

BACKGROUND

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Global Antitrust, International Trade, and Regulatory Reforms: Tools to Promote American Economic Welfare and Economic Freedom

Alden F. Abbott

Abstract

In recent years, some governments have used competition law to advance goals other than the preservation of a strong competitive process—and at times have denied private parties fundamental due process in applying that law. The U.S. government should use its antitrust policy expertise to promote regulatory reforms here and overseas designed to reduce barriers to competition and promote economic welfare. It should do this by pushing for the elimination of regulatory barriers to commerce in international trade negotiations. It should also use a variety of regulatory review tools to pursue far-reaching beneficial regulatory reforms.

Properly applied, U.S. and foreign nations' antitrust laws seek to promote the public welfare by condemning private actions that distort the competitive process that lies at the heart of our free-market economy. Unfortunately, in recent years some governments have used competition law to advance goals other than the preservation of a strong competitive process, and at times have denied private parties fundamental due process in applying that law. This has imposed serious harm on American businesses.

The U.S. government should pursue all appropriate means, including consultations among antitrust agencies and international trade agreements, to forestall the misapplication of antitrust laws by other nations, and to promote the appropriate, market-oriented application of competition law worldwide. More broadly, the U.S. government should use its antitrust policy expertise to promote regulatory reforms here and overseas designed to reduce barriers to competition and promote economic welfare. It should do this by

KEY POINTS

- The U.S. government should promote regulatory reforms here and overseas designed to reduce barriers to competition and promote economic welfare. It should do this by pushing for the elimination of regulatory barriers to commerce in international trade negotiations.
- The White House should establish and lead a task force charged with developing a strategy to stem future substantive and due-process abuses by foreign anti-trust authorities.
- It should also use a variety of regulatory review tools to pursue far-reaching beneficial regulatory reforms. These should include such actions as renegotiating NAFTA, concluding a U.K.-U.S. FTA, and continued CRA reviews to eliminate unnecessary and wasteful regulations that restrain trade and impede economic growth.
- U.S. international antitrust, regulatory trade liberalization, and general regulatory reform should be seen as far more than mere means to grow the economy. They are instruments to promote economic freedom.

This paper, in its entirety, can be found at <http://report.heritage.org/bg3238>

The Heritage Foundation
214 Massachusetts Avenue, NE
Washington, DC 20002
(202) 546-4400 | heritage.org

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pushing for the elimination of regulatory barriers to commerce in international trade negotiations. It should also use a variety of regulatory review tools to pursue far-reaching beneficial regulatory reforms. Finally, the reform initiatives proposed herein are a means not just to raise American prosperity, but to advance the cause of economic freedom worldwide.

Overview of Antitrust Law

U.S. antitrust law seeks to promote the public welfare by condemning private actions that distort the competitive process that lies at the heart of our free-market economy. Antitrust law is one of America's most successful exports, having been adopted by over 130 nations in recent decades, including all of the major countries of the world. (Antitrust is referred to as "competition law" abroad.)¹ Properly applied, competition law promotes consumer welfare, economic efficiency, and innovation.

Unfortunately, in recent years some governments have used competition law to advance goals other than the preservation of a strong competitive process, and at times have denied private parties fundamental due process in applying that law. This has become a serious problem for United States business, as the globalization of commerce and antitrust law increasingly has brought American firms' activities within the crosshairs of foreign antitrust regulators. The U.S. government should pursue all appropriate means, including consultations among antitrust agencies and international trade agreements, to forestall the misapplication of competition law by other nations, and to promote the appropriate, market-oriented application of competition law worldwide.

In addition, and more broadly, the U.S. government should use its expertise in antitrust policy to promote regulatory reforms here and overseas designed to reduce barriers to competition and promote economic welfare. International trade negotiations, including the renegotiation of the North American Free Trade Agreement (NAFTA) and negotiation of a possible bilateral free trade agreement with the

United Kingdom, afford the U.S. government a near-term opportunity to promote these economically desirable reforms. More generally, even apart from its trade agenda, the Trump Administration should use a variety of regulatory review tools to pursue far-reaching beneficial regulatory reforms. Finally, the reform initiatives proposed herein are a means not just to raise American prosperity, but to advance the cause of economic freedom worldwide.

An Overview of American Antitrust Law

The U.S. antitrust laws aim to curb efforts by firms to reduce competition in the marketplace or to create or maintain monopolies. Admittedly, as Professor Herbert Hovenkamp, author of the leading antitrust treatise, points out, the antitrust statutes' language is "vague and malleable."² For example, over a century of federal case law has been required to make sense of and cabin the Sherman Antitrust Act's literal prohibition on "every contract, combination...or conspiracy in restraint of trade."³ Even today, uncertainty about the likely antitrust treatment of many corporate contracts or mergers creates a continuing demand for antitrust counseling.

Until the past 50 years or so, antitrust was viewed by certain commentators as promoting a variety of goals—such as protecting small businesses and reducing the influence of large enterprises—in addition to improving the functioning of free markets. Such views also crept into American antitrust case law. Supporters of the position that antitrust law should be used to attack large enterprises, regardless of their efficiency and the economic benefits they generated, stressed that the antitrust statutes were enacted in the wake of populist and Progressive Movement concerns about "the trusts" and "big business" abuses, and should be construed in light of such a history.

Since the 1970s, however, American federal courts have substituted economic reasoning for this "historical" approach, influenced by economics-based "Chicago School" and "Harvard School" scholarship.⁴ The late professor (and federal judge) Robert

1. The terms "antitrust law" and "competition law" are used interchangeably in this *Backgrounder*.

2. Herbert Hovenkamp, *Federal Antitrust Policy*, 5th ed. (West Publishing, 2011), p. 69. This work is a detailed and highly scholarly one-volume treatise on American antitrust law and policy.

3. 15 U.S. Code § 1.

4. See, e.g., William E. Kovacic, "The Intellectual DNA of Modern U.S. Competition Law for Dominant Firm Conduct: The Chicago/Harvard Double Helix," *Columbia Business Law Review*, Vol. 2007, No. 1, https://www.ftc.gov/system/files/documents/public_statements/417961/2007dna.pdf (accessed June 28, 2017).

Bork was instrumental in that turnaround, arguing convincingly that courts had misapplied antitrust to undermine efficient business conduct.⁵ Instead, according to Bork, antitrust should be deemed a “consumer welfare prescription” used to target only economically inefficient conduct.

Today, American antitrust law is aimed at promoting consumer welfare and “economic efficiency.” It pursues this goal by forbidding business behavior that harms the competitive process and that lacks countervailing efficiency justifications.⁶ Concern typically focuses on “bad” actions—business behavior that is not “competition on the merits”⁷—that reduce output and raise prices. Certain conduct—“naked” cartel activity lacking any efficiency justification, such as secret price fixing or bid rigging—is deemed categorically illegal or unlawful per se. Conduct that is not per se illegal is assessed under a “rule of reason,” which requires detailed and often intrusive analysis of particular practices.

In other words, contemporary American competition policy focuses on ensuring a vigorous competitive process, not on protecting individual competitors from the outcome of competition on the merits, whatever it may be. The notion is that allowing the market to work, free from competitive distortion, best protects the long-term interests of consumers and of a vibrant American economy. As such, U.S. antitrust law does not prohibit the mere exercise of legitimately obtained market power—that is, the mere charging of “high” prices by firms that succeed through merits-based competition. As the Supreme Court emphasized in its landmark 2004 decision, *Verizon v. Trinko*:

The mere possession of monopoly power, and the concomitant charging of monopoly prices, is not only not unlawful; it is an important element of the free-market system. The opportu-

nity to charge monopoly prices—at least for a short period—is what attracts “business acumen” in the first place; it induces risk taking that produces innovation and economic growth. To safeguard the incentive to innovate, the possession of monopoly power will not be found unlawful unless it is accompanied by an element of anti-competitive conduct.⁸

Foreign Antitrust Law: Background and Recent Challenges

Until relatively recently, the U.S. dominated the field of antitrust. Europe, Canada, and a few other jurisdictions had competition laws, but their application was fairly limited, and they were of relatively minor significance to American business and consumer interests.

After the 1991 dissolution of the Soviet Union, however, other nations rapidly began to enact competition laws.⁹ This included former communist countries (Russia, for example), and even some nations that retained ruling communist parties, such as China and Vietnam. The U.S. government strongly endorsed those initiatives on the ground that robust competition-law regimes would buttress competitive forces and thereby encourage the adoption and acceptance of market-based economic systems—to the benefit of the United States and the global economy.

The U.S. antitrust agencies, the Federal Trade Commission (FTC) and the Justice Department (DOJ), have supported convergence of competition laws toward a model based on the promotion of consumer welfare and a vigorous competitive process (reflecting the U.S. approach). They have furthered this end through consultations with foreign counterpart agencies, public pronouncements, and active involvement in international organizations such as the International Competition Net-

5. See Robert H. Bork, *The Antitrust Paradox*, 2nd ed. (New York: Free Press, 1993).

6. See, generally, Hovenkamp, *Federal Antitrust Policy*.

7. Antitrust law also prohibits mergers that, while otherwise involving perfectly legitimate business objectives, “may...substantially lessen competition or...tend to create a monopoly.” Clayton Antitrust Act, 15 U.S. Code § 7. Mergers, which play a prominent role in corporate conduct, are “bad acts” in an antitrust sense only if their effects raise these statutory concerns.

8. *Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 407 (2004).

9. For an overview of the globalization of competition law and U.S. government efforts to promote convergence among antitrust laws based on sound economic principles, see Maureen Ohlhausen, “International Antitrust Enforcement: China and Beyond,” testimony before the Subcommittee on Regulatory Reform, Commercial and Antitrust Law, Committee on the Judiciary, U.S. House of Representatives, June 7, 2016, <https://judiciary.house.gov/wp-content/uploads/2016/05/Ohlhausen-Testimony.pdf> (accessed June 29, 2017).

work (ICN),¹⁰ an informal network of competition agencies and expert advisers, and the Organization for Economic Co-operation and Development (OECD),¹¹ an international research organization headquartered in Paris that is funded by the world's largest economies. Moreover, since the 1990s, the FTC and DOJ have engaged in extensive technical assistance efforts to help new foreign competition agencies' staff "learn the ropes" of sound antitrust enforcement. The FTC and DOJ also have entered into a variety of mutual cooperation agreements with foreign competition authorities to facilitate the sharing of case-specific information and economic analysis when feasible.

There has been a growing recognition that promoting consumer welfare is the key goal of competition analysis, and a substantial degree of competition-law convergence has occurred, particularly in such areas as cartel enforcement and the advance notification of proposed mergers. Nevertheless, significant differences remain among jurisdictions, even as they agree in theory with the centrality of consumer welfare and vigorous competition to antitrust. Most notably, the majority of competition agencies follow a "European model" of competition law, which centers on administrative determinations of liability, the heavy use of fines, and liability for the "abuse of a dominant position"—a doctrine that makes it easier to attack business practices by major companies than using U.S. monopolization doctrine outlined in the *Trinko* decision.

An even greater problem is the uncertain scope and lack of due process associated with the application of certain foreign competition laws. Many nations' competition statutes contain expansive "public interest" or "industrial policy" mandates. Those provisions give enforcers broad leeway to challenge practices not on the basis of harm to the competitive process or to consumer welfare, but rather based on more subjective criteria such as, for example, protecting "national champions," discriminating against foreign businesses, and advancing

workers' interests over consumer welfare and competitive vitality.

Equally troublesome is a lack of fairness in foreign competition law enforcement actions that injures foreign companies by precluding them from effectively defending their business decisions. What is more, due to the globalization of commerce, biased competition law decisions reached in a foreign country increasingly have negative international spillover effects, interfering with international trade flows and harming commercial enterprises based elsewhere. A March 2017 bipartisan report by leading American antitrust and international trade experts (hereinafter "Expert Group Report") highlighted the nature of this problem:

[C]ompetition laws are not always applied in a transparent, accurate and impartial manner, and they can have significant adverse impacts far outside a country's own borders. Certain of our major trading partners appear to have used their laws to actually harm competition by U.S. companies, protecting their own markets from foreign competition, promoting national champions, forcing technology transfers and, in some cases, denying U.S. companies fundamental due process.¹²

To deal with the problem of inappropriate application of foreign competition laws, the Expert Group Report proposed that the Trump Administration establish a cabinet-level White House working group to prioritize the coordination of international competition policy within the U.S. government.¹³ The report recommended that the working group focus on developing a strategy to combat foreign governments' misuse of competition laws—including protectionist and discriminatory actions, due-process deficiencies, and inappropriate imposition of extra-territorial remedies that are unnecessary to protect a country's legitimate competition-law objectives.

In issuing its recommendation, the report also reaffirmed the centrality of consumer welfare and

10. See International Competition Network, <http://www.internationalcompetitionnetwork.org/> (accessed June 29, 2017). Although the U.S. Chamber of Commerce commissioned and distributed the Expert Group Report (see footnote 12), the Chamber played no part in preparing the report or in overseeing the work of the authors.

11. See Organization for Economic Cooperation and Development, <http://www.oecd.org/> (accessed June 29, 2017).

12. U.S. Chamber of Commerce, "International Competition Policy Expert Group: Report and Recommendations," March 2017, https://www.uschamber.com/sites/default/files/icpeg_recommendations_and_report.pdf (accessed June 29, 2017), p. 1.

13. *Ibid.*, pp. 6–32.

vigorous competition as the organizing principles of antitrust policy, and in no way suggested altering the ways in which the U.S. antitrust agencies carry out their statutory responsibilities. The report did, however, propose that other parts of the U.S. government take an active role in combating foreign government actions that are at odds with sound competition enforcement principles.

Notably, the Expert Group Report called for a review of existing and potential trade-policy tools that might be applicable to abusive foreign conduct. In order to foster an international climate designed to discourage competition-law abuses, the report also urged that the ICN and the OECD undertake more peer reviews of national competition-law systems; encourage international bodies to support a “due-process code” enumerating transparent, accurate, and impartial procedures; include due-process requirements in competition-law chapters of bilateral and multilateral trade agreements negotiated by the U.S. government; and work to promote agreements under which nations would cooperate with and take into account legitimate interests of other nations affected by a competition investigation.

In discussing due process, the report emphasized finding common ground on basic notions of fairness (such as the right to be informed of the nature of charges being brought, and the right to be heard) that are universal among both common-law and civil-law systems that claim to respect the rule of law. Finally, citing concerns raised by the FTC, the report urged that the U.S. government seek an international consensus against antitrust remedy provisions that inappropriately limit the exercise of intellectual property rights outside the enforcer’s jurisdiction—such as prohibitions on “excessively high” patent-licensing royalties that create a disincentive to innovation.¹⁴

The Expert Group Report’s concerns about procedural and substantive inadequacies in foreign competition laws are echoed in a January 2017 American

Bar Association Presidential Transition Report on Antitrust Enforcement (hereinafter “ABA Report”).¹⁵ The ABA Report noted the growing economic burden associated with the “huge antitrust expansion” occurring worldwide:

Costs can arise from inapt substantive standards (including intermixture and confusion within many competition laws of both economic and other policy goals), lack of transparency, inadequate procedural protections, inexperienced decision makers, and institutions struggling to deal with the complexities of antitrust law, economics[,] and procedure essential to effective antitrust enforcement.¹⁶

The ABA Report emphasized reliance on stepped-up efforts by the FTC and DOJ in dealing with foreign antitrust overreach, while paying lip service to the need for occasional higher-level U.S. government involvement when American antitrust agency efforts prove insufficient. Specifically, the ABA Report suggested that the FTC and DOJ: (1) coordinate their efforts to monitor global developments; (2) anticipate the harmful effects of foreign legislation; (3) identify ill-advised and conflicting foreign antitrust mandates that affect American consumers and businesses; and (4) “[i]dentify or open appropriate channels to engage the Executive Branch when necessary to resolve elevated disputes.”¹⁷

The FTC and DOJ should—and undoubtedly will—continue to interact regularly with their foreign counterparts. Nevertheless, they are not institutionally capable of resolving the problem of foreign government competition law abuses. These American antitrust agencies are primarily responsible for enforcing American antitrust law and setting American antitrust policy. Other components of the U.S. Executive Branch, charged with conducting American foreign economic policy (including, in

14. *Ibid.*, p. 31, citing Ohlhausen, “International Antitrust Enforcement.” Recently, complaints of inappropriate extraterritoriality and lack of due process have featured in discussions of competition law enforcement actions brought by Korea and China against Qualcomm and InterDigital. The Expert Group Report, however, makes it clear that problems of this sort are viewed as widespread and not limited to a handful of countries or special situations.

15. See American Bar Association, Section of Antitrust Law, “Presidential Transition Report: The State of Antitrust Enforcement,” January 2017, https://www.americanbar.org/content/dam/aba/publications/antitrust_law/state_of_antitrust_enforcement.authcheckdam.pdf (accessed June 29, 2017).

16. *Ibid.*, pp. 56 and 57.

17. *Ibid.*, pp. 57 and 58.

particular, the U.S. Trade Representative and the Departments of State, Treasury, and Commerce), necessarily have a key role to play when American economic interests are being damaged by other nations' misapplications of competition law. Thus, the Expert Group Report's recommendations merit serious consideration.

Competition Policy, Regulation, and International Trade

Antitrust law is primarily aimed at private restraints of trade. The most serious long-term harm to competition, however, stems from government actions,¹⁸ which in large part are immune to the reach of the antitrust laws.¹⁹

Substantial harm to economic welfare stems from laws, regulations, and policies that empower certain private interests to obtain or retain artificial competitive advantages over their rivals, be they foreign or domestic.²⁰ Furthermore, anticompetitive private arrangements that are backed by government actions often have substantial effects on trade outside the jurisdiction that imposes the restrictions, and generally are hard to challenge under domestic competition law.²¹ Such trade-related anticompetitive market distortions, much like the abuses of competition law identified by the Expert Group's Report, prevent foreign firms from entering into or competing effectively in domestic markets.

Examples of foreign government restraints that harmed U.S. firms in the past include a combination of Japanese government and private restraints that cumulatively blocked efficient entry into the Japanese photographic film market by foreign firms; the Mexican government's empowerment of Mexico's dominant telecommunications company to fix the rates that foreign telecom carriers had to pay to terminate calls in Mexico; and the government-sponsored Canadian Wheat Board's policies that precluded competing wheat sellers (as well as potential wheat buyers) from having an adequate opportunity to compete for participation in the Wheat Board's sales.²²

The Trump Administration's decision to renegotiate and seek to modernize NAFTA, which covers the United States, Canada, and Mexico,²³ presents an opportunity to reduce U.S. government regulations that distort international trade and thereby stifle competition.

As detailed by Heritage scholar Bryan Riley,²⁴ three sorts of market-broadening measures should be pursued. First, regulations that impede competitive forces by limiting digital cross-border transactions among the three NAFTA nations, such as data-flow restrictions and data-localization requirements, could be eased, if not entirely eliminated. Second, the removal of exceptions for energy and other sectors originally excluded from coverage in the original

18. See, generally, Bork, *The Antitrust Paradox*.

19. The U.S. "state action doctrine" shields anticompetitive behavior that is expressly authorized and actively supervised under state law. See Alden F. Abbott, "Constitutional Constraints on Federal Antitrust Law," Heritage Foundation *Legal Memorandum* No. 143 (December 11, 2014), http://thf_media.s3.amazonaws.com/2014/pdf/LM143.pdf. Commendably, the antitrust agencies of the U.S. and other foreign countries recently have engaged in various "competition advocacy" efforts to convince their governments to avoid adopting or retaining anticompetitive laws and regulations—and international bodies such as the ICN and the OECD also have encouraged such initiatives. Nevertheless, while competition advocacy is a worthwhile endeavor and has achieved some good results, its success to date has been rather limited, perhaps reflecting the clout of the special interests that benefit from the continuation and adoption of specific anticompetitive legal requirements. Various links to materials on advocacy, including an ICN advocacy "toolkit" for use by competition agencies, are found at International Competition Network, "Advocacy," <http://www.internationalcompetitionnetwork.org/working-groups/current/advocacy.aspx> (accessed June 15, 2015).

20. See, generally, Alden F. Abbott and Shanker Singham, "Enhancing Welfare by Attacking Anticompetitive Market Distortions," *Conurrences*, No. 4 (2011), pp. 1-5, <https://www.ftc.gov/sites/default/files/attachments/key-speeches-presentations/ssrn-id1977517.pdf> (accessed June 29, 2017).

21. *Ibid.*

22. See Alden F. Abbott and Shanker Singham, "Anticompetitive Policies Reduce Economic Freedom and Hurt Prosperity," chapter 5, in Terry Miller and Anthony Kim, *2016 Heritage Index of Economic Freedom* (Washington, DC: The Heritage Foundation, 2016), p. 52, <http://www.heritage.org/index/book/chapter-5>.

23. News release, "USTR: Trump Administration Announces Intent to Renegotiate the North American Free Trade Agreement," Office of the U.S. Trade Representative, May 18, 2017, <https://ustr.gov/about-us/policy-offices/press-office/press-releases/2017/may/ustr-trump-administration-announces> (accessed June 29, 2017).

24. See Bryan Riley, "Three Recommendations for Renegotiating NAFTA," Heritage Foundation *Issues Brief* No. 4654, February 6, 2017, <http://www.heritage.org/sites/default/files/2017-02/IB4654.pdf>.

NAFTA agreement would promote competition in the affected lines of commerce. Third, the elimination of a requirement that all parties satisfy certain environmental and labor-related regulatory standards would significantly reduce unwarranted regulatory costs that cabin pro-competitive opportunities for trade expansion.²⁵

The reduction of regulatory barriers accomplished through a NAFTA renegotiation could serve as a template for similar market-opening measures in other trade negotiations involving the U.S. In particular, a free trade agreement (FTA) between the United States and the United Kingdom (U.K.) merits serious consideration. A U.K.–U.S. FTA would benefit the economies of both nations and underscore their commitment to economic freedom.²⁶ A U.K.–U.S. FTA should, of course, seek to eliminate tariffs between the two nations. But that is just for starters.

The reduction of trade barriers in specific sectors could significantly raise the welfare of American and British producers and consumers. An important area for trade liberalization is better U.K. producer access to U.S. federal and state government procurement markets. In particular, U.S. “Buy American” laws that favor domestic suppliers currently limit the ability of U.K. firms to participate in federal and state government procurements.²⁷ Waiver of those laws would involve an economic-welfare-enhancing “win-win”: It would strengthen beneficial competition in U.S. public tenders, reduce U.S. taxpayer burdens, and provide new, desirable commercial opportunities for U.K. bidders. A further reduction of barriers to defense trade (elimination of export licenses for defense-related exports to the U.K. and expansion

of defense procurement opportunities) also would be mutually beneficial, as would improved access for each nation’s providers to U.K. and U.S. financial services and insurance markets. This would enhance competition and generate efficiencies for all of the other industry sectors that rely on insurance and financial transactions.

Finally, greater access to the U.K. agricultural market for U.S. producers of lamb, mutton, beef, pork, poultry, oilseeds, dairy, and bulk commodities would benefit American agricultural producers and British consumers alike. In short, regulatory reform that reduces trade-related barriers to competition should lie at the heart of a U.S.–U.K. FTA.

The reduction by all negotiating parties of anti-competitive trade-related regulatory barriers should also feature in the United States’ approach to any future bilateral or multilateral negotiations with other countries.²⁸ But the Trump Administration does not need to wait for trade talks to carry out pro-competitive regulatory reform, and it should not do so. Indeed, more generally, overregulation is a major problem, whether or not it has a substantial effect on international trade. The Heritage Foundation’s annual “Red Tape Rising” reports have highlighted the immense economic burden of regulation (total U.S. regulatory costs exceed \$2 trillion annually),²⁹ which by its very nature tends to significantly distort the terms of competition and reduce economic efficiency.

Commendably, President Trump has directed federal agencies to set up regulatory review task forces, which are directed to evaluate existing regulations and propose for elimination those rules whose costs

25. As Heritage Foundation scholar Bryan Riley explains, U.S. trade agreements, inspired by NAFTA’s example, have “slowly but surely increased environmental and labor mandates that added to the ‘managed trade’ aspect of international commerce.” This undermines free trade and economic welfare. “Inclusion of environmental and labor mandates risks turning trade agreements into supranational regulatory arrangements that restrict trade flows instead of freeing them.” Moreover, “[s]uch regulatory deals also obscure the fact that trade is good for workers and for the environment.” *Ibid.*, p. 3.

26. See, generally, Nile Gardiner and Theodore Bromund, “Freedom from the EU: Why Britain and the U.S. Should Pursue a U.S.–U.K. Free Trade Area,” Heritage Foundation *Background* No. 2951, September 26, 2014, http://thf_media.s3.amazonaws.com/2014/pdf/BG2951.pdf.

27. Buy American Laws create additional, costly regulatory burdens for producers, increase costs for American taxpayers, and are unlikely to yield job growth in target industries. See Tory Whiting, “‘Buy American’ Laws: A Costly Policy Mistake That Hurts Americans,” Heritage Foundation *Background* No. 3218, May 18, 2017, <http://www.heritage.org/sites/default/files/2017-05/BG3218.pdf>. More generally, the role of excessive regulation in hampering U.S. international trade opportunities is briefly explored in Bryan Riley, “Some Barriers to U.S. Trade Are Self-Inflicted,” Heritage Foundation *Commentary*, April 13, 2017, <http://www.heritage.org/trade/commentary/some-barriers-us-trade-are-self-inflicted>.

28. The Heritage Foundation has highlighted the benefits of a possible U.S.–Japan FTA. See Riley Walters, “A U.S.–Japan Free Trade Agreement in 2018,” Heritage Foundation *Issue Brief* No. 4702, May 4, 2017, <http://www.heritage.org/sites/default/files/2017-05/IB4702.pdf>.

29. See James L. Gattuso and Diane Katz, “Red Tape Rising 2016: Obama Regs Top \$100 Billion Annually,” Heritage Foundation *Background* No. 3127, May 23, 2016, <http://www.heritage.org/government-regulation/report/red-tape-rising-2016-obama-regs-top-100-billion-annually>.

outweigh their benefits.³⁰ In addition to taking on existing regulatory burdens, the Trump Administration's Office of Management and Budget (OMB) will continue to review new proposed Executive Branch regulations through a cost-benefit lens, as has been done since the Reagan Administration. The Heritage Foundation recently recommended that OMB regulatory review be stiffened (made applicable to guidance documents, not just formal rules) and extended to independent federal agencies, to render it a more effective tool for reining in the regulatory state.³¹

What is more, the Trump Administration has cooperated with Congress to overturn a number of costly Obama-era rules under the terms of the Congressional Review Act (CRA), which allows a simple expedited up-or-down vote on final agency regulations with the President's signature.³² The CRA has two added deregulatory benefits: (1) it bars an agency from adopting a regulation that is substantially similar to the one overturned, absent a new act of Congress; and (2) it allows Congress to reach back and review agency regulations that were never properly submitted to Congress under the CRA.

Finally, and fortunately, the tools used by antitrust economists to study the harm caused by anti-competitive private restraints also can be used to measure the negative economic welfare effects of government-imposed anticompetitive distortions. The Trump Administration should establish a White-House-led task force charged with examining and proposing fundamental reforms (as appropriate, and in light of sound economic analysis) to major statute-based regulatory regimes that distort competition.³³ The task force could draw upon the expertise of some of the roughly 100 career PhD

economists employed by DOJ and the FTC, who have great expertise in the economics of regulation and of industry. The task force's recommendations could serve as the blueprint for far-reaching pro-competitive regulatory reform, based on clearer and more precise statutes designed to minimize regulatory overreach.

Recommendations: A Prescription to Advance American Economic Freedom

Sound U.S. international antitrust, international trade, and regulatory policy reforms, pursued in tandem, will significantly benefit the American economy. To this end, the Trump Administration should consider the following measures:

- **Establish a White-House-led task force charged with developing a strategy to stem future substantive and due-process abuses** by foreign antitrust authorities that impose serious harm on American businesses.
- **Focus on removing regulatory impediments to expanded trade and beneficial competition** in the context of international trade negotiations (such as the renegotiation of NAFTA and the crafting of a U.S.–U.K. free trade agreement).
- **Undertake vigorous efforts to eliminate harmful non-cost-beneficial regulations and intensify the review of proposed regulations**, building on recent Executive Orders by President Trump and the authority for expedited review and elimination of regulations pursuant to the Congressional Review Act.

30. In February 2017, President Trump issued a Presidential Executive Order requiring federal agencies to "evaluate existing regulations... and make recommendations...regarding their repeal, replacement, or modification, consistent with applicable law" when the regulations were found to be economically harmful, unnecessary, or inconsistent with regulatory reform policies. See President Donald J. Trump, "Enforcing the Regulatory Reform Agenda," Executive Order No. 13777, February 24, 2017, <https://www.federalregister.gov/documents/2017/03/01/2017-04107/enforcing-the-regulatory-reform-agenda> (accessed June 29, 2017). This order followed on the heels of an earlier Trump Executive Order requiring that federal executive agencies pair "any new incremental costs associated with new regulations" with commensurate cost savings from repealing "at least two existing regulations." See President Donald J. Trump, "Reducing Regulation and Controlling Costs," Executive Order No. 13771, January 30, 2017, <https://www.federalregister.gov/documents/2017/02/03/2017-02451/reducing-regulation-and-controlling-regulatory-costs> (accessed June 29, 2017).

31. See Diane Katz, "A Regulatory Reform Agenda for the First 100 Days," Heritage Foundation *Issue Brief* No. 4652, February 1, 2017, <http://www.heritage.org/sites/default/files/2017-02/IB4652.pdf>.

32. See Paul Larkin, "The Reach of the Congressional Review Act," Heritage Foundation *Legal Memorandum* No. 201, February 8, 2017, http://www.heritage.org/sites/default/files/2017-02/LM-201_1.pdf.

33. This proposal is developed in Alden F. Abbott, "A Strong Competition Policy Prescription for a New U.S. Administration," *Concurrences*, No. 4 (2016), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2877780 (accessed June 29, 2017).

- **Establish a White-House-led task force charged with examining and proposing fundamental reforms** to major statute-based regulatory regimes that distort competition.

Taken together, these measures should bestow significant benefits on American consumers and producers and help accelerate American economic growth. But perhaps most fundamentally, comprehensive U.S. international antitrust, regulatory trade liberalization, and general regulatory reform should be seen as far more than mere means to grow the economy. They are instruments to promote economic freedom.³⁴

Private individuals should have the right to enter into voluntary, mutually beneficial transactions with other individuals, which impose no harm on third parties, as a matter of economic liberty. Private parties also have a fundamental right to earn a living,³⁵ and to engage in legitimate commerce (as individuals and as companies that represent the interests of individuals) to achieve that end. Regulatory and antitrust impediments to free trade, and unnecessary regulatory strictures, interfere with the free exercise of those rights by inappropriately constraining freedom of contract and reducing the value of property. It follows that American economic freedom will rise as unwarranted regulatory and trade restraints are lifted through implementation of the proposed reforms.³⁶ Achievement of such an outcome will take time, but is well worth being pursued.

—*Alden F. Abbott is Deputy Director of, and John, Barbara, and Victoria Rumpel Senior Legal Fellow in, the Edwin Meese III Center for Legal and Judicial Studies, of the Institute for Constitutional Government, at The Heritage Foundation.*

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34. "Economic freedom is the fundamental right of every human to control his or her own labor and property. In an economically free society, individuals are free to work, produce, consume, and invest in any way they please. In economically free societies, governments allow labor, capital, and goods to move freely, and refrain from coercion or constraint of liberty beyond the extent necessary to protect and maintain liberty itself." The Heritage Foundation, "What is Economic Freedom?" in Terry Miller and Anthony Kim, *2017 Heritage Index of Economic Freedom*, (Washington, DC: The Heritage Foundation, 2017), <http://www.heritage.org/index/about>.
35. "The right to earn a living and enjoy the fruits of one's labor is a fundamental human right, guaranteed by the Constitution." Cato Institute, "The Right to Earn a Living: How Government Stifles Initiative and Harms Economic Growth," September 20, 2010, <https://www.cato.org/events/right-earn-living> (accessed June 29, 2017).
36. The Heritage Foundation's *Index of Economic Freedom* (see footnote 34 above) annually ranks nations in numerical order, based on their degree of economic freedom. The *Index* is based on measures of: (1) rule of law (property rights, government strategy, judicial effectiveness); (2) government size; (3) regulatory efficiency; and (4) open markets. The proposed international antitrust improvements, trade-barrier-related regulatory reductions, and general regulatory reforms would improve the U.S.'s economic freedom scores in all four categories, and thereby help it raise its current (2017) disappointing ranking of number 17 in the world.
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