup> 482 F.2d 672 (1973).

<sup>65</sup> *Id.* at 681.

<sup>66</sup> Magnuson-Moss Warranty—Federal Trade Commission Improvement Act, Pub. L. No. 93-637, 88 Stat. 2183 (1975) (codified at 15 U.S.C. §§ 2301–2312 (2012)).

<sup>67</sup> Hurwitz, *supra* note 28, at 234.

<sup>68</sup> Section 18(b)(2).

<sup>69</sup> Hurwitz, *supra* note 28, at 234-35 (citations omitted).