

FTC Competition Regulation: A Cost-Benefit Appraisal

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There are recent indications that the Federal Trade Commission (FTC) is seriously contemplating promulgating rules that address competition issues, specifically rules that define particular unfair methods of competition. The FTC has extensive experience in issuing consumer protection rules. FTC regulation of competition through rulemaking, however, would be at odds with a long American tradition of relying on case-by-case antitrust adjudication, rather than rulemaking, to deal with practices that harm the competitive process.

This longstanding history of avoiding a regulatory approach to antitrust enforcement counsels caution. Before proceeding with competition rulemaking, the FTC should carefully consider whether the benefits of such rulemaking would outweigh the costs, given the opportunity cost of redirecting scarce FTC resources from antitrust enforcement initiatives to proposed rules. Any cost-benefit appraisal should weigh both the legal risks and the potential economic policy concerns (error costs and rule of law harms) that would attend competition rulemaking. Based on these considerations, competition rulemaking is inappropriate. The FTC should stick with antitrust enforcement as its primary tool for strengthening the competitive process and thereby promoting consumer welfare.¹

BACKGROUND ON FEDERAL ANTITRUST ADJUDICATION

As I explain in a recent primer, federal antitrust enforcement through case law prosecutions has been a prominent feature of American political economy for over a century:²

US antitrust laws, broadly speaking, aim to curb efforts by firms to reduce competition in the marketplace or to create or maintain monopolies. These laws proscribe certain merg-

ers and business practices in general terms, leaving courts to decide in specific terms which mergers and practices are illegal on the basis of the facts of each case. Courts have applied the antitrust laws to changing markets, from a time of horses and buggies to the present digital age. Yet for many years, US antitrust laws have had the same basic objective: to protect the process of competition for the benefit of consumers, making sure that businesses have strong incentives to operate efficiently, keep prices down, and keep quality up. Though imperfect in application (like all legal institutions), the modern consumer-welfare approach to antitrust law has served the American public well.³

Two separate federal agencies, the US Department of Justice (DOJ) and the FTC, enforce antitrust law. The DOJ prosecutes in federal court alleged violations of the Sherman Antitrust Act of 1890, which bars (a) contracts, combinations, and conspiracies that unreasonably restrain trade and (b) monopolization, attempted monopolization, and conspiracies to monopolize.⁴ The FTC prosecutes antitrust violations under authority granted it by section 5(a)(1) of the Federal Trade Commission Act of 1914, which declares illegal “unfair methods of competition in or affecting commerce” (the courts have held that this language encompasses all Sherman Act violations as well as other practices that harm competition but that may not fit neatly into categories of conduct formally prohibited by the Sherman Act).⁵ Section 5 also authorizes the FTC to pursue internal administrative actions that require parties to cease and desist from engaging in such anticompetitive actions.⁶ The FTC and DOJ may file in federal court to enjoin violations of section 7 of the Clayton Antitrust Act of 1914, which prohibits mergers and acquisitions that may substantially lessen competition.⁷ In addition, the FTC (but not the DOJ) may challenge anticompetitive mergers through administrative actions.

RULEMAKING AT THE FTC: A BRIEF HISTORY

Section 6(g) of the original Federal Trade Commission Act authorizes the FTC “to make rules and regulations for the purpose of carrying out the provisions of this subchapter.”⁸ This authority largely lied dormant for almost half a century. After promulgating few rules before 1962, the FTC issued a variety of rules over the next decade, focused on consumer protection, not competition. Only one rule, dealing with price discrimination in men’s and boys’ tailored clothing,⁹ dealt solely with an unfair method of competition. That 1968 rule apparently was never enforced,¹⁰ and it was rescinded in 1994.¹¹

Section 6(g) rules are enacted pursuant to the informal rulemaking requirements of section 553 of the Administrative Procedure Act (APA), which apply to the vast majority of federal agency rulemaking proceedings. Informal rulemaking is fairly straightforward:

The informal rulemaking process defined by the APA consists of four main steps. First, Congress must pass legislation that either creates an administrative agency or gives guid-

ance or directives to an existing agency. The legislation forms the basis for the rules, which should be geared toward achieving the goals identified by Congress.

The second step is twofold: the agency must draft a proposed rule and publish notice of the proposed rule.

The third step, known as the comment period, begins when the proposed rule is published and continues for at least 30 days. During this time, members of the public may comment on the proposed rule.

The fourth step, codification of the final rule, takes place once all periods for public comment have passed and the agency has made any final revisions to the rule. Most rules have an “effective date” set far enough into the future to allow affected parties to bring themselves into compliance.¹²

In 1971, the FTC enacted a section 6(g) rule stating that it was both an “unfair method of competition” and an “unfair act or practice” for refiners or others who sell to gasoline retailers “to fail to disclose clearly and conspicuously in a permanent manner on the pumps the minimum octane number or numbers of the motor gasoline being dispensed.”¹³ In 1973, in the *National Petroleum Refiners* case, the US Court of Appeals for the DC Circuit upheld the FTC’s authority to promulgate this and other binding substantive rules.¹⁴ The court rejected the argument that section 6(g) authorized only nonsubstantive regulations regarding the FTC’s nonadjudicatory, investigative, and informative functions, spelled out elsewhere in section 6.

In 1975, Congress granted the FTC specific consumer protection rulemaking authority (authorizing enactment of trade regulation rules dealing with unfair or deceptive acts or practices) through section 202 of the Magnuson-Moss Warranty Act, which added section 18 to the Federal Trade Commission Act. Section 18 imposes hearing-type requirements that are not found in APA informal rulemakings. As the FTC explains,

Under Section 18 of the FTC Act, 15 U.S.C. Sec. 57a, the Commission is authorized to prescribe “rules which define with specificity acts or practices which are unfair or deceptive acts or practices in or affecting commerce” within the meaning of Section 5(a)(1) of the Act. Among other things, the statute requires that Commission rulemaking proceedings provide an opportunity for informal hearings at which interested parties are accorded limited rights of cross-examination. Before commencing a rulemaking proceeding, the Commission must have reason to believe that the practices to be addressed by the rulemaking are “prevalent.” 15 U.S.C. Sec. 57a(b)(3).

Once the Commission has promulgated a trade regulation rule, anyone who violates the rule “with actual knowledge or knowledge fairly implied on the basis of objective circum-

stances that such act is unfair or deceptive and is prohibited by such rule” is liable for civil penalties for each violation.¹⁵

Magnuson-Moss consumer protection rulemakings impose adjudicatory-type hearings and other specific requirements on the FTC, unlike more flexible section 6(g) APA informal rulemakings. However, the FTC can obtain civil penalties for violation of Magnuson-Moss rules, something it cannot do if 6(g) rules are violated. Since 1975, the FTC has promulgated only seven Magnuson-Moss rules, reflecting the “slow and cumbersome” nature of those rulemakings,¹⁶ according to some scholarly critics.¹⁷ The FTC has nevertheless issued a wide variety of substantive consumer protection rules in recent decades under various special statutes directed at specific consumer protection problems identified by Congress.¹⁸ Notably, however, the FTC has not enacted any 6(g) competition rules in the nearly 50 years since the *National Petroleum Refiners* case was decided.

THE RENEWED CALL FOR FTC COMPETITION RULEMAKING: LEGAL RISKS

Very recently, momentum has been building in support of FTC competition rulemaking as a potential solution to allegedly inadequate antitrust enforcement. Highly publicized studies released in 2020 by the House Committee on Antitrust, Commercial, and Administrative Law and the Washington Center for Equitable Growth touted rulemaking as one among several reforms needed to reinvigorate antitrust policy.¹⁹ Around the same time, a leading law review article authored by FTC Commissioner Rohit Chopra and then-antitrust scholar (now FTC Chair) Lina Khan set forth factors “that should weigh in favor of rulemaking.”²⁰ Most significantly, on March 25, 2021, Acting FTC Chair Rebecca Kelly Slaughter announced that she was establishing a rulemaking group in the FTC’s Office of General Counsel, stating, “It is . . . time for the Commission to activate its unfair methods of competition rulemaking authority in our increasingly concentrated economy, and I am excited for this new rulemaking group to explore all the possibilities.”²¹ Accordingly, at this time a three-member majority of the five-member FTC is on record as supporting competition rulemaking.

Before launching section 6(g) competition rulemakings, however, the FTC would be well advised first to weigh the legal risks and policy concerns associated with such an endeavor. Rulemakings are resource-intensive proceedings and should not be lightly undertaken without an eye to their feasibility and implications for FTC enforcement policy. In the following section, I first assess the legal risks.

First, and Most Fundamentally, Does the FTC Have the Legal Authority to Promulgate Substantive Competition Rules?

In a recent set of public comments filed with the FTC, the Antitrust Section of the American Bar Association notes,

The Commission’s [6(g)] rulemaking authority is buried within an enumerated list of investigative powers, such as the power to require reports from corporations and partnerships, for example. Furthermore, the [FTC] Act fails to provide any sanctions for violating any rule adopted pursuant to Section 6(g). These two features strongly suggest that Congress did not intend to give the agency substantive rulemaking powers when it passed the Federal Trade Commission Act.²²

Rephrased, this argument suggests that the structure of the Federal Trade Commission Act indicates that the rulemaking referenced in section 6(g) is best understood as an aid to FTC processes and investigations, not a source of substantive policymaking. Although the *National Petroleum Refiners* decision rejected such a reading, that ruling came at a time of significant judicial deference to federal agency activism and may be dated. Furthermore, the Antitrust Section of the American Bar Association continues: “Given that Magnuson-Moss was enacted to address concerns raised by *National Petroleum Refiners* and similar cases, it’s hard to see Section 6(g), with its vague and broad language, as providing a firm footing for informal antitrust rulemaking by the Commission.”²³

The US Supreme Court’s April 2021 decision in *AMG Capital Management v. FTC* further bolsters the statutory structure argument that section 6(g) does not authorize substantive rulemaking.²⁴ In *AMG*, the court unanimously held that section 13(b) of the Federal Trade Commission Act, which empowers the FTC to seek a “permanent injunction” to restrain a violation of the act, does not authorize the FTC to seek monetary relief from wrongdoers. The court’s opinion rejected the FTC’s argument that the term “permanent injunction” had historically been understood to include monetary relief. The court noted that the injunctive language was “buried” in a lengthy provision that focuses on injunctive, not monetary relief (note that the term “rules” is similarly “buried” within 6(g) language dealing with unrelated issues). The court also pointed to the structure of the Federal Trade Commission Act, with detailed and specific monetary relief provisions found in sections 5(l) and 19, as “confirm[ing] the conclusion” that section 13(b) does not grant monetary relief. By analogy, a court could point to Congress’s detailed enumeration of substantive rulemaking provisions in section 18 (a mere two years after *National Petroleum Refiners*) as cutting against the claim that section 6(g) can also be invoked to support substantive rulemaking. Finally, the Supreme Court in *AMG* flatly rejected a number of relatively recent appeals court decisions that upheld section 13(b) monetary relief authority. It follows that the FTC cannot confidently rely on judicial precedent (stemming from one arguably dated court decision, *National Petroleum Refiners*) to uphold its competition rulemaking authority.

In sum, the FTC will have to overcome serious fundamental legal challenges to its section 6(g) competition rulemaking authority if it seeks to promulgate competition rules. The FTC should weigh this substantial litigation risk (with its attendant costs and delays) against whatever benefits it believes would be generated by rulemaking before proceeding.

Second, Even Assuming That Section 6(g) Is Held to Authorize Competition Rulemaking, the FTC Faces Several Other Cost-Generating Legal Risks

Challenges to the underlying rulemaking authority conferred by section 6(g) are not the only legal perils of competition rulemaking.

One such challenge is posed by the breadth of the term “unfair methods of competition.” In 2020, FTC Commissioner Noah Phillips pointed out renewed interest by some Supreme Court justices in the nondelegation doctrine,²⁵ which mandates that Congress provide “an intelligible principle” to guide the agency to which it has delegated legislative discretion.²⁶ Substantive rulemaking is, of course, legislative in nature. In *Schechter Poultry*,²⁷ the Supreme Court applied the doctrine to strike down the National Industrial Recovery Act, which authorized the president to approve “codes of fair competition,” a term similar to “unfair methods of competition.” Compounding the potential nondelegation issue for the FTC is “the lack of clarity in the [FTC’s 6(g)] rulemaking authority.”²⁸ What’s more, although the doctrine has not been used to strike down a statute since 1935, “a majority of the current Supreme Court has expressed interest in revitalizing the non-delegation doctrine.”²⁹ Taken together, these factors suggest a not-insignificant litigation risk for potential competition rulemaking proceedings.

The FTC also faces litigation risks from the APA requirements applicable to informal rulemaking.³⁰ Courts can overturn informal agency rules found to be “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.”³¹ The “arbitrary or capricious” test is met if a court determines that a rule’s underlying factual assertions are unreasonable. In order to avoid a finding of unreasonableness, the FTC would have to provide a sufficient basis to justify a determination that a particular practice barred by rule is inevitably anticompetitive. Doing so might prove difficult, because it would be in tension with traditional “rule of reason” analysis of antitrust litigation, which evaluates particular practices on a fact-specific, case-by-case basis.³² If a reviewing court were to find that the FTC rulemaking record did not sufficiently take into account potential procompetitive manifestations of a condemned practice, for example, it might decide that the rule is arbitrary and strike it down. (The existence of prior antitrust rule of reason case law decisions upholding particular examples of the conduct condemned by a rule could bolster a judicial finding that the rule is unreasonable.) This risk would appear to be not insubstantial, particularly given the lack of a preexisting competition rulemaking tradition that could help guide rulemaking review by the courts.³³

Finally, even if a final competition rule passes initial legal muster, applying its terms to individual businesses charged with rule violations may prove difficult. Individual businesses may seek to structure their conduct to evade the particular strictures of a rule, and changes in commercial practices may render less common the specific acts targeted by a rule’s language. One could therefore expect parties to argue in rule-related litigation that their actions fall outside a rule’s specific boundaries. A separate defense might be that changes in the economy have eliminated rational

justifications for some or all of a rule's prohibitions. FTC litigation risks associated with countering such claims would raise the costs of ensuring rule compliance, thereby undermining the case for competition rules as a lower-cost alternative to case-by-case litigation. The lack of financial sanctions for violating section 6(g) rules (by contrast, violators of Magnuson-Moss consumer protection rules face civil penalties) would further complicate FTC efforts to promote robust competition rule compliance.

ECONOMIC POLICY CONCERNS RAISED BY COMPETITION RULEMAKING

Apart from the issue of legal risks, any cost-benefit appraisal of FTC competition rulemaking should take into account the economic policy concerns raised by competition rulemaking. These fall into two broad categories.

First, Competition Rules Would Generate Higher Error Costs Than Adjudications

Competition rules would tend to generate higher error costs than case-by-case adjudications under the antitrust rule of reason. Although adjudications are not free from error, they tend to cabin both false positives (mistaken convictions of procompetitive practices) and false negatives (mistaken acquittals of anticompetitive practices).³⁴ They do so by allowing for full consideration of matter-specific facts bearing on the procompetitive and anticompetitive aspects of business arrangements and by subjecting initial decisions to judicial review by US courts of appeals. Moreover, antitrust case law allows inquiries and decisions to adapt as industries evolve and economic understanding improves, a process that tends to further diminish errors arising from prosecutors' misperception of competitive dynamics.³⁵ To further reduce error in enforcement, and to provide up-to-date guidance to the private sector, federal antitrust enforcers issue and periodically update interpretive antitrust guidelines that are designed to be flexibly applied to specific factual circumstances.³⁶

Competition rules, however, inherently would be overbroad and would suffer from a very high rate of false positives. By characterizing certain practices as inherently anticompetitive without allowing for consideration of case-specific facts bearing on actual competitive effects, findings of rule violations inevitably would condemn some (perhaps many) efficient arrangements. Furthermore, because rules by their nature are fixed in stone (at least until they are amended or repealed), they "frequently fail to account for market dynamic, new sources of competition, and consumer preferences."³⁷ Thus, they lack case law adjudication's feature of analytic improvement (reflected in periodically updated federal antitrust guidelines) based on changing market conditions and improved economic analysis.

In sum, competition rules are a far more blunt and inflexible tool than adjudication and, as such, are less conducive to welfare-enhancing competition policy outcomes.³⁸

Second, Competition Rules Would Undermine the Rule of Law and Thereby Reduce Economic Welfare

Second, given the existence of two separate federal antitrust enforcers, FTC competition rules would raise serious rule-of-law questions, with attendant negative economic welfare ramifications. Specifically, depending upon which agency investigates, an individual firm's business practice would be subject to two very different legal standards. If the FTC handles the matter and determines that the practice runs afoul of a competition rule, it may demand that the firm cease and desist from the practice at issue, without regard to any possible justifications the firm might proffer. If, however, the DOJ (which cannot apply FTC rules) prosecutes the practice under the antitrust rule of reason,³⁹ the firm may be able to mount legal defenses, including the argument that its conduct produces efficiencies that outweigh any anticompetitive effects. Apart from its inherent unfairness, this problematic state of affairs may also lead to foregone economic efficiency gains by chilling aggressive efficiency-seeking business arrangements in sectors subject to rules.

Additional economic welfare losses would arise from the FTC and DOJ tradition of dividing up enforcement responsibilities by industry sector through mutual agreement, based on agency-specific sectoral knowledge and expertise.⁴⁰ This tradition would raise the specter of disparate legal treatment, depending upon the nature of a firm's business. Therefore, firms and industry associations would be incentivized to engage in costly rent-seeking (lobbying Congress and federal agencies) directed at avoiding being subject to competition rules. Relatedly, the perception of heightened antitrust risk associated with particular practices or industry sectors subject to new competition rules could artificially skew investment decisions (at least at the margin), leading to less efficient resource allocation and reduced economic welfare.

CONCLUDING COMMENTS

The FTC and DOJ have a long and successful history of antitrust enforcement featuring flexible, fact-specific adjudication that aims to promote consumer welfare. Case-by-case antitrust adjudication, though imperfect, has served the American public well. Recent proposals to supplement FTC antitrust enforcement through the enactment of substantive competition rules would represent a marked departure from this tradition. Accordingly, before proceeding with rulemaking, the FTC should carefully weigh whether the benefits of adding competition rules to the mix would outweigh the costs. In other words, given inevitable agency resource limitations, would economic welfare be enhanced if the FTC were to reallocate some of its antitrust enforcement resources to rulemaking endeavors? To answer this question, a review of the legal risks and economic policy concerns raised by rulemaking is required.

First, rulemaking raises several serious legal risks for the FTC. There are substantial legal arguments that the FTC does not possess legal authority to promulgate substantive competition rules, because of the language and structure of the Federal Trade Commission Act and the constitutional

nondelegation doctrine. Furthermore, even if the FTC possesses the initial authority to undertake rulemakings, litigation challenges claiming that issued rules are unreasonable (that is, the rules lack a solid factual foundation for declaring a practice anticompetitive) or do not apply to a particular defendant may be expected. These litigation issues would consume FTC resources and add to the costly delays inherent in developing competition rules in the first place. The compounding of separate serious litigation risks suggests a significant probability that costs would be incurred in support of rules that ultimately would fail to be applied.

Second, even assuming competition rules were to be upheld, their application would raise serious economic policy questions. The inherent inflexibility of rule-based norms is ill suited to deal with dynamic evolving market conditions, compared with matter-specific antitrust litigation that flexibly applies the latest economic thinking to particular circumstances. As such, rules would be expected to generate far higher error costs than traditional litigation. In addition, FTC application of normative competition rules that the DOJ could not employ would lead to potential costly inconsistencies in antitrust enforcement, an affront to the rule of law. Any alleged special advantages of competition rules over traditional litigation (such as reduced delay in acting against competitive harm or clarification of the elements of a particular anticompetitive practice) would be highly questionable at best and not comparable in magnitude to far more certain rule-related costs.⁴¹

In conclusion, an evaluation of rule-related legal risks and economic policy concerns demonstrates that a reallocation of some FTC enforcement resources to the development of competition rules would not be cost effective. Continued sole reliance on case-by-case antitrust litigation would generate greater economic welfare than a mixture of litigation and competition rules. One would hope that the FTC would keep this consideration in mind before it undertakes competition rulemaking.

ABOUT THE AUTHOR

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NOTES

1. The FTC, primarily through its Office of Policy Planning, also comments on the competition and consumer protection implications of proposed and existing government policies. As the FTC explains, “when courts, government offices, or other organizations consider cases or policy decisions that affect consumers or competition, the FTC may offer insight through amicus briefs or advocacy letters. In these matters, the FTC provides its expertise and advocates for policies

that protect consumers and promote competition.” “Advocacy,” Federal Trade Commission, accessed June 14, 2021, <https://www.ftc.gov/policy/advocacy>; James C. Cooper, Paul A. Pautler, and Todd J. Zywicki, “Theory and Practice of Competition Advocacy at the FTC,” *Antitrust Law Journal* 72, no. 3 (2005): 1091-1122. Discussion of FTC competition advocacy is beyond the scope of this policy brief.

2. For additional information on the history and enforcement of US antitrust laws, see Alden F. Abbott, “US Antitrust Laws: A Primer” (Mercatus Policy Brief, Mercatus Center at George Mason University, Arlington, VA, March 2021). This policy brief employs the terms “competition enforcement” (the term most commonly employed outside the United States) and “antitrust enforcement” (the predominant American term) interchangeably.
3. Abbott, “US Antitrust Laws,” 1.
4. Sherman Antitrust Act of 1890, 15 U.S.C. § 1; 15 U.S.C. § 2.
5. 15 U.S.C. § 45(a)(1). This section also prohibits “unfair or deceptive acts or practices in or affecting commerce,” authority which underlies the FTC’s enforcement regarding consumer protection.
6. A final FTC decision ordering that a party or parties cease and desist from violating section 5 may be appealed to a US federal court of appeals.
7. 15 U.S.C. § 18. The FTC and DOJ may also challenge a variety of other specific anticompetitive acts and practices that are declared illegal under various Clayton Act provisions, such as interlocking directorates (that is, the same person making business decisions for competing companies).
8. 15 U.S.C. § 6(g). Section 6(g) was amended in 1975 to add the phrase “except as provided in section [18] of the [Federal Trade Commission Act],” before the language authorizing rulemaking. Section 18, added by congressional legislation passed in 1975, sets forth detailed instructions for carrying out consumer protection rulemakings dealing with particular “unfair or deceptive acts or practices.” Magnuson-Moss Warranty Act, Pub. L. No. 93-637, § 202(b), 88 Stat. 2183, 2198 (1975). Section 18, by its plain terms, does not apply to competition rulemaking, which means that any competition rules promulgated by the FTC would have to be under its section 6(g) authority.
9. Discriminatory Practices in Men’s and Boys’ Tailored Clothing Industry, 32 Fed. Reg. 15584 (November 9, 1967).
10. American Bar Association Antitrust Law Section, *Comments of the Antitrust Law Section of the American Bar Association in Connection with the Federal Trade Commission Workshop on “Non-Competes in the Workplace: Examining Antitrust and Consumer Protection Issues*, April 24, 2020, https://www.americanbar.org/content/dam/aba/administrative/antitrust_law/comments/april-2020/comment-42420-ftc.pdf.
11. Trade Regulation Rule: Discriminatory Practices in Men’s and Boys’ Tailored Clothing Industry, 59 Fed. Reg. 8527 (February 23, 1994).
12. “Informal Agency Rulemaking,” Justia, last updated May 2021, <https://www.justia.com/administrative-law/rulemaking-writing-agency-regulations/informal-rulemaking/>.
13. 36 Fed. Reg. 23871 (December 16, 1971).
14. Nat’l Petroleum Refiners Ass’n v. FTC, 482 F.2d 672 (D.C. Cir. 1973), *cert. denied*, 396 U.S. 910 (1974).
15. “A Brief Overview of the Federal Trade Commission’s Investigative, Law Enforcement, and Rulemaking Authority,” Federal Trade Commission, revised, October 2019, <https://www.ftc.gov/about-ftc/what-we-do/enforcement-authority>.
16. Andrea Vittorio, “The Long Path to Protecting Consumer Data: FTC Rules Explained,” *Bloomberg Law*, May 21, 2021.
17. Jeffrey S. Lubbers, “It’s Time to Remove the ‘Mossified’ Procedures for FTC Rulemaking,” *George Washington Law Review* 83, no. 6 (2015): 1979-1998. Lubbers notes that Magnuson-Moss proceedings took many more years to complete on average than pre-Magnuson-Moss APA rulemakings.
18. For a catalog of all FTC rules, see “Rules and Guides,” Federal Trade Commission, accessed June 13, 2021, <https://www.ftc.gov/enforcement/rules/rules-and-guides>. By way of example, FTC abuse-specific rules promulgated owing to special statutes include the Children’s Online Privacy Protection Rule, 16 C.F.R. pt. 312, and the CAN-SPAM Rule, 16 C.F.R. pt. 316 (designed to curb abusive “commercial electronic mail messages”).

19. Subcommittee on Antitrust, Commercial, and Administrative Law of the Committee on the Judiciary, *Investigation of Competition in Digital Markets: Majority Staff Report and Recommendations*, October 6, 2020; Bill Baer et al., *Restoring Competition in the United States* (Washington, DC: Washington Center for Equitable Growth, November 2020). Baer et al. held a variety of positions in the Obama administration.
20. Rohit Chopra and Lina M. Khan, “The Case for ‘Unfair Methods of Competition’ Rulemaking,” *University of Chicago Law Review* 87, no. 2 (2020): 357–79. Khan was confirmed as a commissioner by the Senate on June 15, 2021, and was appointed FTC chair by President Joe Biden on the same day.
21. Federal Trade Commission, “Acting Chairwoman Slaughter Announces New Rulemaking Group,” press release, March 25, 2021, <https://www.ftc.gov/news-events/press-releases/2021/03/ftc-acting-chairwoman-slaughter-announces-new-rulemaking-group>.
22. American Bar Association Antitrust Law Section, *Comments of the Antitrust Law Section*, 54.
23. American Bar Association Antitrust Law Section, 57.
24. AMG Capital Management, LLC, et al. v. FTC, No. 19-508, slip op. (Apr. 22, 2021), 593 U.S. ____ (2021).
25. Noah Joshua Phillips, “Non-Compete Clauses in the Workplace: Examining Antitrust and Consumer Protection Issues” (remarks, Federal Trade Commission, Washington, DC, January 9, 2020), 6–7.
26. J.W. Hampton, Jr., & Co. v. United States, 276 U.S. 394, 409 (1928).
27. A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935).
28. Phillips, “Non-Compete Clauses in the Workplace,” 7.
29. Peter J. Wallison, “An Empty Attack on the Nondelegation Doctrine,” *Fedsoc Blog*, April 22, 2021. Wallison served as White House counsel during the Reagan administration.
30. For an overview of APA review of agency actions, see Jared P. Cole, *An Introduction to Judicial Review of Federal Agency Action* (Washington, DC: Congressional Research Service, December 2016).
31. 5 U.S.C. § 706(2)(A).
32. Abbott, “US Antitrust Laws,” 2.
33. Another substantial litigation risk could arise from the claim that a novel FTC construction of “unfair methods of competition” through rulemaking would violate due process of law, to the extent that it were to “fall substantially outside the norms of established antitrust jurisprudence.” Justin (Gus) Hurwitz, “Chevron and the Limits of Administrative Antitrust,” *University of Pittsburgh Law Review* 76, no. 2 (2014): 267.
34. For a fuller exposition of antitrust error costs, see Thom Lambert and Alden F. Abbott, “Recognizing the Limits of Antitrust: The Roberts Court versus the Enforcement Agencies,” *Journal of Competition Law and Economics* 11, no. 4 (2015): 791–853.
35. *Kimble v. Marvel Entertainment, LLC*, 135 S. Ct. 2401, 2412–13 (2015) (recognizing the “dynamic potential” of the antitrust laws and the flexibility to “revise our legal analysis as economic understanding evolves and . . . to reverse antitrust precedents that misperceived a practice’s competitive consequences”).
36. “Guidelines and Policy Statements,” US Department of Justice, last updated November 12, 2020, <https://www.justice.gov/atr/guidelines-and-policy-statements-0>.
37. Christine S. Wilson, “Antitrust on the Antiques Roadshow: Appraising U.S. Antitrust Laws in a Modern Economy” (remarks, Defining the Digital Market, online event, April 27, 2021), 12. In other words, unlike case adjudications, “rule-making will freeze the legal and economic analysis of any business conduct subject to a rule, preventing the nuanced inquiries that determine whether conduct actually harms consumers.” Wilson, “Antitrust on the Antiques Roadshow,” 12.
38. As FTC Commissioner Christine Wilson points out, FTC competition rules would be very different in nature from FTC consumer protection rules, which may improve the quality of information available to consumers: “At their best, our

consumer protection rules strive to provide consumers with accurate information about products or sectors. . . . Competition rulemaking, in contrast, would ban a specific type of business practice across the economy. This approach is not compatible with current antitrust laws, which are fact-specific and evolve to embrace new economic learning.” Wilson, “Antitrust on the Antiques Roadshow,” 13.

39. Section 16 of the Federal Trade Commission Act, 15 U.S.C. § 56, grants the FTC exclusive authority to litigate a variety of claims under the Federal Trade Commission Act, unless the FTC authorizes the DOJ to do so. One of the claims that the FTC could authorize the DOJ to bring would involve “judicial review of a rule prescribed by the Commission,” 15 U.S.C. § 56(a)(2)(C). At most, however, this would involve having the DOJ defend an FTC rule (assuming the DOJ would be willing to do so). It would not empower the DOJ to bring its own antitrust lawsuits based on FTC rules.
40. In theory, the FTC and the DOJ could agree to eliminate this clearance tradition (which involves a staff coordination mechanism by which the agencies agree to clear matters to each other on a case-specific basis) and instead divide up enforcement responsibilities according to the nature of the infraction. However, such an agreement would prove infeasible. A single investigation could raise a variety of different potential antitrust violations. Moreover, because antitrust statutes currently authorize the DOJ and the FTC to prosecute the same types of violations, neither agency could be expected to be willing to give up its jurisdiction over a particular form of misconduct. Congress could, of course, amend antitrust law to address the problem (for example, by assigning all merger enforcement to the FTC, and all nonmerger enforcement to the DOJ), but in my opinion the political economy of congressional oversight would render such a solution highly improbable. Different committees of jurisdiction oversee the two antitrust enforcers (the House and Senate judiciary committees oversee the DOJ, and the House and Senate commerce committees oversee the FTC), and a legislative amendment that divides up agency responsibilities would narrow the scope of competition issues dealt with by each oversight committee—a very unlikely scenario.
41. There is no reason to believe, as a general matter, that delays stemming from rulemaking proceedings and subsequent rule-related litigation would be shorter than delays arising out of traditional antitrust litigation. In addition, antitrust case law precedents in tandem with enforcement agency guidelines arguably provide greater clarity and legal certainty than rigid norms inserted in competition rules that face an uncertain legal future.