



**United States of America
Federal Trade Commission**

Celebrating Competition Advocacy

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Opening Remarks at
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Concurrences Review and George Washington University Law School

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* The views expressed in these remarks are my own and do not necessarily reflect the views of the Federal Trade Commission or any other Commissioner. Many thanks to my Attorney Advisor, Tom Klotz, for assisting in the preparation of these remarks.

Let me begin by thanking Concurrences Review and the George Washington University Law School for the invitation to this dinner. I look forward to our program this evening. Before I launch into substance, let me give the standard disclaimer: The views I express are my own, and do not necessarily reflect the views of the Federal Trade Commission or any other Commissioner.

Tonight's dinner celebrates the Antitrust Writing Awards. As it says on its website, the goal of this awards program is to promote antitrust scholarship and competition advocacy. I fully support this goal. In fact, I view competition advocacy as perhaps the most important mission of antitrust authorities and others who seek to foster vibrant market competition.

With apologies to those who have heard this story before, I'd like to take a minute to tell the story of how I came to believe in the power of free markets and, indirectly, the importance of competition advocacy. In 1984, my mother and I took a trip behind the Iron Curtain to explore our ancestral roots. I distinctly recall the portion of our trip that involved traveling from West Germany into East Germany by bus. That bus trip starkly illustrated the importance of free-market institutions. In West Germany, the fences were sturdy and straight, the fields immaculate, and the tractors well maintained. Just over the border in East Germany, however, the fences were either rickety or missing entirely, the fields were weedy, and the tractors rusty. Given the shared history of these two countries, it was quite clear that the problem was not with the East German farmers, their equipment, or their land. Rather, it was with East German economic policies that confiscated the fruits of their labor, thereby altering their incentives in a way that over time dramatically reduced both economic output and consumer welfare. Bill Kovacic has a similar story, and has lived his life as a faithful disciple of the gospel of free markets and competition advocacy.

Bill also made a lasting impression on me when he said that measuring the effectiveness of an antitrust agency by the number of enforcement actions that it brings can create the wrong incentives for that agency.¹ Obviously, enforcement is an important tool of every antitrust agency. And the FTC is committed to vigorous enforcement of our competition and consumer protection laws. But we have tools other than enforcement to encourage free markets to flourish. And this is where the important work of competition advocacy can make a difference.

The FTC has two things that are key to effective competition advocacy in the United States – first, an understanding of how markets work; and second, a broad network of relationships with other federal, state, and local governments. For this reason, the FTC is well-positioned to promote the importance of free markets – and to highlight the fact that government intervention frequently distorts market forces and harms competition.

When asked, the FTC frequently offers input on legislation, regulations, and policies that may raise barriers to entry, limit choice, or otherwise hinder competition.² Obviously, government bodies may decide to promote goals other than competition – public health, safety, national security, and so on. But through our comments, we seek to identify the potential harms to competition so that those harms can be weighed against other benefits to consumers and the public interest. It is our hope that policymakers will take these harms to competition into account when assessing the overall desirability of a particular policy or proposal. This type of competition advocacy is especially important because of the durability – in fact, often the permanence – of government barriers to entry and restraints on competition.³

¹ See William E. Kovacic, Hugh M. Hollman & Patricia Grant, *How Does Your Competition Agency Measure Up?*, 7 *European Competition J.* 25, 26-27 (2011).

² See <https://www.ftc.gov/policy/advocacy/advocacy-filings>.

³ See Timothy J. Muris, *State Intervention/State Action – A U.S. Perspective*, Remarks before Fordham Annual Conference on International Antitrust Law & Policy, New York, NY (Oct. 24, 2003) at 4, *available at*

This activity is not new: the FTC has long engaged in competition advocacy. An early example occurred in 1974 when FTC Chairman Lewis Engman took aim at burdensome federal transportation regulations.⁴ In a speech that went on to receive substantial coverage in the popular press, he discussed how the Civil Aeronautics Board raised prices by limiting the entry of new carriers and controlling the distribution of airline routes. He also observed that the Interstate Commerce Commission effectively sanctioned price fixing among trucking companies. Chairman Engman concluded that the country's failure to rely on market forces and sound competition policy led to higher transportation costs. His speech prompted new interest in deregulating the transportation sector. During the ensuing decade, the FTC promoted the deregulation of airlines, railroads, trucking, and inter-city buses. It is likely that the Commission's advocacy, later joined by the Antitrust Division, helped create a policy climate that favored deregulation in the transportation arena.

The FTC has continued to follow the example set by Chairman Engman. One notable area of activity is that of occupational licensing. There are some industries where licensing is important. To take an extreme example, I don't want an unlicensed surgeon operating on my brain. Occupational licensing and credentials serve an important purpose in many areas. But there are other areas where onerous licensing requirements may be imposed by incumbents who seek to limit competition and establish barriers to entry.

https://www.ftc.gov/sites/default/files/documents/public_statements/state-intervention/state-action-u.s.perspective/fordham031024.pdf; RICHARD A. POSNER, ANTITRUST LAW 114 (2d ed. 2001).

⁴ See generally Timothy J. Muris, Creating a Culture of Competition: The Essential Role of Competition Advocacy, Prepared Remarks before International Competition Network, Panel on Competition Advocacy and Antitrust Authorities, Naples, Italy (Sept. 28, 2002).

In the mid 2000s, while researching a paper that I wrote with Mark Schechter on this topic,⁵ I discovered some remarkable statistics. At the time, California required more than 1,600 hours of cosmetology training for hair braiders, roughly 110 hours of training for emergency medical technicians, and only 22 hours for security guards carrying loaded guns.⁶ It would appear appropriate to reduce the disproportionate training requirement for hair braiders relative to training obligations that appear more directly related to health and safety.

To promote a greater understanding of the potential competitive effects of occupational licensing, the FTC has submitted literally hundreds of comments and amicus briefs to agencies, courts, legislatures, and self-regulatory entities across a wide range of industries.⁷ And in 2017, Acting Chairman Maureen Ohlhausen created an Economic Liberty Task Force to renew the Commission's efforts to address occupational licensing regulations.⁸

Given rising health care costs, our efforts have been particularly robust in the health care arena. For instance, we have identified the benefits of telehealth services for underserved and remotely located populations.⁹ And we have advocated expanded roles for advanced practice

⁵ Mark C. Schechter & Christine S. Wilson, *The Learned Professions in the United States: Where Do We Stand Thirty Years After Goldfarb?*, in EUROPEAN COMPETITION LAW ANNUAL 2004 555 (Claus-Dieter Ehlermann & Isabela Atanasiu eds., June 2006).

⁶ *Id.* at 564. As a result of litigation, plaintiff hair braider was no longer subject to cosmetology requirements that did not apply to service she offered. *See Cornwell v. Hamilton*, 80 F. Supp. 2d 1101 (S.D. Cal. 1999).

⁷ For an overview of the advocacy efforts involving occupational licensing and regulation, *see* Prepared Statement of Fed. Trade Comm'n on Competition and the Potential Costs and Benefits of Professional Licensure, before the H. Comm. on Small Bus., 113 Cong. 14 (July 16, 2014), *available at* https://www.ftc.gov/system/files/documents/public_statements/568171/140716professionallicensurehouse.pdf.

⁸ On September 24, 2018, the Economic Liberty Task Force released its report, Options to Enhance Occupational License Portability, *available at* https://www.ftc.gov/system/files/documents/reports/options-enhance-occupational-license-portability/license_portability_policy_paper.pdf.

⁹ *See, e.g.*, FTC Staff Comment to the Dep't of Veterans Affairs regarding RIN 2900-AQ06 – Authority of Health Care Providers to Practice telehealth (Nov. 1, 2017), *available at* https://www.ftc.gov/system/files/documents/advocacy_documents/ftc-staff-comment-department-veterans-affairs-regarding-its-proposed-telehealth-rule/v180001vatelehealth.pdf; FTC Staff Comment to Alaska State Rep. Steve Thompson regarding S.B. 74 (March 25, 2016), *available at*

registered nurses and physician assistants to increase access and choice – while still meeting public health and safety goals.¹⁰

The Commission continues to have an active domestic competition advocacy agenda. During the past year, we have submitted comments to several federal agencies – including the FDA,¹¹ the Consumer Product Safety Commission,¹² and the Departments of Commerce¹³ and Health and Human Services.¹⁴ During that same period, the FTC also has provided input to

https://www.ftc.gov/system/files/documents/advocacy_documents/ftc-staff-comment-alaska-state-legislature-regarding-telehealth-provisions-senate-bill-74-which/160328alaskatelehealthcomment.pdf (addressing proposal to allow licensed Alaska physicians located out-of-state to provide telehealth services in same manner as licensed Alaska physicians located in-state and allow certain Alaska-licensed behavioral health professionals to provide services remotely).

¹⁰ See, e.g., FTC Staff Paper, Policy Perspectives: Competition and the Regulation of Advanced Practice Nurses (March 2014), *available at* <https://www.ftc.gov/system/files/documents/reports/policy-perspectives-competition-regulation-advanced-practice-nurses/140307aprnpolicypaper.pdf>; FTC Staff Comment to the Dep't of Veterans Affairs (July 25, 2016), *available at* https://www.ftc.gov/system/files/documents/advocacy_documents/comment-staff-ftc-office-policy-planning-bureau-competition-bureau-economics-department-veterans/v160013_staff_comment_department_of_veterans_affairs.pdf (supporting proposed rule that would allow APRNs to provide services required by the VA without the oversight of a physician); FTC Staff Comment to the Iowa Dep't of Public Health (Dec. 20, 2016), https://www.ftc.gov/system/files/documents/advocacy_documents/ftc-staff-comment-professional-licensure-division-iowa-department-public-health-regarding-proposed/v170002_ftc_staff_comment_to_iowa_dept_of_public_health_12-21-16.pdf (regarding the appropriate level of supervision of physician assistants).

¹¹ FTC Comment on the Food and Drug Administration's revised Draft Guidance on Citizen Petitions (Dec. 4, 2018) *available at* https://www.ftc.gov/system/files/documents/advocacy_documents/federal-trade-commission-comment-food-drug-administrations-revised-draft-guidance-industry-entitled/p013510_ftc_comment_regarding_fdas_revised_draft_guidance_12-3-18.pdf.

¹² FTC Staff Comment to Consumer Product Safety Comm'n: The Internet of Things and Consumer Product Hazards (June 15, 2018), *available at* https://www.ftc.gov/system/files/documents/advocacy_documents/comment-staff-federal-trade-commissions-bureau-consumer-protection-consumer-product-safety/p185404_ftc_staff_comment_to_the_consumer_product_safety_commission.pdf (warning that poorly secured Internet of Things devices could pose a consumer safety hazard and outlining ways to mitigate such risks).

¹³ FTC Staff Comment to the National Telecommunications & Information Administration: Developing the Administration's Approach to Consumer Privacy (Nov. 9, 2018), *available at* https://www.ftc.gov/system/files/documents/advocacy_documents/ftc-staff-comment-ntia-developing-administrations-approach-consumer-privacy/p195400_ftc_comment_to_ntia_112018.pdf.

¹⁴ Statement of the FTC to the Dep't of Health & Human Servs. regarding the HHS Blueprint to Lower Drug Prices and Reduce Out-of-Pocket Costs (July 16, 2018), *available at* https://www.ftc.gov/system/files/documents/advocacy_documents/statement-federal-trade-commission-department-health-human-services-regarding-hhs-blueprint-lower/v180008_commission_comment_to_hhs_re_blueprint_for_lower_drug_prices_and_costs.pdf (addressing REMS and biologic competition).

various state bodies, including the Pennsylvania Public Utility Commission,¹⁵ the New York State Education Department,¹⁶ and the state legislatures of Washington State,¹⁷ Alaska,¹⁸ Nebraska,¹⁹ and Pennsylvania.²⁰ And tomorrow, the Commission is testifying in Alaska to encourage the repeal of certificate-of-need laws that limit the construction of new hospitals.

Our competition advocacy is not limited to the domestic arena. In the early 2000s, I had the privilege of serving as chief of staff to FTC Chairman Tim Muris. Given his belief in the importance of competition advocacy, Tim insisted that it be the topic of one of the first work

¹⁵ FTC Staff Comment to Pennsylvania Public Utility Comm'n on Rulemaking Regarding Electricity Generation Customer Choice (May 22, 2018), *available at* https://www.ftc.gov/system/files/documents/advocacy_documents/comment-staff-federal-trade-commission-pennsylvania-public-utility-commission-concerning-notice/v180003_ftc_staff_comment_to_the_pennsylvania_puc.pdf.

¹⁶ FTC Staff Comment to Office of Professions of New York State Educ. Dep't, regarding EDU-06-18-00010P Endorsement Requirements for Licensure as a Dentist (Apr. 6, 2018), *available at* https://www.ftc.gov/system/files/documents/advocacy_documents/ftc-staff-comment-new-yorks-proposal-allow-licensure-endorsement-canadian-dental-licenses/v180007_ftc_staff_comment_to_nys_ed_dept_re_dental_licensure_requirements.pdf (addressing proposal to reduce the barriers to licensure of dentists).

¹⁷ FTC Staff Comment to Washington State Rep. Paul Graves regarding S.S.B. 5411/H.B. 1473 (Feb. 9, 2018), *available at* https://www.ftc.gov/system/files/documents/advocacy_documents/ftc-staff-comment-washington-state-rep-paul-graves-regarding-ssb-5411/hb-1473/proposed_advocacy_comment_-_wa_eye_care_final_2-9-18.pdf (addressing legislation that would restrict the use of telehealth eye care).

¹⁸ Statement of the FTC to the Alaska Senate Comm. on Labor & Commerce on Certificate-of-Need Laws and SB 62 (Feb. 6, 2018), *available at* https://www.ftc.gov/system/files/documents/advocacy_documents/statement-federal-trade-commission-alaska-senate-committee-labor-commerce-certificate-need-laws/p859900_ftc_testimony_before_alaska_senate_re_con_laws.pdf.

¹⁹ FTC Staff Comment to Nebraska State Senator Laura Ebke regarding LB299, the Occupational Board Reform Act (Jan. 17, 2018), *available at* https://www.ftc.gov/system/files/documents/advocacy_documents/federal-trade-commission-staff-comment-nebraska-state-senate-regarding-nebraska-lb299-occupational/v180004_ftc_staff_comment_to_nebraska_state_senate_re_lb_299_jan-18.pdf.

²⁰ FTC Staff Comment to Pennsylvania State Rep. Jesse Topper regarding HB 100 (Jan. 3, 2018), *available at* https://www.ftc.gov/system/files/documents/advocacy_documents/federal-trade-commission-staff-comment-pennsylvania-state-house-representatives-regarding-likely/v180002_ftc_staff_comment_to_pa_state_house_re_house_bill_100_and_aprn-cnps.pdf (addressing legislation that would eliminate requirement that advanced practice registered nurse-certified nurse practitioners have written collaborative agreements with physicians in certain circumstances).

streams when the ICN was launched.²¹ Of course, the FTC participates not just in the ICN but in other multilateral organizations, including the Competition Committee of the OECD. These organizations facilitate dialogue and convergence toward sound competition policy and enforcement.

And sometimes competition advocacy takes the form of capacity building. The FTC participates in technical assistance programs, helping countries around the world to develop and enhance their own competition and consumer protection work.²² When looking for individuals who have made significant contributions to the adoption of sound competition policy internationally, Bill Kovacic is among the leaders.

We undertake competition advocacy – whether domestically or internationally – because we believe in the power of markets to deliver the best outcomes for consumers. The interaction of supply and demand, market prices, profit and losses, and private property rights creates efficient incentives to guide and direct economic behavior. When individual market participants act according to these incentives, Adam Smith’s invisible hand directs market outcomes that offer consumers the optimal combination of goods and services at competitive prices.²³ And resources are put to their highest valued use.

²¹ See Muris, *supra* n.4. Since Chairman Muris’s speech to the ICN, the Advocacy Working Group has become one of the most vibrant work streams within the ICN. See, e.g., International Competition Network, Advocacy Working Group, Model Advocacy Provisions Subgroup, Report on Advocacy Provisions (2003), available at <https://www.internationalcompetitionnetwork.org/portfolio/report-on-advocacy-provisions>; ICN Advocacy Working Group, Advocacy Toolkit Part I: Advocacy Process and Tools (May 2011), available at https://www.internationalcompetitionnetwork.org/wp-content/uploads/2018/09/AWG_Toolkit1.pdf; ICN Advocacy Working Group, Advocacy Toolkit Part II: Effective Communication of a Competition Advocacy Message (Apr. 2011), available at <https://www.internationalcompetitionnetwork.org/portfolio/competition-advocacy-toolkit-part-ii>.

²² See generally U.S. Federal Trade Commission’s and Department of Justice’s Experience with Technical Assistance for the Effective Application of Competition Laws (Feb. 6, 2008), available at <https://www.ftc.gov/sites/default/files/attachments/international-assistance-program/ftcdojtechnicalassist.pdf>.

²³ See ADAM SMITH, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS, Book IV Ch. II at 477 (Edwin Cannan ed., Univ. Chicago Press 1976) (1776).

These outcomes stand in stark contrast with the outcomes for consumers we see in the government-controlled economies of Venezuela and North Korea.²⁴ In centrally planned economies, where state ownership is pervasive and market forces are absent, there are no effective incentive mechanisms to direct economic activity. When the government substitutes its own judgment for that of the market, economic actors still pursue their own self-interest – but they do so without incentives that align their interests with the government’s plan. Consequently, command economies produce suboptimal outcomes and are destined to fail.

You may wonder why I’ve chosen to address this topic tonight. I did so because I am concerned about a rising chorus of calls for new and more expansive government programs that will replace market incentives in our country with government control. For example, today we hear proposals like Medicare for All²⁵ that are destined to ignore incentive effects and instead reduce important aspects of competition in health care markets. The FTC addressed this topic under Chairman Muris when, in 2004, the agency issued a report with the DOJ titled *Improving Health Care: A Dose of Competition*.²⁶ This report described factors that can dampen competitive forces and consequently harm consumers. For example, third party payments and extensive government intervention in health care markets both distort incentives. Similarly,

²⁴ See, e.g., Stephania Taladrid, *Venezuela’s Food Crisis Reaches a Breaking Point*, The New Yorker (Feb. 22, 2019), available at <https://www.newyorker.com/news/news-desk/venezuelas-food-crisis-reaches-a-breaking-point>; Benjamin Haas, *Famine to Feast: North Korean defectors awestruck by food choices in South*, The Guardian (Dec. 24, 2018), available at <https://www.theguardian.com/world/2018/dec/24/famine-to-feast-north-korean-defectors-awestruck-by-food-choices-in-south>.

²⁵ See, e.g., Associated Press, *Sanders’ “Medicare for All” expands long-term care benefits* (March 11, 2019), available at <https://www.modernhealthcare.com/politics-policy/sanders-medicare-all-expands-long-term-care-benefits>; Alison Kodjak, *Several Democrats Eyeing a Presidential Run Embrace ‘Medicare for All’* (Jan. 30, 2019), available at <https://www.npr.org/sections/health-shots/2019/01/30/689930022/several-democrats-eying-a-presidential-run-embrace-medicare-for-all>.

²⁶ Federal Trade Comm’n & Dep’t of Justice, *Improving Health Care: A Dose of Competition* (July 2004), available at <https://www.ftc.gov/sites/default/files/documents/reports/improving-health-care-dose-competition-report-federal-trade-commission-and-department-justice/040723healthcarerpt.pdf>.

there are proposals like the Green New Deal²⁷ that, again, depart from our long-standing reliance on markets to deliver the best outcomes for consumers.

I have seen with my own eyes in Eastern Europe and the Soviet Union the natural result of initiatives like these. Long lines, empty shelves, and deprivation were rampant during my trip in 1984. It amazes me that various stakeholders are willing to ignore the vast body of evidence demonstrating the benefits for consumers in market economies, particularly when compared with outcomes in command economies.

But it confirms that there is a continuing need for competition advocacy. As long as stakeholders float proposals for regulatory schemes that are hostile to free markets as a way of organizing our economy, there will be work for competition advocates like me. I am committed to encouraging reliance on competition and market mechanisms to organize economic activity in the United States. Consequently, I lend my voice to those, including President Trump, who are pushing back against the rising tide of voices calling for greater government intervention in the marketplace.²⁸

I believe competition advocacy is an essential part of the FTC's mission and I will encourage the Commission to continue its efforts in this area. But the antitrust agencies cannot be the only voices promoting sound competition policy. This explains why I am pleased to be here tonight. I am delighted that the Antitrust Writing Awards encourage the scholarship and competition advocacy that supplement the agencies' efforts.

²⁷ See H. Res. 109 Recognizing the duty of the Federal Government to create a Green New Deal, 116th Cong., 1st sess., available at <https://ocasio-cortez.house.gov/sites/ocasio-cortez.house.gov/files/Resolution%20on%20a%20Green%20New%20Deal.pdf>.

²⁸ See Donald J. Trump, State of the Union Address, Remarks before United States Congress, Washington, DC (Feb. 5, 2019).