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Advice for New FTC Leadership

By Luke M. Froeb & Michael Vita

Edited by Justin Stewart-Teitelbaum & Angela Landry

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I. Focus on Consumer Welfare

In the 40 years preceding the Federal Trade Commission ("FTC") under the Biden Administration ("Biden FTC"), consumer welfare was the goal of antitrust enforcement.[3] Though having to prove that consumers are harmed by the challenged conduct makes cases harder to win, pursuing this goal guides the FTC, motivates its staff, and deters practices that harm consumers. Instead of onerous merger filing requirements borne by all potential merging firms, the FTC should renew its focus on only those mergers likely to harm consumers.

II. Promote Innovation

Since 2010, the U.S. economy has grown at a real rate of 1.74% per capita. At this rate, per capita income doubles every 40 years.[4] When our kids turn 40, they will earn twice as much as we did.

Public policy—especially antitrust policy—should recognize that innovation drives growth, much of which comes from Big Tech and startups. Big Tech has provided consumers with more everyday value than any other small group of firms in history.[5] And most startups "exit" via acquisition, not by going public.[6] If the FTC prevents these exits due to concerns about lost potential competition, funding becomes harder to come by, which deters startups.[7] The FTC should recognize these innovation incentives when setting enforcement priorities.

III. Reverse Policies that Harm Consumers

Significant policy reversals would raise consumer welfare. The current merger guidelines have been widely criticized by experts across the political spectrum for creating uncertainty about enforcement, which deters all potential mergers not just those that harm consumers.[8] The FTC should return to the 2010 Horizontal Merger Guidelines and the 2020 Vertical Merger Guidelines.

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[1] Professor Luke M. Froeb (Vanderbilt University) has been a staff economist at the U.S. Dept. of Justice ("DOJ"), and Chief Economist at both the FTC and DOJ. He has consulted with numerous firms, including Big Tech and PBMs.

[2] Dr. Michael Vita retired in 2023 from his position as Deputy Director of the FTC's Bureau of Economics after a 39-year career at the FTC. Dr. Vita supervised numerous horizontal and vertical merger investigations and was a member of the team that drafted the 2020 Vertical Merger Guidelines.

[3] Fred Ashton, *Why the Consumer Welfare Standard Is the Backbone of Antitrust Policy*, AM. ACTION F. (Oct. 26, 2022), https://www.americanactionforum.org/insight/why-the-consumer-welfare-standard-is-the-backbone-of-antitrust-policy; *see also* Douglas H. Ginsburg, *Wither the Consumer Welfare Standard?*, 46 HARV. J. L. & PUB. POL'Y 69 (2023).

[4] *See Real Gross Domestic Product per Capita*, FED. RSRV. BANK OF ST. LOUIS, https://fred.stlouisfed.org/series/A939RX0Q048SBEA (last visited Nov. 20, 2024).

Real gross domestic product per capita is calculated based on the following: 2010Q1 = $53,683; 2024Q1 = $68,549;log[(68549/53683)/14]*100 = 1.746%; log(2)/.01746 =39.699 years.

[5] The value of Big Tech to consumers is seen in their market capitalization. As of July 2024, the combined market capitalization of leading technology companies—Apple, Microsoft, Nvidia, Alphabet, Amazon, Meta, and Tesla—exceeds $15 trillion. This unprecedented valuation underscores their significant economic impact. *See, e.g.*, Ehsan Soltani, *Charted: The Surging Value of the Magnificent Seven (2000-2024*), VISUAL CAPITALIST (Aug. 14, 2024), https://www.visualcapitalist.com/cp/charted-the-surging-value-of-magnificent-seven-2000-2024.

[6] *See, e.g.*, Gené Teare, *What Are The Odds Of Success For A US Seed Funded Startup?*, CRUNCHBASE (Dec. 1, 2021), https://news.crunchbase.com/liquidity/seed-funding-series-a-success ("[W]e find that of the startups that most recently raised seed funding in 2011, 15 percent have exited, with a much higher likelihood of an acquisition by 10 to 1 compared to going public.").

[7] If exits are more difficult due to antitrust concerns, a high cost of capital, or a bad economic outlook, fundraising becomes much harder, so we get fewer startups. *See, e.g.*, Paul O'Brien, *Startup with the Exit in Mind*, STARTUP ECONOMIST (Nov. 14, 2019), https://seobrien.com/start-up-with-the-exit-in-mind; Dion F. Lisle, *Where Have All the Exits Gone?*, VentureVINE (Nov. 19, 2024), https://medium.com/venturevine/where-have-all-the-exits-gone-43a56c354237.

[8] *See, e.g.*, Richard A. Epstein, *The DOJ and FTC's Misguided Attack on Mergers*, 49 J. CORP. L. 275 (2024); Carl Shapiro, *Evolution of the Merger Guidelines: Is This Fox Too Clever by Half?*, 65 REV. INDUS. ORG. 147 (2024); Luke M. Froeb, Steven T. Tschantz & Gregory J. Werden, *Deterrence in Merger Review: Likely Impacts of Recent U.S. Policy Change*s, ANTITRUST CHRONICLE (May 2024), https://www.pymnts.com/cpi-posts/deterrence-in-merger-review-likely-effects-of-recent-u-s-policy-changes.

The 2022 Unfair Methods of Competition ("UMC") policy[9] has enabled enforcement that goes beyond harm to competition. Returning to the 2015 bipartisan UMC policy[10] would properly limit enforcement to practices that harm competition and consumers.

The Commission's revival of Robinson-Patman Act enforcement and its Pharmaceutical Benefit Manager ("PBM") study need to end. The former was designed to protect competitors, not competition; and the "interim" PBM study[11] ignores evidence—including a previous FTC study—that PBM's effectively, and on net, reduced their customers' costs.[12]

IV. Keep Politics Out of Agency Analysis

The Biden FTC has leaned heavily on political loyalists to implement a top-down agenda untethered from economics. As the staff lost confidence in the agency's mission, morale collapsed, and many talented attorneys and economists left the FTC. The FTC's Bureau of Economics Director resigned the day before the FTC was scheduled to vote on its controversial PBM study.[13] New leadership should promote quality analysis at the staff level and leave political considerations to the Commission.

V. Better Manage Agency Resources

The FTC now has a $425M budget (an increase of $75M since 2021),[14] but it is experiencing budget shortfalls due to questionable spending priorities. Resources have been drained by excessive expert witness expenditures, often on cases that are years from going to trial. In addition, the FTC created a second anticompetitive practices [non-merger] division in its Bureau of Competition. Given the large number of merger cases, the large numbers of second requests (in 2021, the FTC issued 42 second requests, up from 23 in 2020), and its more aggressive approach to merger enforcement, it is unclear why resources were allocated to a second non-merger division instead of the merger shops. Last, the FTC has failed to properly budget for cost-of-living increases.

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[9] FED. TRADE COMM'N, File No. P221202, POLICY STATEMENT REGARDING THE SCOPE OF UNFAIR METHODS OF COMPETITION UNDER SECTION 5 OF THE FEDERAL TRADE COMMISSION ACT (Nov. 10, 2022).

[10] FED. TRADE COMM'N, STATEMENT OF ENFORCEMENT PRINCIPLES REGARDING "UNFAIR METHODS OF COMPETITION" UNDER SECTION 5 OF THE FTC ACT (Aug. 13, 2015).

[11] U.S. FED. TRADE COMM'N OFF. OF POL'Y PLANNING, PHARMACY BENEFIT MANAGERS: THE POWERFUL MIDDLEMEN INFLATING DRUG COSTS AND SQUEEZING MAIN STREET PHARMACIES (Interim Staff Report, July 2024).

[12] See the empirical research, including a 2005 FTC study and Competition Advocacy letters, summarized in Luke M. Froeb & Mikhael Shor, *Formularies, Rebates, and the Economics of PBM Bargaining* (Vanderbilt Owen Graduate School of Management Research Paper, May 8, 2023), available at https://ssrn.com/abstract=4442064 or http://dx.doi.org/10.2139/ssrn.4442064.

[13] Leah Nylen, *FTC's Top Economist Resigned Amid Dispute over Pharma Study*, POLITICO (Feb. 25, 2022), https://www.politico.com/news/2022/02/25/ftcs-top-economist-resigned-amid-dispute-over-pharma-study-00011878.

[14] *See* Fed. Trade Comm'n, *Budget and Strategy*, https://www.ftc.gov/about-ftc/budget-strategy (last visited Nov. 18, 2024) (stating that FTC's FY 2024 budget is $425.7 million); FED. TRADE COMM'N, FISCAL YEAR 2021 AGENCY FINANCIAL REPORT, https://www.ftc.gov/system/files/documents/reports/agency-financial-report-fy2021/ftc_fy2021_agency_financial_final.pdf (noting that FTC's budget obligations were $351.5 million in FY 2021).