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Can't Anyone Here Play This Game? Judging the FTC's Critics

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Consume or Invest: What Do/Should Agency Leaders Maximize?

William E. Kovacic & David A. Hyman¹

Abstract

In the regulatory state, agency leaders face a fundamental choice: should they “consume” or should they “invest?” “Consume” means launching high profile cases and rule-making. “Invest” means developing and nurturing the necessary infrastructure for the agency to handle whatever the future may bring. The former brings headlines, while the latter will be completely ignored. Unsurprisingly, consumption is routinely prioritized, and investment is deferred, downgraded, or overlooked entirely. This essay outlines the incentives for agency leadership to behave in this way and explores the resulting agency costs (pun intended). The U.S. Federal Trade Commission’s health care portfolio provides a useful case study of how one agency managed and minimized these costs. Our essay concludes with several proposals that should help encourage agency leadership to strike a better balance between consumption and investment.

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Consume or Invest:

What Do/Should Agency Leaders Maximize?

“[P]art of public service is planting trees under whose shade you’ll never sit.”²

I. Introduction

In the management cliché hall of fame, the all-time winner is “pick the low-hanging fruit.”³ Of course, obtaining high-value results with a minimum of effort is excellent advice, at least as a starting point. But, as a general principle, the message is extremely short-sighted. Unless leaders plant trees, there will be neither shade nor fruit for future generations to enjoy.

The conflict between picking and planting – between consuming and investing – is a policy perennial. Good leaders know that any success they may achieve depends on the investment decisions made by their predecessors. In like fashion, good leaders also know that the benefits of any investment they make will be captured by their successors.

Agency leaders are not angels.⁴ They are human beings, who desire personal recognition and advancement. Investment in institutional capability and capacity does not result in newspaper headlines, popular acclaim, or the offer of a high paying private-sector job. Instead, it is the announcement of a “big” case or rulemaking that casts the agency and agency leadership in a positive light.

If there is no turnover in agency leadership, this dynamic would not create a major problem: “when agency leadership does not change, the leaders capture the benefits (and bear the costs) of the outcomes in the cases

² Hillary Clinton Transcript, *Building The ‘Growth and Fairness’ Economy*, WALL ST. J., July 13, 2015, at <http://blogs.wsj.com/washwire/2015/07/13/hillary-clinton-transcript-building-the-growth-and-fairness-economy/>.

³ Lucy Kinder, *Office jargon: The worst culprits in management speak*, THE (UK) TELEGRAPH, Nov. 27, 2015, available at <http://www.telegraph.co.uk/finance/jobs/10393668/Office-jargon-The-worst-culprits-in-management-speak.html>.

⁴ See The Federalist No. 51 (“If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary. In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself. A dependence on the people is, no doubt, the primary control on the government; but experience has taught mankind the necessity of auxiliary precautions.”)

that they initiate.”⁵ But, agency leadership is never indefinite. Indeed, in most of the administrative state, political appointees come and go quite frequently.⁶ A timely departure makes it possible for agency leadership to “outrun their mistakes,” so that when blame-time arrives, the burden will fall on someone else.”⁷ In practice, this means that agency leaders have a significant incentive to launch big cases or rulemaking without being overly concerned about the agency’s capability and capacity to deliver the goods.⁸ Stated more concretely, agency leaders will predictably and systematically slight investment and prioritize consumption. I.B.G.-Y.B.G. (“I’ll be gone, you’ll be gone”) doesn’t apply only to Wall Street.⁹

⁵ David A. Hyman & William E. Kovacic, *Can’t Anyone Here Play This Game? Judging the FTC’s Critics*, GEO. WASH. L. REV. (forthcoming, 2015) (hereinafter *Can’t Anyone Here Play This Game?*).

⁶ PETER H. SCHUCK, WHY GOVERNMENT FAILS SO OFTEN AND HOW IT CAN DO BETTER 316-317 (2014) (“A study of presidential appointees. . . found an overall median tenure of only 2.5 years; one quarter of them served more than 3.6 years while another quarter served for less than eighteen months.”)

⁷ Id., quoting ROBERT JACKALL, MORAL MAZES: THE WORLD OF CORPORATE MANAGERS 90 (1988). Anthony King and Ivor Crewe study the behavior of cabinet ministers and other senior officials in the United Kingdom, and reach the same conclusion: “[t]he sheer passage of time may also result in non-accountability. By the time the Thatcher government’s exciting new personal pensions had been mis-sold on a vast scale, the relevant ministers and probably most of their senior officials had long since passed on. It would have been almost impossible to hold any of them to account. . . the relationship in British politics between, on the one hand, long-term success and failure and, on the other, personal triumph and disgrace is all but non-existent. Most blunderers, however gross their blunders, go unpunished.” ANTHONY KING & IVOR CREWE, THE BLUNDERS OF OUR GOVERNMENTS 354, 359 (2014).

⁸ Timothy J. Muris, *Principles for a Successful Competition Agency*, 72 U. CHI. L. REV. 165, 166 (2005) (“An agency head garners great attention by beginning ‘bold’ initiatives and suing big companies. When the bill comes due for the hard work of turning initiatives into successful regulation and proving big cases in court, these agency heads are often gone from the public stage. Their successors are left either to trim excessive proposals or even to default, with possible damage to agency reputation. The departed agency heads, if anyone in the Washington establishment now cares about their views, can always blame failure on faulty implementation by their successors.”).

⁹ Eric Dash, *What’s Really Wrong with Wall Street Pay*, N.Y. TIMES ECONOMIX BLOG, Sep. 18, 2009, at http://economix.blogs.nytimes.com/2009/09/18/whats-really-wrong-with-wall-street-pay/?_r=0 (“A major cause of the current crisis will most likely prove to be a mismatch of incentives for Wall Street traders. If a mortgage trader made a big bet, he had the chance to land a big bonus if it paid off (and his boss did, too). If, however, that bet didn’t pan out — and the trader lost a lot of money for the firm — he might receive no bonus at all. On the contrary, he might get a princely severance package.

But one thing seems pretty clear: That trader would not receive a “negative bonus.” In other words, he did not personally incur the cost of the trading blowup. Indeed, the open secret on Wall Street was that traders did not risk losing their own money — just the chance of receiving an enormous payout.

Economists call this a moral hazard problem. In bankerspeak, it’s known as the

Building on our previous work,¹⁰ we show the importance of balancing consumption against investment. We focus on the policy mismatches that arise when short-term political appointees lead governmental agencies with long-term policy needs – but our analysis also applies to private and non-profit firms. We also discuss measures that can serve to counteract inadequate attention to investment. We use the health care program of the Federal Trade Commission (FTC) since the mid-1970s to illustrate the importance of sustained investments in capability.

Part II describes how investments in agency capability provide the necessary foundation on which an agency builds successful cases, rules, and other policy initiatives. Part III examines the structural and political incentives that encourage agency leadership to systematically privilege consumption over investment. Part IV provides a case study of the FTC's health care portfolio, where investments in policy R&D have played a critical role in generating policy success. Part V identifies a few modest strategies that might encourage the prioritization of investment by agency leaders. Part VI addresses objections that might be raised against a rebalancing of consumption and investment. Part VII concludes.

II. The Need for Investment

In this essay, we focus on agencies similar to the FTC, but the framework we describe applies to many governmental agencies. Regulatory agencies, like the FTC, have a wide variety of policy

“I.B.G.-Y.B.G.” issue — as in “I’ll Be Gone and You’ll Be Gone” if the trade goes south.”)

The same dynamic has been noted in international development projects: “[w]hen those who design development projects and get them approved by relevant authorities, move on, get promoted, and are not held accountable for results, is that not a case of you’ll be gone and I’ll be gone? If you are not going to be held accountable for implementation and results you don’t have to worry about whether or not the project will produce results under real world conditions. You can cut and paste global best practice on a technical issue into projects to be implemented in vastly different environments. Job done. When implementation challenges inevitably arise and hold things up, well, that is somebody else’s problem. For the design team it is a case of ‘I’ll be gone and you’ll be gone.’” Sina Odugbemi, *I’ll Be Gone and You’ll Be Gone*, World Bank Blog, Sep. 23, 2009, at <http://blogs.worldbank.org/publicsphere/ill-be-gone-and-youll-be-gone>.

¹⁰ Hyman & Kovacic, *supra* note 5; David A. Hyman & William E. Kovacic, *Why Who Does What Matters: Governmental Design and Agency Performance*, 82 GEO WASH. L. REV. 1446 (2014) (hereinafter *Agency Performance*); David A. Hyman & William E. Kovacic, *Competition Agencies with Complex Policy Portfolios: Divide or Conquer?* CONCURRENCES, No. 1-2013, at 9 (hereinafter *Divide or Conquer*); David A. Hyman & William E. Kovacic, *Institutional Design, Agency Life Cycle, and the Goals of Competition Law*, 81 FORD. L. REV. 2163 (2013); William E. Kovacic & David A. Hyman, *Competition Agency Design: What’s on the Menu?* 8 EUR. COMP. J. 527 (2012).

instruments at their disposal.¹¹ An agency can prosecute cases, promulgate rules, conduct studies, issue reports, convene public consultations, issue guidelines, or have agency personnel give speeches. To apply these tools effectively, the agency must do three things well: it must understand the behavior it observes; it must decide whether the behavior is sufficiently problematic to justify intervention; and, it must then choose among the various alternative solutions. The expert performance of these three tasks – requires substantial institutional capability and capacity. Developing that capability and capacity requires an agency to perform effectively in five distinct investment domains.¹²

The first investment domain requires the agency to hire skilled professionals and other personnel, and organize them into teams. These teams can be organized in a variety of ways. For example, the FTC has separate Bureaus for Competition, Consumer Protection, and Economics. The Bureau of Competition and the Bureau of Consumer Protection are staffed by lawyers; the Bureau of Economics is staffed by economists.¹³ As we have noted elsewhere, “the government is already thickly planted with bureaus, agencies, and inter-agency working groups, departments and commissions” – and each has its own internal organization designed to effectuate the statutory mission.¹⁴

Whatever organizational configuration is chosen, a successful operating unit will contain teams with strong analytical skills and deep expertise in the relevant subject matter.¹⁵ Good teams prosper by reason of their intellectual acumen and intuition, honed by repeated study of specific

¹¹ For a discussion of how effective policy making often requires a wide range of instruments, see *More than Law Enforcement: The FTC's Many Tools – A Conversation with Tim Muris and Bob Pitofsky*, 72 ANTITRUST L.J. 773 (2005) (hereinafter Muris/Pitofsky Conversation).

¹² The importance of these factors is examined in Hyman & Kovacic, *Agency Performance*, *supra* note 7, at 1474-75; William E. Kovacic, *The Digital Broadband Migration and the Federal Trade Commission: Building the Competition and Consumer Protection Agency of the Future*, 8 J. ON TELECOM. & HIGH TECH. 1, 7 (2010); see also King & Crewe, *supra* note 7, at 382-84 (identifying “skills shortages” as important cause of failure of government programs”).

¹³ See Hyman & Kovacic, *Divide or Conquer*, *supra* note 10. See also Luke Froeb, Paul Pautler & Lars Hendrik Roeller, *The Economics of Organizing Economists*, 76 ANTITRUST L. J. 569 (2009) (describing the impact of the FTC relying on multi-disciplinary teams of lawyers and economists v. having lawyers and economists organized into separate bureaus).

¹⁴ Hyman & Kovacic, *Agency Performance*, *supra* note 10. See also Jennifer Nou, *Intra-Agency Coordination*, 129 Harv. L. Rev. __ (forthcoming, 2015)

¹⁵ See William E. Kovacic, *The Federal Trade Commission at 100: Into our 2nd Century* 46-49 (Jan. 2009) (importance of talented personnel to FTC performance), available at <http://www.ftc.gov/workshops/ftc100/docs/ftc100rpt>.

problems. For example, the FTC economists and lawyers who review mergers in the pharmaceutical industry have analyzed dozens of transactions over the past few decades.¹⁶ They have a sophisticated understanding of individual firms, drug research pipelines, and industry trends. The personnel on the groups changes over time, yet the FTC pharmaceutical mergers team has sustained a good mix of experienced managers and case handlers and newer employees who learn from longstanding team members.

Second, the agency must develop an administrative infrastructure (both personnel and physical facilities) to support substantive projects. A major component of the FTC's consumer protection work consists of prosecuting fraudulent schemes involving health care products and services.¹⁷ These and other anti-fraud initiatives have benefitted immensely from investments the FTC made in the 1990s to build an electronic data base (Consumer Sentinel) that collects and analyzes complaints about alleged misconduct.¹⁸ By amassing complaints received by the FTC and a variety of governmental and non-governmental partners, Consumer Sentinel enables the FTC's consumer protection specialists to identify fraudulent scams quickly and assemble the evidence necessary to initiate litigation.¹⁹ Thus, the investment in Consumer Sentinel made it much easier for the FTC to detect and remedy serious fraud on a real-time basis.²⁰

The FTC has made similar investments in mobile telephony.²¹

¹⁶ Markus H. Meier, Bradley S. Albert & Saralisa Brau, *Overview of FTC Antitrust Actions in Pharmaceutical Services and Products* 26-64 (discussing FTC pharmaceutical mergers program), available at <http://www.ftc.gov/system/files/attachments/competition-policy-guidance/rxupdate.pdf>.

¹⁷ See, e.g., FTC Press Release, *FTC, All 50 States and D.C. Charge Four Cancer Charities With Bilking Over \$187 Million from Consumers* (May 19, 2015), available at <http://www.ftc.gov/news-events/press-releases/2015/05/ftc-all-50-states-dc-charge-four-cancer-charities-bilking-over>; FTC Press Release, *No Silver Lining for Marketers of Bogus Supplement; Federal Agencies Crack Down on Health Fraud* (June 19, 2003), available at <http://ftc.gov/news-events/press-releases/2003/06/no-silver-lining-marketers-bogus-supplement-federal-agencies>; FTC Press Release, *Company Touting Unproven Cancer Treatment Agrees to Settle FTC Charges* (July 24, 2002), available at <http://www.ftc.gov/news-events/press-releases/2002/07/company-touting-unproven-cancer-treatment-agrees-settle-ftc>.

¹⁸ See *Muris/Pitofsky Conversation*, *supra* note 11, at 789-91 (discussing creation and operation of Consumer Sentinel).

¹⁹ FTC, *Consumer Sentinel Network* (describing functions of Consumer Sentinel Network), available at <http://www.ftc.gov/enforcement/consumer-sentinel-network>.

²⁰ See *Muris/Pitofsky Conversation*, *supra* note 11, at 796-97 (describing impact of Consumer Sentinel).

²¹ On the FTC's programs in this area, see FTC, Staff Report, *Paper, Plastic ... or Mobile? An FTC Workshop on Mobile Payments* (Mar. 2013), available at

Communications technology is one of the most dynamic areas of commerce, and the FTC has to continuously invest in order to keep up. In response, the FTC has hired technologists with expertise in the relevant technical disciplines and established an internal “mobile laboratory” to detect fraud in the use of mobile telephones.²²

A third key ingredient of agency capability is the depth and currency of its knowledge about the sectors and practices that are subject to the agency’s scrutiny. As suggested above, one element of this knowledge base is the accumulated experience of agency analysts in dealing with specific industries and commercial practices. Another important source of an agency’s knowledge consists of investments that are the public policy equivalent of the research and development expenditures that a private company makes to create new or improve existing products.²³

Policy R&D²⁴ can take various forms, including empirical studies of individual sectors or commercial phenomena, legal research concerning the legal predicates for future cases, hearings and public consultations, and retrospective assessments of completed agency initiatives.²⁵ These measures have a common purpose – to improve the agency’s ability to identify areas of needed intervention; devise useful remedies; and give advice to legislators and other government agencies. The urgency to make these

<http://www.ftc.gov/reports/paper-plastic-or-mobile-ftc-workshop-mobile-payments>; FTC, Staff Report, Mobile Privacy Disclosures – Building Trust Through Transparency (Feb. 2013), available at <http://www.ftc.gov/sites/default/files/documents/reports/mobile-privacu-disclosures-building-trust-through-transparency-federal-trade-commission-staff-report/130201mobileprivacyreport.pdf>.

²² See FTC, Division of Litigation, Technology & Analysis (describing FTC’s Mobile/Internet Lab), available at <http://www.ftc.gov/about-ftc/bureaus-offices/bureau-consumer-protection/our-divisions/division-litigation-technology>; Joel Schectman, *Q&A David Vladeck, Former Director of FTC Consumer Unit*, Risk & Compliance Journal, Wall St. J., Jan, 22, 2014 (“[W]e did not have the technologists on staff at the time and to do highly technical cases of the kind we did during my [Vladeck’s] tenure, and doing still today, you need substantial forensic work. One of the things we did was bring in technologists to have on staff. We set up a laboratory to do forensic work on mobile devices. You need to have people who can view evidence captures on mobile devices and really understand the ecosystem behind the screen. I think we were the first civil law enforcement agency anywhere that had a fully functioning lab for mobile devices.”).

²³ Kovacic, *supra* note 15, at 91-109 (describing FTC investments that increase the agency’s knowledge base).

²⁴ This phrase originated in Timothy J. Muris, *Looking Forward: The Federal Trade Commission and the Future Development of U.S. Competition Policy*, 2003 COLUMBIA BUS. L. REV. 359.

²⁵ See *Muris/Pitofsky Dialogue*, *supra* note 11, at 774-76 (discussing FTC policy R&D tools); William E. Kovacic, *Measuring What Matters: The Federal Trade Commission and Investments in Competition Policy Research and Development*, 72 Antitrust L.J. 861 (2005) (same); Kovacic, *supra* note 15, at 91-109 (same).

investments is especially great in sectors, such as health care, that feature high levels of technological and organizational dynamism.²⁶ Congress gave the FTC a diverse portfolio of policy R&D tools,²⁷ and their application has figured prominently in the agency's health care programs.

A fourth form of investment that fosters program success is the development of internal procedures that enable the agency to make intelligent decisions about how to deploy its limited resources. There are many ways that an agency can structure its internal decision making process.²⁸ Good agency practice includes continuing efforts to improve these processes to test evidence rigorously and to counteract behavioral phenomena, such as confirmation bias, that might otherwise cause the agency to slight theories or facts that dictate a reassessment of its views.²⁹

Finally, an agency must "play well with others." In many fields of regulation, policy making duties are shared by a multiplicity of public bodies within individual jurisdictions and across nations.³⁰ In a world of increasing policymaking multiplicity and fragmentation, the attainment of good regulatory solutions requires interagency and inter-jurisdictional engagement. Some forms of engagement take place through formal mechanisms such as memoranda of understanding between two or more agencies, or a network that brings together multiple agencies within a single jurisdiction or across jurisdictions.³¹ Others can be highly informal, such as a custom of senior managers or case handlers from different agencies meeting regularly to discuss matters of common concern. These formal and informal means of coordination and cooperation do not happen without investment – although investment does not guarantee that other agencies

²⁶ William E. Kovacic, *Antitrust in High-Tech Industries: Improving the Federal Antitrust Joint Venture*, 19 GEO. MASON L. REV. 1102-03 (2012).

²⁷ Foremost among these are provisions that authorize the FTC to collect information on industrial conditions and specific practices outside the context of law enforcement and to publish studies. 15 U.S.C. §§ 46, 49. Their significance is discussed in William E. Kovacic, *The Federal Trade Commission as Convenor: Developing Regulatory Policy without Litigation or Rulemaking*, 13 COLO. TECH. L.J. 17, 19 (2015).

²⁸ See William E. Kovacic et al., *Merger Control Procedures and Institutions: A Comparison of EU and US Practice*, 59 *Antitrust Bull.* 55 (2014) (comparing European Union and U.S. merger control processes).

²⁹ James C. Cooper & William E. Kovacic, *Behavioral Economics and Regulatory Agency Decisionmaking*, 41 *J. Reg. Econ.* 41 (2011).

³⁰ Hyman & Kovacic, *Agency Performance*, *supra* note 10, at 1480-81.

³¹ See Hugh M. Hollman & William E. Kovacic, *The International Competition Network: Its Past, Current, and Future Role*, 20 *MINN. J. INT'L L.* 274 (2011) (describing development of formal networks that bring together competition agency officials to discuss matters of common concern); *Muris/Pitofsky Conversation*, *supra* note 11, at 795 (describing FTC agreements with foreign governments to cooperate on consumer protection matters)

will decide to make nice.³²

An agency that does all of these things increases the chances of attaining policy success. The requisite investments will seldom happen by accident. Rather, each generation of agency leadership must make a commitment to build institutional capability and capacity, and continuously examine whether it is investing enough, and in the right things. As we discuss more fully below, these investments are the foundation on which good outcomes depend.

III. The Sirens of Consumption

If investment is so important, why do we think that agency leadership routinely defers, downgrades, or overlooks it?³³ The explanation is simple: the Sirens of consumption are hard to resist.³⁴ What agency leader can resist the temptation of being the one to announce an attention-grabbing intervention, such as the initiation of a case against a major industry player, or the launch of a new rule-making project? The resulting press conference and favorable academic commentary provide ready-made opportunities for credit-claiming. Professional reputations and post-public service employment opportunities will rise or fall depending on the volume of an agency's activity.³⁵ Simply stated, the initiation of cases and rule-

³² There have been periodic bitter disputes between the FTC and DOJ over "clearance" (i.e., which agency should handle certain types of cases; the substantive content of a report on Section 2 of the Sherman Act; and the DOJ's recommendation against the granting of certiorari in *Schering-Plough*, an early FTC reverse payment case. One of us (Kovacic) ruefully noted in an interview that despite continuous investment, "we have an archipelago of policy-makers, with very inadequate ferry service between the islands. . . In too many instances, when you go to visit those islands, the inhabitants come out with sticks and torches and try to chase you away." Jonathan B. Baker, *Turning on Itself*, THE NEW REPUBLIC, Sep. 14, 2008, at <https://newrepublic.com/article/63428/turning-itself>.

³³ See Kovacic, *supra* note 12, at 7; Muris, *supra* note 8.

³⁴ William E. Kovacic, *Rating the Competition Agencies: What Constitutes Good Performance?* 16 GEO. MASON L. REV. 903, 923 (2009) ("The perceived imperative to create new cases can create a serious mismatch between commitments and capabilities, as the sirens of credit claiming beckon today's manager to overlook the costs that improvident case selection might impose on the agency in the future, well after the incumbent manager has departed.")

³⁵ Consumption increases post-public service employment opportunities in two ways. First, consumption enhances reputation directly. And, those responsible for creating a regulatory labyrinth are ideally situated to guide affected firms through the maze – and be handsomely compensated for doing so. In nautical terms, having created underwater obstacles at the entry to the harbor, the former regulator then acts as the pilot who can bring ships safely to shore. See Hyman & Kovacic, *Can't Anyone Here Play This Game?*, *supra* note 5 (discussing private sector demand for former regulators who played a role in creating regulatory mechanisms).

making projects are the readily observable events by which agency leadership is typically judged.³⁶

Worse still, the temporal disconnect between launches and (sometimes crash) landings means that agency leadership does not bear the full cost of launching cases and rule-making that should never have been initiated. The same dynamic applies to cases and rule-making that should have been initiated, but failed because there was insufficient capability and capacity to handle the matter in question. Indeed, agency leadership may not bear any of the costs, if they are able to blame their successors for the (usually unspecified) mistakes that supposedly caused a bad outcome.³⁷

Politics can also encourage excessive and unwise consumption. When the price of gasoline rose sharply in the early-1970s, Congress demanded that the FTC take action to protect independent refiners from alleged overreaching by large, vertically integrated petroleum companies.³⁸ The FTC responded in 1973 by filing *In re Exxon*, a “shared monopolization” case seeking the vertical disintegration of the eight largest petroleum refiners in the United States.³⁹ The sprawling case was unmanageable from the start, and it fast became seen by FTC staff as a professional chain gang where morale and careers went to die.⁴⁰ In 1981,

³⁶ Kovacic, *supra* note 12, at 10-11. See also William E. Kovacic, *The Modern Evolution of U.S. Competition Policy Norms*, 71 ANTITRUST L. J. 377, 404-05, 408-10 (2004) (describing and criticizing tendency of commentators to use prosecution of cases as main measure of competition agency quality); King & Crewe, *supra* note 7, at 333-45 (noting “hyperactivism” of ministers in U.K.). Unsurprisingly, the preeminent annual ranking of competition agencies focuses chiefly on the prosecution of cases. Global Competition Review, 2015 Rating Enforcement – The Annual Ranking of the World’s Leading Competition Authorities (2015).

³⁷ William E. Kovacic, *Federal Antitrust Enforcement in the Reagan Administration: Two Cheers for the Disappearance of the Large Firm Defendant in Nonmerger Cases*, 12 RES. L. & ECON. 173, 189 (1989) (“[A] short-term perspective may incline the manager to launch headline-grabbing initiatives with inadequate regard for the matter’s underlying merits or the ultimate cost to the agency, in resources and reputation, in litigating the case. If the case goes badly, the manager responsible for the take-off rarely is held to account for the crash landing. He can hope the passage of time will dim memories of his involvement, he can blame intervening agents for their poor execution of his good idea, or he can shrug his shoulders and say he was making the best of the fundamentally bad situation that policymakers encounter in the nation’s capital.”) See also Muris, *supra* note 8.

³⁸ William E. Kovacic, *The Federal Trade Commission and Congressional Oversight of Antitrust Enforcement*, 17 TULSA L. REV. 587, 637-39 (1982).

³⁹ *In re Exxon Corp.*, [1973-1976 Transfer Binder] Trade Reg. Rep. (CCH) ¶ 20,388 (Dkt. No. 8934, July 17, 1973), complaint dismissed, 98 F.T.C. 453 (1981). The run-up to the case and the political pressure that inspired it are examined in Timothy J. Muris & Bilal K. Sayyed, *The Long Shadow of Standard Oil: Policy, Petroleum and Politics at the Federal Trade Commission*, 85 S. CAL. L. REV. 843, 859-64 (2011).

⁴⁰ Edward Cowan, *Attorneys Quit F.T.C. Oil Case*, N.Y. Times, June 26, 1978, at D-1.

after eight years of pre-trial discovery, the Commission dismissed the case.⁴¹ The case consumed massive resources and inflicted lasting harm on the FTC's reputation.⁴²

The same pattern recurred thirty years later, albeit with a different outcome. The price of gasoline spiked repeatedly during 2000-2008, and members of Congress used a variety of techniques to induce the FTC to take action.⁴³ In one instance, two members of the Senate imposed a "hold" on the nomination of Deborah Majoras to be the agency's chair.⁴⁴ The hold was released only after the Commission in May 2004 opened an investigation to study the decision of Chevron to close a refinery in Bakersfield, California.⁴⁵

Congress held multiple hearings, during which legislators berated agency leaders for allowing gasoline prices to rise. Perhaps the most striking of these legislative show trials was the appearance of Chairman Majoras in May, 2006 before the Senate Committee on Commerce, Science & Transportation to defend an FTC report on the impact of Hurricane Katrina and Hurricane Rita on petroleum product prices.⁴⁶ The report found no evidence of supplier collusion, and instead concluded that the observed price spikes were the inevitable result of national disasters that severely disrupted refining and transport operations. Despite demagogic and frequently ad hominem interrogation, Majoras held firm. She refused to commit the agency to use its antitrust law enforcement powers in a futile, expensive attempt to tame forces entirely beyond the agency's control.

To be sure, the problem is not unique to gasoline. Elected officials routinely demand that regulators "do something" when the price of heating

⁴¹ Exxon Corp., 98 F.T.C. 453, 459 (1981).

⁴² William E. Kovacic, *Standard Oil Co. v. United States and Its Influence on the Conception of Competition Policy*, 2012 COMP. L.J. 89 (discussing FTC's prosecution of petroleum industry shared monopolization case and its long-term effects on the agency). Kovacic spent two years working on the *Exxon* case, and saw first-hand the corrosive effects of requiring staff to work on a matter that all involved knew to be doomed.

⁴³ This episode is recounted in Muris & Sayyed, *supra* note 39, at 903-07.

⁴⁴ One of us (Kovacic) was the FTC's General Counsel at this time and observed the congressional moves to delay consideration of the Majoras nomination.

⁴⁵ The opening and closing of the FTC inquiry are described in FTC Press Release, *FTC Closes its Investigation of Shell Oils Decision to Close Bakersfield, California, Refinery* (May 25, 2005), available at <http://www.ftc.gov/news-events/press-releases/2015/05/ftc-closes-its-investigation-shell-oils-decision-close>.

⁴⁶ Federal Trade Commission Investigation of Gasoline Price Manipulation and Post-Katrina Price Gasoline Increases: A Commission Report to Congress (May 22, 2006), available at <http://www.ftc.gov/sites/default/files/documents/reports/federal-trade-commission-investigation-gasoline-price-manipulation-and-post-katreina-gasoline-price/060518publicgasolinepriceinvestigationreportfinal.pdf>.

oil, natural gas, electricity, and other important consumer products rises dramatically. Rather than attribute a price increase to causes beyond the control of the product's suppliers, such as a sudden boost in input costs, elected officials typically insist that wrongful supplier behavior (e.g., collusion, fraud, price-gouging) accounts for the unwanted event. In these circumstances, the regulator will face intense pressure to use its powers to address the problem. Intervention (in the form of an investigation or case) is faster and easier than attempting to educate legislators and cabinet officials that the root cause of the market shock lies elsewhere – and the intervention may actually be counter-productive.⁴⁷ Indeed, the failure to intervene may be viewed by members of Congress as dereliction of duty.

Caving in to the pressure to intervene will provide momentary relief to agency leadership, but at a significant long-term institutional cost. Filing the *Exxon* case got Congress off of the FTC's back, but it inflicted painful long-term harm. And, by the time the bill comes due, those who were responsible for the initial decision to intervene will be long gone – and will find it easy to blame their successors if anyone bothers to ask.⁴⁸

A third factor encouraging consumption is a miscalculation of the likely difficulty, costs, and risks of the contemplated intervention. The decision to launch a case should rest upon a clear-headed understanding of how hard it will be to gather relevant evidence; the legal foundations of the case; the type and quality of personnel required for effective implementation; and the risks to the agency of proceeding. Each of these should be evaluated within the context of the agency's overall portfolio of existing commitments. If an agency does not undertake this analysis, leadership will tend to initiate matters without a realistic view of what it

⁴⁷ Price-gouging legislation provides a particularly clear example. See Michael A. Sallinger, *Give Your Cabdriver a Fat Tip!*, Wall St. J. June 24, 2006, at <http://www.wsj.com/articles/SB115110485824489519>. (“If the public were to ask my advice on the wisdom of price gouging legislation, however, I would counsel against it. When disasters like Katrina and Rita occur, prices must go up. The difficulty is that without knowing the details of a disaster, it is impossible to specify in advance how much prices need to rise. As result, price-gouging legislation -- particularly if penalties are severe and enforcement is aggressive -- will pose two distinct risks. One is that prices will not rise to market-clearing levels and gas stations will run out of gasoline. As unpleasant as high-priced gasoline is, running out will be even worse. The other is that gas stations will shut down rather than risk an allegation of price gouging.”) See also Steven Mufson, *Congress Tells FTC to Define Price Gouging*, Wash. Post, May 6, 2006 (““Many economists cringe when they hear politicians talk about price gouging,” said N. Gregory Mankiw, an economics professor at Harvard University and former chairman of President Bush's Council of Economic Advisers. “To economists, the price system is central to how market economies allocate resources. Sometimes prices need to rise to balance supply and demand, even if that outcome is politically unpopular.”)

⁴⁸ See *supra* note 37.

will take to complete them successfully.

The IBM case provides a striking example of the problem. The case was launched by the Department of Justice (DOJ), on the final day of Lyndon Johnson's presidency in January 1969.⁴⁹ Among other relief, DOJ sought to break IBM into four or more computer companies.⁵⁰ It quickly became apparent that the case was in trouble.⁵¹ DOJ had vastly underestimated the doctrinal, evidentiary, and administrative difficulties of seeking to take apart what was, perhaps, the paramount exemplar of American technological progress in the post-World War II era.⁵² Nor did DOJ anticipate the scope and ferocity of defense that IBM and its external advisors would mount to oppose the government. IBM's ensemble of exceptional trial lawyers and expert economists overwhelmed a DOJ prosecution team afflicted with disorganization and rapid turnover in personnel.⁵³ In 1982 DOJ abandoned the case,⁵⁴ whose duration had "spanned the terms of five Presidents, nine Attorney Generals, and seven Assistant Attorney Generals."⁵⁵ The trial consumed 700 calendar days, generated a transcript of over 104,000 pages, and featured 17,000 exhibits.⁵⁶ In Robert Bork's phrase, the IBM case was "the Antitrust Division's

⁴⁹ *United States v. IBM Corp.*, [1961-1970 Transfer Binder] Trade Reg. Rep. (CCH) ¶ 45,069 (S.D.N.Y. Jan. 17, 1969) (complaint alleging monopolization and attempted monopolization).

⁵⁰ See FRANK FISHER ET AL., *FOLDED, SPINDLED, AND MUTILATED – ECONOMIC ANALYSIS AND U.S. v. IBM 353-68* (1983) (reprinting DOJ's original complaint and amended complaint against IBM).

⁵¹ Donald Baker, who served as DOJ's Assistant Attorney General for Antitrust from 1976 to 1977, wrote that "[b]y even the mid-1970s, it was clear that the [IBM] case was a relic." Donald Baker, *Government Enforcement of Section Two*, 61 Notre Dame L. Rev. 898, 8190 (1986) (hereinafter *Section Two*).

⁵² The history of the IBM case and DOJ's missteps in the formulation and litigation of the matter are recounted in John E. Lopatka, *United States v. IBM: A Monument to Arrogance*, 68 Antitrust L.J. 145 (2000). We also based the statements in this paragraph on interviews that Kovacic conducted with Edwin Zimmerman, a senior official at DOJ at the time of the filing of the IBM case, and Frederic M. Scherer, who served as DOJ's chief economic expert on the case.

⁵³ IBM's successful defense against the DOJ case is reviewed in JAMES STEWART, *THE PARTNERS* 53-113 (1983). Among the stars of the IBM defense team was David Boies, a young partner at Cravath, Swaine & Moore. Years later Boies headed the litigation trial team in DOJ's successful prosecution in the late 1990s of Microsoft for illegal monopolization of the market for computer operating systems.

⁵⁴ *In re International Business Machs. Corp.*, 687 F.2d 591, 593 (2d Cir. 1982) (ordering the issue of a writ of mandamus directing district court to dismiss complaint in accordance with stipulation of the parties).

⁵⁵ Baker, *Section Two*, supra note 51, at 899 n. 13.

⁵⁶ *Post-Mortem on IBM Case Provides Forum for Conflicting Perspectives*, 42 Antitrust & Trade Reg. Rep. (BNA) 310-11 (1982).

Vietnam.”⁵⁷ These examples make it clear that an agency’s failure to think carefully in advance about its capability to deliver on a single major case can be devastating.

What happens when agency leadership ignores these points, and chases the Sirens of consumption? The FTC in the 1970s provides a clear case study of what can go wrong. As we noted in an earlier article, “it is one thing to launch a single bet-the-agency case and entirely another to launch a half-dozen of those cases and an equal number of significant rulemaking projects simultaneously—let alone staff each case and rulemaking project so as to maximize the likelihood of good outcomes across the entire portfolio.”⁵⁸

Despite the obvious risks, that is more or less what the FTC did in the 1970s. Consider a partial list of the agency’s competition matters during this period:

- Shared monopolization cases involving the country’s eight leading petroleum refiners (the *Exxon* case)⁵⁹ and the four leading producers of ready-to-eat breakfast cereals;⁶⁰
- Cases alleging monopolization or attempted monopolization based on predatory pricing against leading producers in the bread, coffee, and reconstituted lemon juice sectors;⁶¹
- A challenge to the long-standing practice of the nation’s leading soft-drink bottlers for using exclusive territories to distribute their products;⁶²
- A case alleging attempting monopolization in the chemicals sector by means of strategic announcements of capacity expansion;⁶³

⁵⁷ This quotation appears in Baker, *Section Two*, supra note 51, at 899 n.13.

⁵⁸ Hyman & Kovacic, supra note 5

⁵⁹ *Exxon Corp.*, 98 F.T.C at 456-59 (complaint alleging agreement to monopolize and maintenance of a noncompetitive market structure).

⁶⁰ *Kellogg Corp.*, 99 F.T.C. 8, 11-16 (1982) (complaint alleging maintenance of a highly concentrated, noncompetitive market structure and shared monopolization).

⁶¹ *International Tel. & Tel. Corp.*, 104 F.T.C. 280, 284-85 (1984) (complaint alleging attempted monopolization in the bread sector); *General Foods Corp.*, 103 F.T.C. 204, 206-08 (1984) (complaint alleging attempted monopolization in production and sale of instant coffee); *Borden, Inc.*, 92 F.T.C 669, 671-72 (1978) (complaint alleging monopolization and maintenance of a noncompetitive market structure in production and sale of reconstituted lemon juice), enforcement granted, 674 F.2d 498, 517 (6th Cir. 1982), modified, 102 F.T.C. 1147 (1983).

⁶² *Coca-Cola Co.*, 91 F.T.C. 517 (1978), remanded for dismissal, 642 F.2d 1387 (D.C. Cir. 1981).

⁶³ *E.I. duPont de Nemours & Co.*, 96 F.T.C. 653, 654-55 (1980) (complaint alleging

- A case alleging monopolization and attempted monopolization against the world's leading producer of plain-paper photocopiers;⁶⁴
- A case challenging illegal monopolization and attempting monopolization against one of the largest U.S. producers of citrus fruit;⁶⁵
- A case attacking the American Medical Association for imposing restrictions on advertising and marketing in the medical profession;⁶⁶
- A case designed to lead to the repudiation of the rule of *United States v. Colgate* which gave manufacturers protection from antitrust liability when unilaterally imposing resale price maintenance upon downstream firms;⁶⁷
- Two cases challenging the parallel, non-collusive adoption of facilitating practices by rival producers;⁶⁸
- A case challenging alleged discrimination by the publisher of airline timetables in its presentation of flight information.⁶⁹

The over-extension of the FTC's 1970s antitrust program was matched by an even more astonishing agenda of consumer protection rule-making proceedings.⁷⁰ Among other matters, the FTC "proposed rules that would have: imposed disclosures on over-the-counter medicines; required inspections, disclosures and warranties on used cars; established definitions (like 'natural') for foods; regulated mobile home warranties; and banned

attempted monopolization).

⁶⁴ Xerox Corp., 86 F.T.C. 364, 367-68 (1975) (complaint alleging monopolization, attempted monopolization, and maintenance of a highly concentrated market structure).

⁶⁵ Sunkist Growers, Inc., 97 F.T.C. 443, 445-49 (1981) (complaint alleging monopolization, attempted monopolization, and maintenance of a noncompetitive market structure).

⁶⁶ American Medical Ass'n, 94 F.T.C. 701 (1979), aff'd in part, modified in part, 638 F.2d 443 (2d Cir. 1980), aff'd by an equally divided Supreme Court, 455 U.S. 676 (1982).

⁶⁷ Russell Stover Candies, Inc., 100 F.T.C. 1 (1982), enforcement denied, 718 F.2d 256 (8th Cir. 1983).

⁶⁸ Boise Cascade, 91 F.T.C. 1 (1978), enforcement denied, 637 F.2d 573 (9th Cir. 1980); Ethyl Corp., 101 F.T.C. 425 (1983), enforcement denied, 729 F.2d 128 (2d Cir. 1984).

⁶⁹ Reuben H. Donnelley Corp., 95 F.T.C. 1 (1976), enforcement denied, 630 F.2d 920 (2d Cir. 1980).

⁷⁰ On the FTC's consumer protection rulemaking agenda in the 1970s, see William MacLeod et al., *Three Rules and a Constitution: Consumer Protection Finds Its Limits in Competition Policy*, 72 ANTITRUST L.J. 943, 951-54 (2005).

certain credit practices. . .”⁷¹ There were almost thirty major rule-making projects in progress during this period – and the then-FTC Chairman (Michael Pertschuk) had announced that going forward, rule-making might be based on public policy grounds, including to “prohibit businesses from hiring illegal aliens, to prevent companies from cheating on taxes, and to require companies with repeated environmental violations to place an environmental on their Boards.”⁷² Pertschuk subsequently acknowledged that he had presided over a rule-making “frenzy.”⁷³

Even if one boldly assumes that each ambitious decision by the FTC to undertake each of these matters, when seen in isolation, made good substantive sense, the full collection completely overwhelmed the FTC’s institutional capacity to deliver. To add new, difficult initiatives to an already crowded agenda without accounting for implementation burdens was a breathtaking example of administrative malpractice.⁷⁴

In fairness, the fault for overextension sometimes lies with legislators, who assign new duties to agencies without considering capability and capacity. These new responsibilities only rarely come with additional resources attached. As we have explained in other work, the agency then faces the choice of either ignoring selected responsibilities or spreading its resources thin in trying to do it all.⁷⁵ The first strategy is a form of regulatory disobedience, and the second is a formula for inevitable failures in delivery.

In reciting the dangers of overextension, we are not suggesting that agency leadership should forego consumption, and devote all of their efforts to investment. Consumption, in the form of law enforcement and rulemaking, is essential to the work of a good regulatory agency. The willingness to litigate cases and the ability to pursue them to a successful end are vital to an agency’s credibility, effectiveness, and legitimacy. Litigated cases set the boundaries of lawful behavior. A regulator that

⁷¹ Id.

⁷² Id., citing Timothy J. Muris & J. Howard Beales, *The Limits of Unfairness Under the Federal Trade Commission Act* 14 Ass’n of Nat’l Advertisers (1991)

⁷³ MICHAEL PERTSCHUK, REVOLT AGAINST REGULATION 54 (1982)

⁷⁴ Kovacic, *supra* note 34, at 923 (“One could understand a decision to bring one innovating and potentially path-breaking shared monopolization case, but it was improvident to bring two. One could imagine a decision to bring one or two predatory pricing cases, but it overtaxed the agency’s capacity to do three at once. To do four significant dominance cases at one time might have been manageable. To do eight was unwise. Incumbent leadership began new matters without asking difficult questions about how the agency would bring them to a successful end.”) See also Kovacic, *supra* note 15.

⁷⁵ Hyman & Kovacic, *Agency Performance*, *supra* note 10. Dodd-Frank placed the new Consumer Financial Protection Bureau in precisely this unenviable position. Id.

cannot credibly commit that it will challenge misconduct is quickly recognized to be a paper tiger.⁷⁶ Litigation also provides an indispensable means for obtaining remedies for the victims of misconduct. Rulemaking is similarly important as a means to correct problems that pervade entire economic sectors, or appear in multiple areas of commerce. Finally, establishing a reputation for courageously taking on hard problems can build internal morale and attract high quality talent.

Simply stated, a sensible scorecard for agency performance must consider not just whether cases or rulemaking are launched, but when and how they land.⁷⁷ The issue is not whether agency leadership aims at ambitious targets, but is instead the “ability to match means to ends.”⁷⁸ We should harness the personal ambition and zeal of agency leadership in the service of effective policy implementation.⁷⁹

IV. A Case Study of Balanced Investment and Consumption

The FTC’s health care portfolio shows the benefits of a balanced approach to investment and consumption. Since the 1970s, the FTC has devoted considerable effort to health care, beginning with a major case challenging restrictions on advertising in the medical profession,⁸⁰ and going on from there.⁸¹ In health care, the FTC has batted through its entire rotation of policy tools, including numerous cases, rule-making, advisory opinions, hearings, and competition advocacy.⁸² More than any other

⁷⁶ Of course, litigation does not require actually taking defendants to trial. As we noted in an earlier article, “taking a case to trial and losing doesn’t help the agency’s brand – and successful agencies don’t need to take their cases to trial to accomplish their regulatory objectives.” Hyman & Kovacic, *Agency Performance*, *supra* note 10, at fn 139.

⁷⁷ In some instances, the scorecard does include outcomes. When the website for Obamacare (healthcare.gov) failed on launch, no amount of spinning could obscure the problem. The continuing inability of the Veterans Administration to address its waiting lists, other than by outright falsification of the data, provides another example of the phenomenon.

⁷⁸ King & Crewe, *supra* note 7, at 419.

⁷⁹ Schuck, *supra* note 6, at 129 (“What matters, or should matter, to the citizenry is the actual performance of officially administered programs on the ground, yet this performance may have little or nothing to do with how publicly-spirited they are. Indeed, just as speed is a bad thing if one is going in the wrong direction, so officials’ zeal may in some situations actually exacerbate program failure.”)

⁸⁰ American Medical Ass’n, 94 F.T.C. 701 (1979), modified and enforced, 638 F.2d 443 (2d Cir. 1980), *aff’d* by an equally divided Court, 455 U.S. 676 (1982).

⁸¹ John E. Kwoka, Jr., *The Federal Trade Commission and the Professions: A Quarter Century of Accomplishment and Some New Challenges*, 72 ANTITRUST L.J. 997 (2005).

⁸² See Jonathan Nuechterlein, *How the FTC Works: Lessons from the Commission’s Supreme Court Trifecta* 3-6 (Mar. 20, 2015) (describing FTC’s reliance on the full portfolio of its policy tools in development its modern health care program), available at https://www.ftc.gov/system/files/documents/public_statements/632081/150320adminlawre

program, the health care program has paid the rent for the FTC's charter as a competition authority.

Consider just a few recent accomplishments. Over the past three years, the FTC has achieved victories in three Supreme Court cases involving health care. In *North Carolina State Board of Dental Examiners*, the Supreme Court held that absent active supervision, antitrust scrutiny of the actions of a state licensing board dominated by active market participants was proper.⁸³ In *Phoebe Putney*, the Court said that state action immunity should be read narrowly, and reiterated the requirement that states must clearly articulate their purpose to suppress competition.⁸⁴ In *Actavis*, the Court said the rule of reason applies to the "reverse payments" in the pharmaceutical sector, and rejected a more permissive "scope of the patent" test.⁸⁵

All three victories were built on a foundation of decades of hard work.⁸⁶ These high-profile cases were part of a larger litigation program that has seen the FTC successfully challenge hospital mergers (after more than a decade of losses);⁸⁷ dramatically reduce abuse of the Hatch-Waxman Act;⁸⁸ attack horizontal restraints involving health care providers;⁸⁹ and oppose overreaching forms of occupational licensing and other restrictions on competition.⁹⁰ In addition to these litigation programs, the FTC has engaged in a large number of advocacy initiatives, encouraging other

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⁸³ *North Carolina State Board of Dental Examiners v. FTC*, 135 S. Ct. 1101 (2015).

⁸⁴ *FTC v. Phoebe Putney Health System*, 133 S. Ct. 1003 (2013).

⁸⁵ *FTC v. Actavis*, 133 S. Ct. 2223 (2013).

⁸⁶ Nuechterlein, *supra* note 82, at 1-2 ("I mention these victories not out of a misplaced sense of triumphalism, but because each of the three cases tells a compelling back story about what makes the FTC successful as a competition authority. Each of the three arose from a multi-decade FTC initiative focusing on a difficult and discrete area of competition policy. And each of those initiatives was built on a solid foundation of strong bipartisan support and close coordination among the FTC's litigators, economists, and policy analysts.")

⁸⁷ Since 2000, the FTC's merger enforcement program in the hospital sector has achieved litigated victories in the courts of appeals in two cases (*St. Alphonsus Ctr. – Nampa, Inc. v. St. Luke's Health Sys., Ltd.*, 778 F.3d 775 (9th Cir. 2015) and *ProMedica v. FTC*, 749 F.3d 559 (6th Cir. 2014)), and has resulted in the abandonment of proposed mergers in two others. In another case (*Evanston Hospital*) the FTC issued an opinion finding that a consummated merger had violated Section 7 of the Clayton Act, though the remedy ultimately achieved in the case is generally regarded as a disappointment. These accomplishments are reviewed in Nuechterlein, *supra* note 82, at 6.

⁸⁸ *FTC v. Actavis*, 133 S.Ct. 2223 (2013).

⁸⁹ *North Texas Specialty Physicians v. FTC*, 528 F.3d 346 (5th Cir. 2008).

⁹⁰ *North Carolina State Board of Dental Examiners*, 135 S. Ct. 1101 (2015); *South Carolina State Board of Dentistry v. FTC*, 455 F.3d 436 (4th Cir. 2006).

government entities to account for the competitive impact of statutes and regulations.⁹¹

These successes were not an accident, or the result of dumb luck. Instead, the FTC: (a) identified health care as a major priority; (b) invested substantial resources to build capability and capacity in the area; and (c) conducted periodic ex post evaluations to identify areas of useful refinement.⁹² We briefly address each of these steps below.

A. Setting Goals and Designing a Strategy to Achieve Them

Before the 1970s, the FTC was a reactive agency, responding to consumer complaints, and trying to “clear the inbox.” During this period, health care was not a major priority for the agency. Health care became a priority because the FTC decided to engage in strategic planning. The strategic planning process was driven by the FTC’s desire to identify areas of the economy where it could make a useful and distinctive contribution, thereby delivering major benefits to consumers. Strategic planning made it clear that health care was a “target-rich” environment for the FTC.

Why did the FTC decide to engage in strategic planning, rather than allow its workload and priorities to be driven by the inbox of consumer complaints? The FTC adopted strategic planning because of external pressure and internal changes. External commentators and legislators demanded improvements, including enhancements in the FTC’s system for setting priorities; a focus on difficult and unsettled areas of competition law; and attention to problems that could be addressed with the FTC’s unique array of policy making instruments.⁹³ Legislators in the early 1970s also identified the rising cost of medical services as a worthy subject for the FTC’s attention.⁹⁴ These demands established the framework within which the FTC shaped its competition policy agenda.

⁹¹ On the FTC’s advocacy program, see Andrew I. Gavil & Tara Isa Koslov, *A Flexible Health Care Workforce Requires a Flexible Regulatory Environment: Promoting Competition Through Regulatory Reform*, 90 WASH. L. REV. __ (forthcoming 2016); Maureen K. Ohlhausen, *100 Is the New 30: Recommendations for the FTC’s Next 100 Years*, 21 GEO. MASON L. REV. 1131, 1134 (2014) (calling FTC’s competition advocacy role a “tool of great importance”); James C. Cooper et al., *Theory and Practice of Competition Advocacy at the FTC*, 72 ANTITRUST L.J. 1091 (2005).

⁹² Nuechterlein, *supra* note 82, at 7 (in targeting health care, “the FTC identified a competition policy problem, closely analyzed it over many years with all the investigatory tools at its disposal, and brought a series of enforcement actions to protect consumers from anticompetitive practices.”)

⁹³ See Hyman & Kovacic, *Can’t Anyone Here Play This Game?* *supra* note 5 (discussing criticism of the FTC by the American Bar Association’s Commission to Study the Federal Trade Commission, and by Congress).

⁹⁴ Kovacic, *supra* note 38, at 639-40.

The internal changes were less visible, but equally significant. During the 1970s, the Commission recruited talented managers and supporting personnel to spot potential high-value applications of the agency's competition powers. Internal analysis and research made it clear that a greater dedication of resources to health care would significantly improve consumer welfare.⁹⁵ The combination of these elements caused agency leadership to prioritize health care.

B. Capability and Capacity Enhancements

Health care promised to be a difficult and risky area of endeavor for the FTC. The FTC was taking on a powerful industry, and intervening in a sector of the economy where the use of competition policy was extremely controversial.⁹⁶ Although the FTC went "looking for trouble," it did so in a way that gave it a fighting chance to succeed.

More specifically, the FTC invested heavily in health policy R&D. These efforts included influential studies of the impact of advertising restrictions on health care products and services;⁹⁷ a major study of the impact of entry by generic producers on the pricing of pharmaceutical products;⁹⁸ and a retrospective examination of the impact of hospital mergers.⁹⁹ These research projects set the foundation for the FTC's enforcement efforts, including the hospital merger litigation program of the past decade.¹⁰⁰

The FTC also used hearings, seminars, and workshops to gather

⁹⁵ The authors are grateful to Daniel C. Schwartz for sharing his experiences about the design of the FTC's modern health care program in the 1970s. Schwartz served as a Deputy Director for the FTC's Bureau of Competition and played a central role in the formulation of the new program. *See also* Kovacic, *supra* note 48.

⁹⁶ *See* William E. Kovacic, *Measuring What Matters: The Federal Trade Commission and Investments in Competition Policy Research and Development*, 72 ANTITRUST L.J. 861 (2005).

⁹⁷ *See* Ronald S. Bond et al., *Federal Trade Commission Staff Report on Effects of Restrictions on Advertising and Commercial Practice in the Professions: The Case of Optometry* (Bureau of Economics, Sept. 1980), available at <https://www.ftc.gov/sites/default/files/documents/reports/effects-restrictions-advertising-and-commercial-practice-professions-case-optometry/198009optometry.pdf>

⁹⁸ Federal Trade Commission Staff, *Generic Drug Entry Prior to Patent Expiration: An FTC Study* (2002), available at <http://www.ftc.gov/os/2002/07/genericdrugstudy.pdf>.

⁹⁹ Orley Ashenfelter et al, *Retrospective Analysis of Hospital Mergers*, 18 INT'L J. ECON. BUS. 5 (2011).

¹⁰⁰ Ronan Harty, *Interview with Chairwoman Edith Ramirez*, 14 The Threshold 1, 6-7 (American Bar Association Section of Antitrust Law, Issue No. 2, Spring 2014); Nuechterlein, *supra* note 82.

information.¹⁰¹ Among other results, these proceedings led to the publication of formative reports dealing with competition in health care,¹⁰² and the state action doctrine.¹⁰³ The state action project, in turn, set in motion a litigation program from which *North Carolina Board of Dental Examiners* is the most recent output. Finally, the FTC and DOJ jointly issued guidelines on antitrust relevant behavior in the health care sector.¹⁰⁴

C. Retrospective Evaluation

The two of us have attended hundreds of presentations by competition agency officials. Such presentations invariably include some version of the observation, “we’ve been very busy.” Audiences are generally too polite to respond, “have you been very effective?”

Of course, some level of activity is important for an agency to build capability, credibility, and legitimacy.¹⁰⁵ However, to treat activity levels as the primary or exclusive measure of performance evades the equally important issue of effectiveness.

To decide whether a program actually worked, ex post evaluation is necessary.¹⁰⁶ Lots of government programs fail.¹⁰⁷ An agency that routinely conducts ex post evaluation can identify what has worked well and what needs to be improved. Ex post evaluation is a vital quality control device, and it should be an automatic feature of the life cycle of policymaking.

Beginning in the late 1970s, the FTC developed a path-breaking program to examine the effects of closed competition matters.¹⁰⁸ The program began with an assessment of a monopolization case and various vertical restraints matters. In the early 2000s, the program was extended to hospital mergers. The hospital merger retrospective sought to determine the

¹⁰¹ For example, in 2003, the FTC and DOJ jointly held over 20 days of hearings on Competition and Consumer Protection in Health Care.

¹⁰² FTC & Department of Justice, *Improving Health Care: A Dose of Competition* (2004), available at <http://www.ftc.gov/reports/healthcare/040723healthcarerpt.pdf>

¹⁰³ Office of Policy Planning, FTC, *Report of the State Action Task Force* (Sept. 2003), available at <http://www.ftc.gov/os/2003/09/stateactionreport.pdf>.

¹⁰⁴ On the importance of agency guidelines as policy making tools, see Hillary Greene, *Agency Character and the Character of Agency Guidelines: An Historical and Institutional Perspective*, 72 ANTITRUST L.J. 1039 (2005).

¹⁰⁵ William E. Kovacic, *Creating a Respected Brand: How Regulatory Agencies Signal Quality*, 22 GEO. MASON L. REV. 237, 247-48 (2015) (discussing importance of sustaining a minimum critical mass of activity).

¹⁰⁶ See *supra* note 87.

¹⁰⁷ See Schuck, *supra* note 6.

¹⁰⁸ William E. Kovacic, *Using Ex Post Evaluations to Improve the Performance of Competition Authorities*, 31 J. Corp. L. 503 (2006).

consequences of various hospital mergers that the FTC had unsuccessfully challenged. The results were vital to the success of a renewed hospital merger enforcement program, which began with a case against Evanston Hospital in the mid-2000s, and has since resulted in a string of successes.¹⁰⁹

V. Striking a Better Balance Between Consumption and Investment

The conflict between consumption and investment may be a policy perennial, but it does not follow that there is nothing that can be done to tip the balance a bit more in favor of the latter. Following on Professor James Q. Wilson, we propose “a few modest suggestions that may make a small difference.”¹¹⁰ These steps do not depend on agency leadership suddenly deciding to “do the right thing.”

A. Create A Pro-Investment Norm

Our most general suggestion is the promotion of a norm that encourages agency leadership to make adequate investments in institutional capability. At conferences and in other public settings, agency leaders are invariably asked to discuss the cases they have already launched, and their plans for initiating new cases. Agency leaders are happy to wax poetic on such subjects – but we should demand that they do more than brag about consumption. Agency leaders should be cross-examined about the steps they are taking to make their agencies better off in the future. Concrete questions might include:

- What investments are you making to enhance the capability of your agency?
- What are you doing to build your agency’s knowledge about the commercial settings that it regulates?
- How many resources are you spending to build better networks with your fellow regulatory institutions, both at home and abroad?
- What steps are you taking to evaluate the results of past interventions?
- How should we measure your success in these areas?

If agency leadership knows they will have to answer these questions,

¹⁰⁹ Id. at 524-26; Nuechterlein, *supra* note 82, at 4-5.

¹¹⁰ JAMES Q. WILSON, BUREAUCRACY: WHAT GOVERNMENT AGENCIES DO AND WHY THEY DO IT 369 (1989).

they will have an incentive to proactively address (and defend) the balance they have struck between consumption and investment.

B. Investment Budgets

Currently, agencies publicly report (and trumpet the successes of) their enforcement efforts, but their investment efforts are invisible. To redress this disparity, each agency should have to annually report its investments in capability and capacity, and explain how these investments will support the agency's anticipated substantive programs. Just as a public company reports its R&D budget to potential investors and analysts, each agency should specify its policy R&D budget. Of course, we do not believe that each agency should spend a fixed percentage of its overall budget on policy R&D, nor do we believe that every dollar of policy R&D investment is of equal value. And, we anticipate no shortage of efforts to "game" the reporting requirements, by reporting inflated investments in policy R&D. Still, the process of preparing an investment budget should force agency personnel to examine whether they are doing enough to set a sound foundation for the future.

C. Setting Priorities and Approving Projects

We have both been in academics long enough to see serial rounds of strategic planning by our respective institutions. The process involves an endless series of meetings, culminating in the creation of meaningless mission statements, backed up by hundreds of pages of boilerplate. Lather, rinse, repeat.

We are hesitant to recommend anything that would force others to go through the same process. But, agencies will either set their own priorities, or they will be set for them by outsiders. Since agency leadership values autonomy, they should be willing to take steps that lower the likelihood outsiders will seize control of the policy agenda. Accordingly, agencies should annually identify and publicize their priorities. As with the investment budget, the process may encourage agency personnel (and outsiders) to consider what the agency is doing – and whether it is worth continuing down the same path.

The agency's process for project approval should involve a similar set of calculations. Unless the agency has a systematic process for deciding whether to initiate a new investigation, case, or rule-making project, there will be little predictability or rationality in the results. And saying "this is the Chairman's pet project" is not a sufficient reason for committing public resources to a project, when the Chairman will not be around to bear the consequences of that decision. Before green-lighting a project, agencies should be able to answer the following questions:

- What do we expect to gain if the project succeeds – doctrinal results, economic impact, enhancement of institutional reputation and capability?
- What are the risks – doctrinal barriers, political backlash that the project will arouse, reputational costs if the project fails?
- Who will do the project – is the team to which the project will be assigned equal to the task?
- How much will it cost, and what projects must we forego if this one goes ahead?
- How does the project fit within our existing portfolio of existing commitments?
- How long will it take to accomplish?
- How will we know whether it worked as we hoped?¹¹¹

Of course, there will often be difficulty in giving confident answers to these questions, and genuine uncertainty has accompanied many a successful project. But, a rigorous effort to answer these questions increases ones' confidence that the agency has the means to deliver, and is not engaged in a snipe/snark/shark hunt.¹¹²

D. *Ex Post Evaluation.*

As described above, a routine program of ex post evaluation provides a valuable feedback mechanism that will allow the agency to assess whether it has properly matched commitments with capabilities. In comparing expectations *ex ante* to outcomes *ex post*, the agency should obtain a better sense of how to structure future projects, and how to increase the prospects for future success. A habit of *ex post* review also deters incumbent leaders from launching new projects without considering potential long-term negative externalities.¹¹³

¹¹¹ This framework is inspired by the prioritization principles adopted by the United Kingdom's Office of Fair Trading and continued by its successor, the Competition and Markets Authority. Kovacic, *supra* note 12, at 8-10; Kovacic, *supra* note 15.

¹¹² A snipe hunt is an impossible task. A snark hunt can end very badly for those involved if the snark turns out to be a Boojum. Lewis Carroll, *The Hunting of the Snark* (1876). And, a shark hunt may require a bigger boat. *See* Jaws (1975).

¹¹³ *See* King & Crewe, *supra* note 7, at 358. ("There would be a lot to be said for encouraging – and if necessary, permitting – both the National Audit Office and the select committees of the House of Commons to assess how well government initiatives were continuing to achieve their declared purposes after, say, five, ten or twenty years. . . Those bodies might even be encouraged to identify and then either to applaud or to chastise those ministers who had been principally responsible for launching the initiatives in the first place. The thought of possibly being publicly chastised several years later, but still well within their own lifetime, might – who knows? – give over-hasty and overambitious ministers pause. It might even cause them to ask, before or at the moment of decision,

VI. A Few Complications

A. *Striking the Proper Balance*

Although we have been quite critical of consumption, we are not suggesting that all consumption is bad. Similarly, although we have praised investment, we are not claiming that all investment is good. The key is to strike the proper balance between these two priorities. To date, the balance has been systematically skewed in favor of consumption. We will not be able to fix that problem until it is recognized as a problem. After that, we will have to create the necessary incentives for agency leadership to “do the right thing.” That approach is far more likely to lead to good results than any of the alternative strategies; as one of us noted in an earlier article:

[I]f you get the incentives right, most of the big problems will take care of themselves, leaving a far smaller and more tractable set of problems to be addressed through regulation, litigation, and benign neglect. But, if you do not get the incentives right, no amount of speeches, op-eds, law review articles, whining and hectoring, moral preening, regulatory oversight, legislation, lawsuits, or lectures about fairness and justice can take their place. Reformers should accordingly focus on getting the incentives right — and legislation that does not address the underlying incentive problem is not, in fact, “reform,” no matter what else it may accomplish.¹¹⁴

B. *Does it Matter Whether Agency Leadership is a Plank Owner or a Successor-in-Interest?*

Departments, agencies, bureaus and commissions are periodically created from scratch, but most agency leaders inherit the job from someone else. The first agency leader is the equivalent of a plank-owner, with tremendous power to shape the nature of the agency, its personnel, and its priorities.¹¹⁵ Subsequent leaders are successors-in-interest, who step into the shoes of their predecessors. As such, they have more limited ability to re-shape the agency in their image. That said, if prior leadership has made good investment decisions, the agency will be in better shape – and better able to withstand the effects of excessive consumption by the latest agency

“How will that look in ten years’ time?”)

¹¹⁴ David A. Hyman, *Follow the Money: Money Matters in Health Care, Just Like Everywhere Else*, 36 AM. J. LAW & MED. 370 (2010)

¹¹⁵ U.S. Navy, *Plank Owners*, available at http://www.navy.mil/navydata/nav_legacy.asp?id=180 (“A ‘plank owner’ is an individual who was a member of the crew of a ship when that ship was placed in commission.”)

head. But, regardless of whether the agency head is a plank owner or a successor-in-interest, they will each end up making a regular series of consumption v. investment decisions – and it is those decisions with which we are concerned. Thus, we do not distinguish between whether agency leadership is a plank owner or a successor-in-interest.

C. *Agency Leadership v. Agency Personnel*

We have presented a stylized example of a governmental agency, in which agency leadership always (or almost always) gets their way. That is obviously an over-simplification. Agency leadership may be short-term, but most agencies are full of “WeBes,” who have their own perspective and priorities.¹¹⁶ The key question – to which the answer is likely to be agency- and leader-specific – is whether agency leadership must consult with the WeBes about consumption v. investment decisions – and who gets the last word on the subject. As always, attention to institutional detail is critical before drawing definitive conclusions.¹¹⁷

D. *Operationalizing the Framework*

In the abstract, investment is hard to argue with. Everyone knows the story of the ant and the grasshopper – and the moral (“to work today is to eat tomorrow”) is hard to argue with. But, “invest more” is spectacularly unhelpful advice. “Build capability and capacity” is sufficiently vague and open-ended that almost anything might qualify. Similarly, “consume less” means that the agency will not be as visible – making it a less credible (and less faithful) enforcer of its statutory mandate. There are political perils with consuming too aggressively – but there are perils with withdrawing from the field, and leaving it unregulated. Finally, people strive to become agency leaders because they want to advance the goals of that agency – and bringing cases and initiating rule-making is one of the few ways of doing just that. Investing in capability and capacity doesn’t result in favorable press coverage for a good reason – it is boring, and often unproductive. And, some forms of consumption actually constitute investment, because they allow the agency to train its personnel – and create the precedents the agency can then rely on to advance its objectives on a broader plane.¹¹⁸

¹¹⁶ Michael Grunwald, *Too Good For Government*, Time, Aug 30, 2012, at <http://business.time.com/2012/08/30/too-good-for-government/> (describing travails of an agency head who tried to transform her agency by devising “a secret Operation Cupcake to try to fire the laggards, but the civil-service cupcakes knew political appointees come and go. They called themselves WeBes, as in We be here, you be gone.”)

¹¹⁷ See Schuck, *supra* note 6; Wilson, *supra* note 110.

¹¹⁸ For example, the FTC’s prosecution of a case involving concerted refusal to deal by dentists in Indiana helped lay the foundation for modern jurisprudence on the rule of reason. See Kovacic, *supra* note 36 (“Consider the FTC’s case in *Indiana Federation of*

We agree with these points – but the problem of excessive consumption is sufficiently pervasive that it demands our attention. Simply stated, we are not opposed to the building of skyscrapers by agency leaders with an edifice complex – we just want to ensure that those skyscrapers are built on a solid foundation.

VII. Conclusion

Public agency leadership faces a recurring choice between consumption and investment. Several factors encourage agency leadership to favor consumption over investment. Predictably enough, this dynamic creates serious problems, including a mismatch between agency commitments (made in time t_0) and the agency's (in)ability to deliver good results (which does not become apparent until time t_n).

In this essay, we make the case that greater attention should be paid to whether agency leadership is investing, rather than consuming. Investment is the foundation for an effective enforcement agency – and we should start treating it as such. If we want agency leadership to plant trees, we need to make it in their interest to do so. Otherwise, instead of behaving like Johnny Appleseed, agency leaders will continue to follow the Sirens of consumption.

Dentists (IFD). An index of importance that focused on the total volume of commerce affected probably would not give much weight to a challenge to a concerted refusal by dentists in Indiana to provide the x-rays of their patients to insurers. In that sense, *IFD* is a comparatively insignificant matter—a small case. Evaluated by its effect on doctrine, the small case made big law. The Supreme Court's decision in *IFD* helped shape modern jurisprudence governing the rule of reason and the proof of anticompetitive effects. Among other results, *IFD* provided a doctrinal foundation for the Justice Department's prosecution of Microsoft.”)