

**Federal Trade Commission
Office of Inspector General**



**Audit of Federal Trade Commission
Expert Witness Services**

OIG Report No. A-20-03 November 14, 2019





Office of Inspector General

UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
WASHINGTON, D.C. 20580

November 14, 2019

MEMORANDUM

FROM: Andrew Katsaros
Inspector General

A handwritten signature in black ink, appearing to read "Andrew Katsaros".

TO: Bruce Hoffman, Director, Bureau of Competition
Bruce Kobayashi, Director, Bureau of Economics

CC: David B. Robbins, Executive Director

SUBJECT: Audit of Federal Trade Commission Expert Witness Services

Attached is our final report on the results of our audit of the Federal Trade Commission's (FTC) expert witness services. The objective of our audit was to examine the extent to which expert witness contracts within the Bureau of Competition (BC) are acquired with the prudent and economical use of FTC funds.

We found that the FTC would benefit from an updated strategy for supporting matters requiring expert witness services. We also found that contracts for expert witness services contained inconsistently documented considerations on in-house expertise.

The FTC's response to the draft report's findings and recommendations is included as Appendix J. The response reflects that the FTC concurred with the report's two recommendations.

Portions of this report related to sensitive contractor and agency information have been redacted for public reporting purposes.

Please submit to us an action plan that addresses the recommendations in this report within 60 calendar days. A public version of this report will be posted on the OIG's website pursuant to sections 4 and 8M of the Inspector General Act of 1978, as amended (5 U.S.C. App., §§ 4 and 8M).

We greatly appreciate the cooperation and courtesies extended to the OIG team by the Bureau of Competition and Bureau of Economics teams during our audit. If you have any questions or concerns regarding this report, please contact me at 202-326-3527, or by email at Akatsaros@ftc.gov.

Attachment



OFFICE OF INSPECTOR GENERAL

AUDIT OF FEDERAL TRADE COMMISSION EXPERT WITNESS SERVICES

November 14, 2019
Report No. A-20-03

IN SUMMARY

Why We Performed This Audit

We conducted a performance audit to examine the extent to which expert witness contracts within the Bureau of Competition (BC) are acquired with the prudent and economical use of FTC funds.

The agency currently has a considerable reliance on contractors to perform expert witness activities. This dependency could potentially limit the ability of the Commission to carry out its strategic goal of maintaining competition throughout the economy and impact the types of cases it chooses to challenge.

We found that the FTC is aware of the escalation in expert witness contract costs over the last several years and has documented strategies for addressing them. Significant merger activity throughout several sectors of industry as well as increasing complexity of matters has placed pressure on FTC resources.

In its recent Congressional Budget Justification, the FTC requested an increase to the annual appropriation of approximately \$6 million, with \$1.6 million for BC's expert witness needs due to the increased number of complex investigations and litigations.

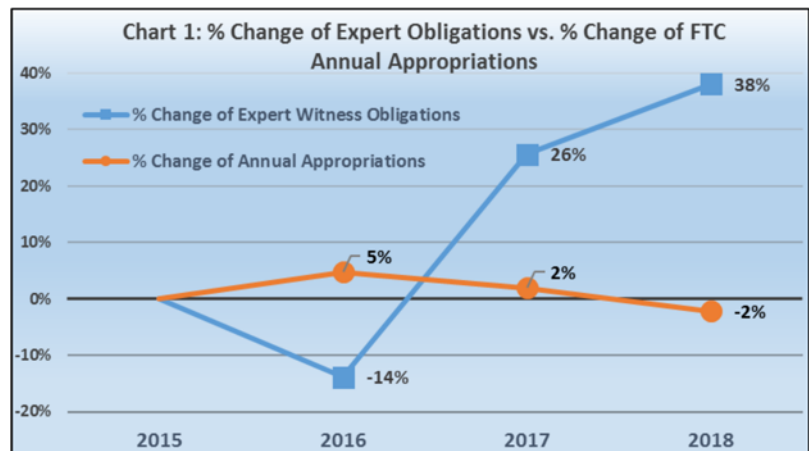
Even with additional appropriated resources, however, the FTC will be forced to make difficult decisions on its investigations.

What We Found

We found that the FTC would benefit from an updated strategy for supporting matters requiring expert witness services.

We also found that contracts for expert witness services contained inconsistently documented considerations of competition or in-house expertise.

The use of expert witness cost information in decision-making on future matters will become more important if costs for expert services continue to rise faster than appropriations.



What We Recommend

We recommend that the Director of the Bureau of Economics:

1. With the Human Capital Management Office, develop and maintain a strategy, updated at least annually, for considering internal expert witness service capacity on future matters.

We recommend that the Director of the Bureau of Competition:

2. Implement requirements for documenting the processes and considerations involved with expert witness contracting decisions, to include considerations on the availability of in-house experts.

FTC management concurred with both recommendations.

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AUDIT RESULTS SUMMARY

We conducted a performance audit to examine the extent to which expert witness contracts within the Bureau of Competition (BC) are acquired with the prudent and economical use of FTC funds. Our objective was to assess the adequacy of cost controls in expert witness contracts. Our audit focused on expert witness services used to support BC's investigations and litigation for competition cases. Specifically, we assessed the adequacy of controls over the contracting process, the role of expert witnesses, and efforts to address escalating contract costs. We audited BC's expert witness activity for the period covering October 1, 2016 through September 30, 2018. Additional information on our objective, scope, and methodology is included in Appendix A. Background information is included in Appendix B.

We found that the FTC is aware of the escalation in expert witness contract costs over the last several years, has documented strategies for addressing them, and found no exceptions overall to the adequacy of cost controls. Significant merger activity throughout several industry sectors, as well as increasing complexity of matters, has placed pressure on FTC resources. Even with additional appropriated resources, however, the FTC will be forced to make difficult decisions on its investigations. The agency currently has a considerable reliance on contractors to perform expert witness activities. This dependency could potentially limit the ability of the Commission to carry out its strategic goal of maintaining competition throughout the economy and impact the types of cases it chooses to challenge.¹

The results of our audit show that the FTC has opportunities to improve its control over the expert witness process. Based on the noted trends and information on historical costs, our independent assessment shows that working with the HCMO to explore the possibility of acquiring expert witness talent within the organization is worth revisiting. The FTC's Bureau of Economics (BE) has previously considered internal recruitment and retention for economists, noting various challenges in acquiring and retaining talent. Our interviews and conversations throughout the audit revealed that FTC program officials have immense experience supporting theories, ideas, and personal views on addressing the escalating costs of expert witness contracts that would benefit from HCMO expertise and considerations of additional data.

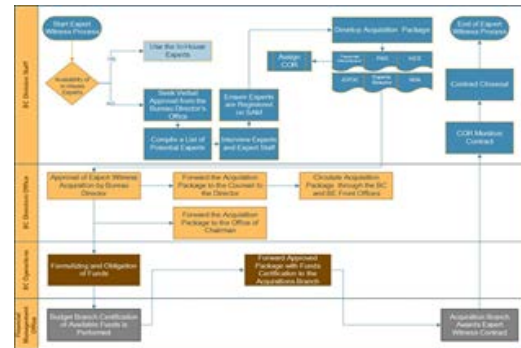
We also found that documentation of key decisions made throughout the process varies widely. At the outset of our audit [REDACTED] instructed litigation teams to consider an in-house expert prior to obtaining external expert witnesses. However, [REDACTED] did not provide detailed guidance on documenting the results of this search. This process typically involves consultation with BE officials to determine if suitable internal resources are available. The documentation of this critical part of the overall process was inconsistent and often lacked structure. Until late in FY 2019, there was no specific guidance on documentation requirements detailing the consideration of an in-house expert witness, including where it should be maintained.²

¹ FTC Strategic Goal 2, *To maintain competition to promote a marketplace free from anticompetitive mergers, business practices, or public policy outcomes*, is included in the *FTC Strategic Plan for Fiscal Years 2018 to 2022*.

² The step of considering an internal expert is a BC process occurring prior to the initiation of the contracting process involving the FMO Acquisitions Division. The FMO Acquisitions Division does not maintain this documentation.

WHY WE PERFORMED THIS AUDIT

With the following challenges in mind, our office analyzed multiple features of various BC expert witness procurements to facilitate decision-making by FTC leadership in this area and to identify what opportunities exist for the FTC to improve its outcomes over the entire process. We documented this process in Appendix B and flowcharted the process in Appendix F (see preview to the right).



The FTC strives to address competitive concerns of proposed mergers or business practices without creating encumbrances on legitimate business activity. The OIG acknowledges that the FTC is striving to accomplish this while enduring level budgets in recent years, matched against escalating litigation costs, increased complexity of matters, and dramatic changes to the economic, technological, and legislative environment.

Two of the most significant challenges involved in anticipating the costs associated with enforcement actions are the uncertainty surrounding the mix of scope and disposition of cases of potential litigation and the overall projecting costs for the expert witness program. Cases involving anticompetitive practices (conduct cases), for example, can go on for several years and make it close to impossible for FTC management to accurately project the required costs of expert witness services.

The Commission can deploy its own staff as expert witnesses when practical; however, these opportunities are currently limited. Outside experts are often employed in specialized occupations that require vast knowledge in narrow subject areas, and the knowledge, education, and professional experience required to develop a skillset for consideration as an expert can take years to develop. Serving as an expert witness can also be demanding and stressful, requiring mental resiliency and an ability to handle opponent criticism. Further, the compressed schedule and unpredictable demands that accompany a competition matter make the use of internal FTC employees difficult. The data demands and analysis required of experts also often do not comport with the use of internal experts. Due to these realities, the FTC has a limited pool of internal personnel that can serve as expert witnesses.

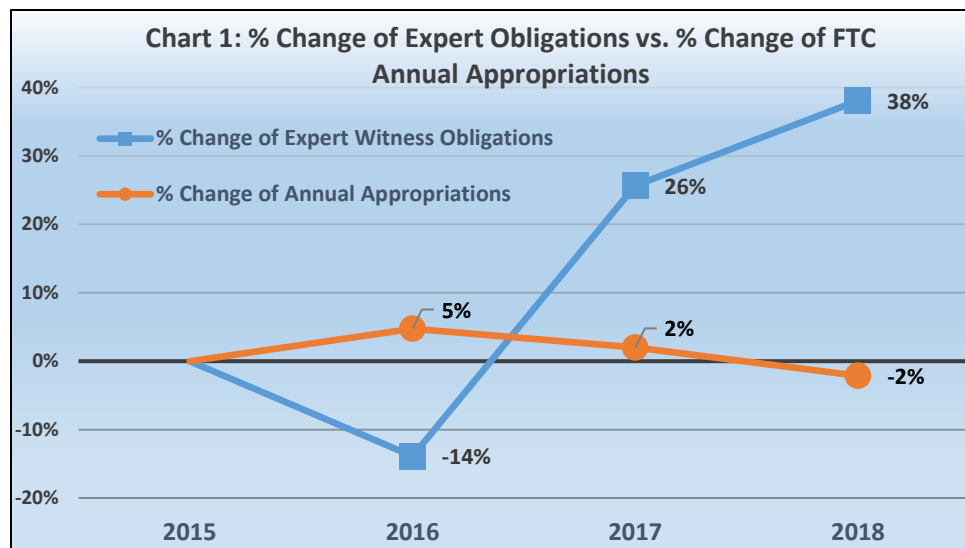
Additionally, due to the nature of the work, it is imperative that experts remain clear of the perception of bias or other conflicts. This limits, but does not eliminate, opportunities for Commission employees to serve as experts. Further, the FTC is limited in the type of incentives that can be offered to an employee performing in the role of an expert witness. An offer of additional compensation beyond the normal pay scale could create independence issues and is otherwise prohibited by federal personnel rules. For these reasons and the reasons described above, the internal development of sought-after expert witness qualifications on a wide basis can be challenging to the Commission.

FINDINGS AND RECOMMENDATIONS

A. The FTC Would Benefit From an Updated Strategy for Supporting Matters Requiring Expert Witness Services

The FTC has many years of data available on the costs of expert services for all types of cases, including contractor cost breakouts, price escalations, the duration and costs of investigative and litigation matters, and the costs of its own services. The FTC has consistently used this information to develop budget projections and manage available expert witness funding. We identified additional opportunities for the agency to use available information and resources to develop insights that inform decisions benefitting matters requiring expert witness services.

The use of expert witness cost information in decision-making on future matters will become more important if costs for expert services continue to rise faster than appropriations. During FY 2015 and FY 2016, BC obligated an average \$9.3 million on expert services and this spending continues to increase. In FY 2017, spending totaled over \$10.7 million and approached \$14.9



Funding for the FTC has not kept pace. Adjusted for inflation, the FTC's overall funding has actually fallen since 2010.³ Due to the unpredictability of expert witness contract costs, the Office of the Chief Financial Officer (OCFO) works closely with BC officials to estimate

annual needs. Although this cannot be determined to be a systemic pattern for several years, indications at the end of our audit suggest that FY 2019 expert witness obligations will be lower than that of FY 2018.

The increase in obligations for expert services between FYs 2015 and 2018 can be attributed in part to economic conditions that drive an increase in the filings for Hart-Scott-Rodino (HSR) merger transactions. In FY 2017, for example, HSR merger transactions increased approximately 12 percent over those reported in FY 2016.

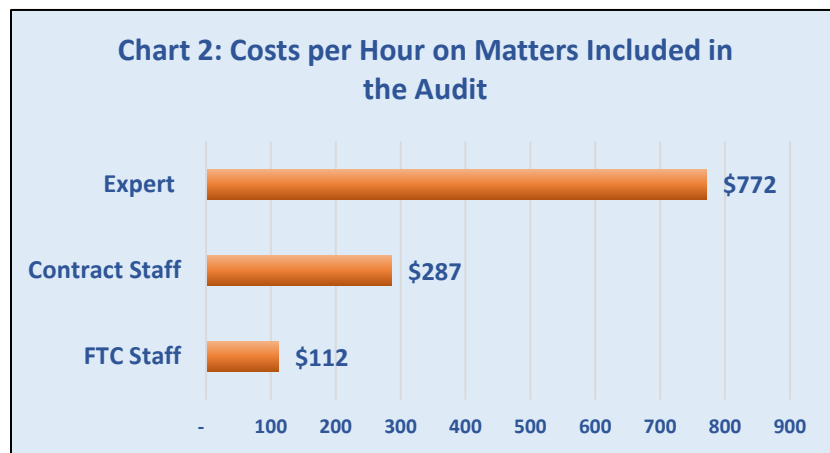
³ Based on an analysis, total actual appropriations reported in prior Congressional Budget Justifications and consumer price index values from the Bureau of Labor Statistics, the FTC's reported actual appropriations in FY 2010 (\$291.7 million) would equal approximately \$335.9 in FY 2018, which had an actual appropriation level of \$310.9.

Program demands that have resulted in a dependency on contractors, without corresponding agency budget increases, could potentially limit the ability of the Commission to carry out its strategic goal of maintaining competition throughout the economy. FTC officials are aware of these challenges, have explored the issue, and have acquired an understanding of the risks that they present to FTC strategic objectives.⁴

The FTC is Paying Significantly for Contractor Expert and Staff Costs

Many of the expert witnesses contracted by BC to assist in competition matters come through a few firms that possess the expertise required to handle and support large complex competition cases. Contracts with these firms typically involve an expert witness and several support staff used to support matters under investigation or litigation. Contract staff support the expert in various ways, including conducting research on economic literature, collecting and cleaning data, and assisting with data analysis.

The FTC is unquestionably paying significantly when it contracts for expert witness services. As shown in Chart 2 for the nine matters under OIG review (representing 80% of the total amount



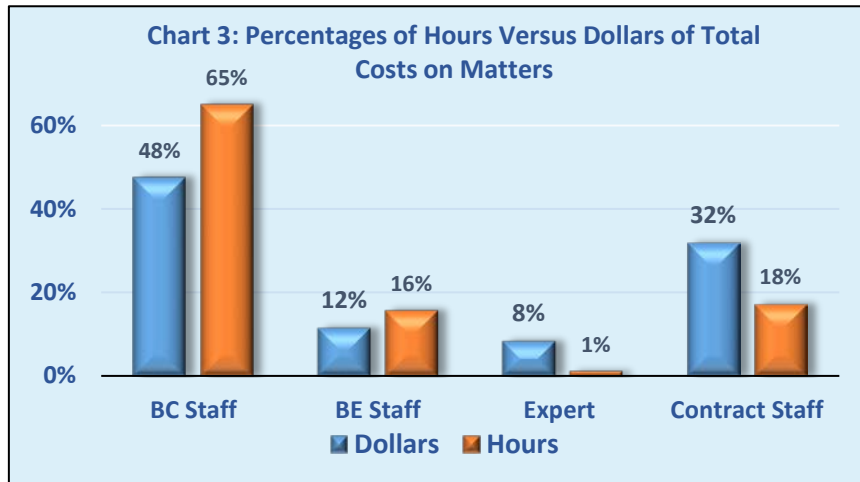
contracted for all expert witness services in FYs 2017 and 2018), the FTC, on average, paid over \$750/hour for each expert under contract.⁵ Even the contract support staff working at the expert firms were expensive as compared to FTC costs, as the FTC paid \$287/hour for these services versus an average FTC staff hour of \$112.⁶ Continuing to

understand these price points provides the FTC with a baseline for determinations on whether in-house expertise can be used in some capacity to support expert witness firms. As shown in Chart 3, despite only dedicating 19% of the total time, the contracted firms represented approximately 40% of the total costs of the matters included in our audit. The expert witness, on average, individually contributed to 8% of the total costs despite contributing only 1% of the total hours. Appendix D includes detailed comparisons of the total costs for each matter under OIG review.

⁴ [Redacted]

⁵ FTE costs were calculated using average salaries of FTC employees working on audited matters and related hours recorded in the Staff Time and Activity Reporting (STAR) system.

⁶ All FTC staff hours are recorded in STAR. STAR data is used to generate program and performance information for annual budget submissions, the Government Performance and Results Modernization Act of 2010 plans and reports, and agency financial statements. STAR data is also used to track and compare expended staff time against statutory mandates and Commission policy.



The features of matters under consideration – including the type and scope of enforcement activity and whether a matter is likely to be litigated – have a significant impact on the total costs to the FTC. For example, conduct matters (e.g., those matters involving anticompetitive business practices) tend to take longer and be more

costly than those involving mergers. Notably, of the nine matters reviewed (two conduct matters and seven merger matters) the conduct matters were the most expensive overall.

In its recent Congressional Budget Justification, the FTC requested an increase to the annual appropriation of approximately \$6 million, with \$1.6 million for BC’s expert witness needs due to the increased number of complex investigations and litigations.⁷ While the FTC is looking to acquire additional appropriated resources, outside costs for expert witness services could be rising faster than proposed budget increases.

The FTC Would Benefit From an Updated Approach to Expert Witness Service Considerations

BE would benefit from updated information supporting hypotheses on the availability of expert witness talent and their general desire for research opportunities. Beyond market changes, much has changed in the FTC during the period that BE last worked with the Human Capital Management Office (HCMO) to consider internal expert witness service capacity, including the type of work the agency is involved with and its public profile.

Based on the noted trends and information on historical costs, our independent assessment shows that working with HCMO to explore the possibility of expanding expert witness services within the organization is worth revisiting. Internal FTC deliberations addressing expert costs concluded that several advantages could be realized by using BE staff for expert services.⁸ The FTC found that it is not always possible to use BE staff for expert testimony and expert support work; however, the study found that “...many BE staff have testified in competition enforcement actions. BE staff possess significant expertise in supporting enforcement actions and in analyzing the markets and industries that are the focus of the enforcement actions.” Additionally, the FTC found that many BE staff economists are open to an opportunity to develop and practice their skills in preparing expert reports and in testifying in a deposition and at trial. Most importantly, the internal FTC analysis showed that additional staff with in-house testifying experience could enhance options for using BE staff in future enforcement actions.

⁷ Federal Trade Commission Fiscal Year 2020 Congressional Budget Justification, March 11, 2019.

⁸

Bureau of Economics leadership communicated that the expanded use of internal experts was not sustainable for various reasons, including the price at which BE was able to acquire talent and the perceived risk to the agency's ability to conduct research in lieu of deploying economists in support of expert witness services. BE leadership also shared documents that in their estimation strongly supported this position. According to its leadership, throughout FY 2019, BE provided as many as three economists per week to serve as experts on agency matters.

The FTC would benefit from revisiting the feasibility and potential benefits of expanding the use of in-house expertise. This will provide the FTC with opportunities to (1) acquire better value from experts under contract; (2) better control firm staff costs; (3) expand the use of hybrid approaches for supporting experts under contract; (4) introduce competition; and (5) develop in-house capacity where appropriate. Understanding and staying informed on this data and how it changes over time will be important for the FTC to improve its control over the costs of contracted expert witness services. As mentioned earlier, the FTC is already accumulating expert witness cost information to better predict annual needs.

Federal guidelines also support the need for agencies to develop their internal data analysis capabilities. OMB Circular A-11, *Preparation, Submission and Execution of the Budget*, details that agency leadership is responsible for establishing measurable goals and for conducting data-driven reviews that are critical for creating a results-oriented culture. Successful reviews include analyzing disaggregated data, learning from past experience, and deciding next steps to increase performance and productivity. Data-driven (or data-informed) reviews or studies can provide the evidence needed to link budget resources to the agency performance plan goals, and guide decisions and actions to improve performance outcomes, manage risk, and reduce costs. Further, the results foster debate among management and staff that help to find, sustain, and spread promising practices and policies.

B. Contracts for Expert Witness Services Contained Inconsistently Documented Considerations of Competition or In-House Expertise

Our review of the documentation of nine matters covered fifteen contracts for expert witness services (see Appendix C for a list of all contracts and matters included in our audit). We determined, overall, that the FTC followed the Federal Acquisition Regulation (FAR) rules requiring considerations that contract prices associated with these awards be fair and reasonable⁹ and that the proper award approvals be included in the contract files in each instance.

Documentation and considerations in other areas were lacking. The results of our tests of 15 separate contracts for expert witness services revealed five documented instances where in-house expertise was considered. This consideration is required [REDACTED]; however, *documentation* of the consideration was not required at the time of our audit so very little information was available for the OIG to review regarding support for conclusions made on the five documented instances. Even in these instances, the FTC documented occasional considerations of in-house expertise or conclusions that in-house expertise was not available without providing rationales. This is not a conclusion that the FTC made the incorrect

⁹ "Fair and Reasonable" is not defined by the FAR. According to the FAR, "a cost is reasonable if, in its nature and amount, it does not exceed that which would be incurred by a prudent person in the conduct of a competitive business." 48 C.F.R. § 31.201-3(a).

assessment in any of its decisions. However, it is a demonstration of the extent to which contracting for expert witness services is institutionalized in the FTC's approach to BC matters.

At the average prices noted in Finding 1, the FTC is incentivized to carefully consider whether competition should be introduced in future matters. Our tests of nine matters revealed that documentation on considerations of multiple sources was not available for five matters and only limited documentation was provided for the remaining four. None of the awards were competed. In the future—for those matters where the FTC anticipates significant expert witness participation based on an analysis of prior similar matters—competition, negotiation, and in-house expertise can be considered more intentionally.

As outlined in the *Standards for Internal Control in the Federal Government*, management identifies information requirements in an iterative and ongoing process. As changes in the entity's objectives and risks occur, management changes information requirements as needed to meet these modified objectives and address these modified risks.¹⁰

Prior to August 2019, [REDACTED] did not instruct on how the consideration of the use of in-house experts should be documented or who is responsible for maintaining the documentation. Because deciding to use an outside contractor can be a significant financial decision, requiring effective documentation of the considerations made in the decision would assist the FTC in future contracting decisions and help lay a foundation for what it would require to build an in-house capability for these services.

Internal Control Standards state that management should develop and maintain documentation of its internal control system and implement control activities through policies. The standards also state that documentation of responsibilities through policies and periodic review of activities can contribute to the effectiveness of implementation. Agencies should use quality information, both internal and external, to achieve objectives. Internal Control Standards also call for management to periodically review the policies, procedures, and related activities for continued relevance and effectiveness in achieving the entity's objectives or addressing related risks.

ADDITIONAL OBSERVATION

Managing Expert Witness Contracts as a Means of Controlling Costs

We found that agency efforts to control expert witness costs focus heavily on obtaining better contract terms through the competition process or adjustments to contract structure. FTC management should not overlook opportunities to enhance contract management. The Contracting Officer's Representative (COR) function is vital to the success of each contract but the COR is also an essential oversight control.

CORs are responsible for monitoring contractor performance, including but not limited to providing technical direction; recommending contract changes; reviewing deliverables; evaluating whether performance measures are achieved; and ensuring the performance is within

¹⁰ GAO, *Standards for Internal Control in the Federal Government*, [GAO-14-704G](#), Washington, D.C., September 2014.

the scope of the contract. As such, staff overseeing the work of experts would benefit from having the economic expertise to understand the professional judgments that need to be made.

Currently, BC attorneys often function as CORs on expert witness contracts. It appears that BC attorneys are selected to serve as CORs on these contracts due to their proximity to the work and overall familiarity with matters being pursued. The FTC should consider the advantages of using BE economists as CORs on expert witness contracts. In instances where contractors may suggest costly or potentially unnecessary analyses, BE economists would be better equipped to understand the plans and/or approach of contracted expert witnesses. Trained economists may have a greater chance of identifying and ferreting out unnecessary ideas promoted by contracted experts. By utilizing a BE economist as the COR, management could potentially increase the opportunity for savings during the management of contracted dollars.

As an additional observation, we provide this matter to FTC management for its consideration, without any associated recommendations.

Recommendations

We recommend that the Director of the Bureau of Economics:

1. In collaboration with the Human Capital Management Office, develop and maintain a strategy, updated at least annually, for considering internal expert witness service capacity on future matters.

We recommend that the Director of the Bureau of Competition:

2. Implement requirements for documenting the processes and considerations involved with expert witness contracting decisions, to include considerations on the availability of in-house experts.

SUMMARY OF AGENCY RESPONSE AND OIG COMMENTS

FTC management concurred with both recommendations to address the rising costs of expert witness services. In its response to our draft report, the agency wrote that, for over a decade, it has focused significant resources on managing expert witness service costs, and on exploring ways to control and minimize them. The response also mentions that, on October 23, 2019, Chairman Simons [REDACTED] proposed new practices for reducing expert witness costs, and directed staff to begin implementing these proposals. The FTC mentions that, to date, staff either are starting to implement these proposals or have already implemented them. FTC also provided technical comments, which we incorporated as appropriate. The FTC's formal response to our draft report is included as Appendix J.

APPENDIX A: OBJECTIVE, SCOPE, AND METHODOLOGY

Our objective was to assess the adequacy of cost controls in expert witness contracts. Our audit focused on expert witness services used to support BC's investigations and litigation for competition cases. Specifically, we assessed the adequacy of controls over the contracting process, the role of expert witnesses, and efforts to address escalating contract costs.

To execute our audit, we researched and reviewed pertinent authorities including Federal laws, agency guidance, policies, and procedures related to the procurement and management of expert witnesses. This included OMB Circular A-123, *Management's Responsibility for Enterprise Risk Management and Internal Control*, GAO's *Standards for Internal Control in the Federal Government* (The GAO Green Book), the Federal Acquisition Regulation (FAR), [REDACTED] internal FTC policies, and policy memoranda.

We obtained documentation on the BC expert witness process, congressional testimony, financial and performance data, and other artifacts relevant to the expert witness program. We reviewed published products, including those from other OIGs, to identify known weaknesses, issues, and recommendations. We used this information to develop our audit approach, which consisted of interviews with FTC officials, focused research and analysis of relevant documentation, and testing of processes against criteria. We assessed the controls that are significant to BC's expert witness program, including policies and procedures used by BC when obtaining expert witness services. We conducted walk-throughs of the expert witness process and documented our understanding of the processes in place and decisions made by management.

We assessed the reliability of FTC expert witness procurement data by (1) comparing data reported in USASpending.gov against FTC internally created financial data on procurements, and (2) comparing data provided by BC on expert witness projects to data provided by the FTC's Financial Management Office (FMO).

As part of our audit, we tested controls significant to the expert witness process. We sampled and reviewed 15 expert witness contracts to assess the documented evidence of key controls. In selecting the contracts to review, we focused on the 15 contracts having the largest obligated amounts within the audit scope. We examined contracts for the following:

- 1. Consideration of Internal Expert Witness:** [REDACTED] instructs BC litigation teams to consider an in-house expert witness prior to pursuing a contract expert.
- 2. Multiple Sources Considered:** [REDACTED] requires a comparison of the qualifications and fees quoted by at least two other experts who have been considered.
- 3. Amount Obligated within Reasonable Range of IGCE:** Judgmentally considered within a reasonable range if contract obligation is no more than 120% of IGCE.
- 4. Significant Staff Costs Charged to Contract:** Judgmentally considered whether staff costs account for more than 50% of total invoices.

- 5. Contract Negotiation Documented:** The Justification for Other than Full and Open Competition (JOFOC) document requires that a contracting officer determine that anticipated cost to the Government will be fair and reasonable and the basis for that determination.¹¹
- 6. Contract File Included Required Approvals:** [REDACTED] requires proper approvals of the Assistant Director/Deputy Assistant Director, the Bureau Director, and the Bureau of Economics Associate Director for Antitrust.

A summary of our testing results is included in Appendix H: Results of Expert Witness Contract Testing.

We performed the audit work from November 2018 through September 2019 at FTC headquarters and the Constitution Center located in Washington, D.C.

We conducted this performance audit in accordance with generally accepted government auditing standards. Those standards require that we plan and perform the audit to obtain sufficient, appropriate evidence to provide a reasonable basis for our findings and conclusions based on our audit objective. We believe that the evidence obtained provides a reasonable basis for our findings and conclusions based on our audit objective.

We considered the following guidance in the performance of our audit:

- OMB Circular A-11, *Preparation, Submission and Execution of the Budget*, Part 6 Strategic Plans, Annual Performance Plans, Performance Reviews, and Annual Program Performance Reports;
- OMB Circular A-123, *Management's Responsibility for Enterprise Risk Management and Internal Control*;
- *Standards for Internal Control in the Federal Government* (the GAO Green Book);

- [REDACTED]
- The Federal Acquisition Regulation; and
 - Acquisitions Division policy.

¹¹ "Fair and Reasonable" is not defined by the FAR. According to the FAR, "a cost is reasonable if, in its nature and amount, it does not exceed that which would be incurred by a prudent person in the conduct of a competitive business." 48 C.F.R. § 31.201-3(a).

APPENDIX B: BACKGROUND

The FTC is an independent federal government law enforcement and regulatory agency led by five presidentially appointed Commissioners with the authority to promote consumer welfare through its jurisdiction over both consumer protection and competition issues. The FTC works to prevent business practices that are anti-competitive, deceptive, or unfair to consumers, while also enhancing informed consumer choice and public understanding of the competitive process.

The FTC's Bureau of Competition along with the Department of Justice's (DOJ) Antitrust Division share the responsibility for enforcing the nation's antitrust laws, which form the foundation of our free market economy. Anticompetitive business practices and antitrust matters constitute a significant portion of BC's investigative and litigation activity. These matters can arise from mergers, agreements among competitors, restrictive agreements between manufacturers and product dealers, or attempts to thwart new competitors.

To support competition throughout the marketplace, BC seeks to prevent mergers and acquisitions that are likely to reduce product quality or choices available to consumers, result in higher prices, create risk or injury to the consumers, and thwart competition in the marketplace. BC focuses competition enforcement on segments of the economy where consumer spending is significant. Those segments include healthcare, technology, energy, consumer products and services, and industrial and manufactured goods. To assist with the enforcement of laws, BC relies heavily on the Bureau of Economics' staff of economists. BE economists support BC's investigations, provide analysis, and help determine if proposed mergers are likely to harm consumers.

A. Escalating Costs of Expert Witnesses

The FTC requires expert witness services to support cases either approaching or in litigation in federal or administrative proceedings. The cases can require experts to opine on such issues as the proper definition of product and geographic markets, the likelihood of entry by new competitors, and appropriate models to weigh merger efficiencies against potential competitive harm. Thus far, the Commission has managed to find resources necessary to fund expert witness costs. However, going forward, the FTC could reach a point where it cannot meet needs without compromising its ability to fulfill other aspects of the agency's mission.

B. The Competition Mission

The mission of the FTC's Bureau of Competition is to enforce antitrust laws to safeguard the economy, promote vigorous competition, and protect consumers from anticompetitive business practices such as price fixing, group boycotts, and exclusionary exclusive dealing contracts and anticompetitive mergers and acquisitions. This generally includes anticompetitive violations of Section 5 of the Federal Trade Commission Act, which bans "unfair methods of competition" and "unfair or deceptive acts or practices."

The FTC promotes competition through five primary law enforcement activities (Premerger Notification, Merger and Joint Venture Enforcement, Merger and Joint Venture Compliance, Nonmerger Enforcement, and Nonmerger Compliance) augmented by Antitrust Policy Analysis and other direct functions. See Appendix G for descriptions of competition enforcement

activities. Table 1 shows the obligations on expert contracts by enforcement activity for FY 2018 and FY 2017.

Table 1: Expert Witness Obligations by Enforcement Activity			
Enforcement Activity	Total	2018	2017
Nonmerger Enforcement – Pharmaceuticals	██████████	██████████	██████████
Nonmerger Enforcement – Information & Technology	██████████	██████████	██████████
Nonmerger Enforcement – Health Care	██████████	██████████	██████████
Nonmerger Enforcement – Manufacturing	██████████	██████████	██████████
Mergers & Joint Ventures Enforcement – Retail Goods	██████████	██████████	██████████
Mergers & Joint Ventures Enforcement – Manufacturing	██████████	██████████	██████████
Mergers & Joint Ventures Enforcement – Health Care	██████████	██████████	██████████
Mergers & Joint Ventures Enforcement – Food	██████████	██████████	██████████
Mergers & Joint Ventures Enforcement – Information & Technology	██████████	██████████	██████████
Mergers & Joint Ventures Enforcement – Defense	██████████	██████████	██████████
Mergers & Joint Ventures Enforcement – Energy & Natural Resources	██████████	██████████	██████████
Mergers & Joint Ventures Enforcement – Other Services	██████████	██████████	██████████
Total Expert Witness Contract Obligations	\$ 25,642,395	\$ 14,872,341	\$ 10,770,054

Source: IBC Oracle Federal Financials Systems (FOCUS)

i. Bureau of Competition

BC is comprised of roughly 275 employees and currently arranged into seven¹² litigation divisions, three regional offices, the Premerger Notification Office, the Compliance Division, and the Office of Policy and Coordination. See Appendix E for the BC Organization Chart and additional information on the responsibilities of the divisions and offices. To combat anticompetitive practices and bring enforcement cases, litigation divisions obtain the services of expert witnesses to consult, and if needed, to testify as part of litigation proceedings. Table 2 details expert witness obligations by BC division for FY 2018 and FY 2017 (Audit Scope).

¹² BC added the Technology Enforcement Division in FY 2019.

Table 2: Expert Witness Contract Obligations by Litigation Division

Bureau of Competition Division / Office	Total	2018	2017
Anticompetitive Practices - BC	██████████	██████████	██████████
Healthcare Services & Products - BC	██████████	██████████	██████████
Mergers I – BC	██████████	██████████	██████████
Mergers II – BC	██████████	██████████	██████████
Mergers III – BC	██████████	██████████	██████████
Mergers IV – BC	██████████	██████████	██████████
Total Expert Witness Contract Obligations	\$ 25,642,395	\$ 14,872,341	\$ 10,770,054

Source: IBC Oracle Federal Financials Systems (FOCUS)

The Premerger Notification Office is instrumental in alerting BC litigation divisions to proposed mergers that often become subject to FTC enforcement.¹³ The premerger program requires filings and waiting periods, which provide the FTC with the time and the information necessary to conduct merger reviews, and ensures that the FTC or DOJ Antitrust Division review virtually every relatively large merger or acquisition that affects U.S. consumers before consummation.¹⁴

By challenging anticompetitive business practices, the FTC seeks to ensure that consumers have choices in price, selection, and service. Mergers may benefit consumers by creating greater efficiency in the market, but can result in higher prices, fewer choices, or lesser quality. The challenge to the Commission is to evaluate the potential impacts on the market – a process which involves significant investigation and economic analysis. The following questions are used in BC considerations when determining if pursuit of a competition matter is warranted:

1. Does the conduct pose a substantial threat to consumers?
2. Does the conduct involve a significant economic sector of the economy?
3. Does the FTC have experience that will allow it to make an impact quickly and efficiently?
4. Does the conduct present a legal issue that would benefit from further study, and potentially have a significant effect on antitrust jurisprudence?
5. Does the matter involve unilateral conduct by dominant firms in industries with substantial network effects, where conduct may impede entry or fringe expansion?¹⁵

¹³ The Hart-Scott-Rodino Act (HSR Act) established the federal premerger notification program, which provides the FTC and the Department of Justice with information about large mergers and acquisitions before they occur.

¹⁴ In general, parties to a merger transaction are required to provide notification to the premerger notification program when the transaction meets the following three tests: (1) Commerce Test, which applies if either party is engaged in commerce or in any activity affecting commerce; (2) Size of Transaction Test, which applies if the transaction is valued at more than \$90 million; (3) Size of Person Test, which applies to whether parties to the transaction meet certain size requirements, if the transaction is valued in excess of \$90 million. The three-test requirements lay out the general criteria and exemptions do apply.

¹⁵ Adapted from *Prepared Remarks of Chairman Joseph Simons, Georgetown Law Global Antitrust Enforcement Symposium*, September 25, 2018.

ii. Bureau of Economics

The Bureau of Economics (BE) is comprised of the Antitrust I, Antitrust II, and Consumer Protection divisions, and the Offices of the Director and Applied Research and Outreach. The Bureau has approximately 110 employees, which includes approximately 80 economists and 20 analysts. The primary function of BE is to provide economic analysis to inform enforcement decisions on consumer protection and competition enforcement matters. BE economists engage in research that provide insight on the issues relevant to the FTC's mission. BE also participates in policy and advocacy work with attorneys from the Office of Policy Planning, the Office of the General Counsel, BC, and the Bureau of Consumer Protection (BCP). The goal is to develop and disseminate historical and analytical information needed to devise sound competition policy.

BE's two antitrust divisions work on investigations of mergers and trade restraints. Staff advise the Commission on proposed antitrust enforcement actions. Economists participate in investigations of alleged antitrust violations and in the presentation of cases.

When working on Competition enforcement matters, BE economists typically provide independent economic analysis to the Commission. The analysis is greatly informed and enhanced by the interaction and cooperation between BC attorneys who work together to gather relevant information during the course of investigations.

A. The Expert Witness Process

The expert witness process typically begins when the recognition and understanding of the challenges posed by specific casework crystalize. Although, expert work varies with the demands of particular cases, expert witness contracts are typically split into two phases: (1) the consulting phase occurring parallel to an investigation; and (2) the testifying phase, required when cases enter litigation. Consulting can involve review, analysis of evidence, initial assessments specific to the competitive matter, and consultation with FTC staff about the case. In the testifying phase, experts will commonly author findings and conclusions based on an analysis of evidence, as well as prepare for deposition, be deposed by opposing counsel, and assist with trial testimony.¹⁶

i. Selection of an Expert Witness

When it is determined that an expert is required and an investigation appears to be heading toward litigation, BC case teams, with the approval of the Bureau Director, will initiate research and develop a pool of available experts. In-house experts should be considered as a first option.¹⁷ If an in-house expert is not plausible, BC attorneys should research [REDACTED] and solicit recommendations from other BC case teams, BC divisions, and BE to develop a list of candidates.¹⁸ BE can help identify concerns about an expert witness candidate's research, public

¹⁶ The testifying phase of an expert witness contract will typically begin when the Commission votes out a complaint, thus voting to pursue the matter in litigation.

¹⁷ [REDACTED]

¹⁸ [REDACTED]

statements, or past testimony that might leave the candidate vulnerable to cross-examination or prevent the candidate from supporting arguments.

When a list of potential experts is developed, an initial series of interviews with candidates occur to confirm availability and that no conflicts of interest exist with any actual or potential parties in the matter arising from the expert's current or past work. During the initial interviews, BC case staff discuss limited aspects of the investigation with the candidates in order to assess the candidate's relevant expertise, experience, and interest in the specific matter.¹⁹

Retaining the services of an outside expert requires a contract. The Financial Management Office (FMO) Acquisitions Division administers all expert witness contracts under the requirements of the Federal Acquisition Regulation (FAR). The Acquisitions Division assists BC staff throughout the acquisition planning process that culminates with a "Documentation Package" required to award an expert witness contract.²⁰ The documentation package is channeled through a chain of reviews and approvals ending with the BC Operations Division entering a formal contract request (requisition). The FMO Budget Division performs a certification of available funds and the documentation package is forwarded to the FMO Acquisitions Division for the contract awarding. See Appendix F for the Expert Witness Contract Process.

ii. Management of Expert Witness Contracts

██████████ each contract must have an attorney to serve as the Contracting Officer's Representative (COR) to oversee the expert contract.██████████²¹ The Acquisitions Division Contracting Officer specifies the COR's responsibilities in the COR appointment letter. All duties delegated to the COR shall be delineated in the COR appointment letter.²² The COR is responsible for understanding the terms of the contract, monitoring contractor performance, documenting performance, approving invoices, monitoring spending, and being aware of modifications to the contract. During the life of the contract the COR must monitor the expert's performance and costs to ensure that the expert does not exceed the contract's budget thresholds. Specifically, the COR reviews invoices to ensure costs (i.e., labor hours) are accurate, work is completed as required by the contract, and contractor performance is acceptable.

Expert witness contracts are typically funded on an incremental basis. The contract ceiling is the total amount requested, while the funded amount on the contract will be a smaller figure. For example, the contract ceiling may be \$800,000, while the total amount funded will be \$200,000. The expert is only allowed to work and bill for up to \$200,000. The BC Operations Division authorizes any release of additional funds.

¹⁹ Before sharing confidential information or discussing possible case theories, BC staff must ensure that the potential expert has signed a Non-Disclosure Agreement (NDA).

²⁰ The Documentation Package must consist of a Transmittal Memo, Performance Work Statement (PWS), Independent Government Cost Estimate (IGCE), the expert's resume, NDA for the expert witness, and a Justification for Other than Full and Open Competition (JOFOC). The JOFOC is a formal, enumerated document that explains why the government is justified in hiring the expert without going through a bidding process.

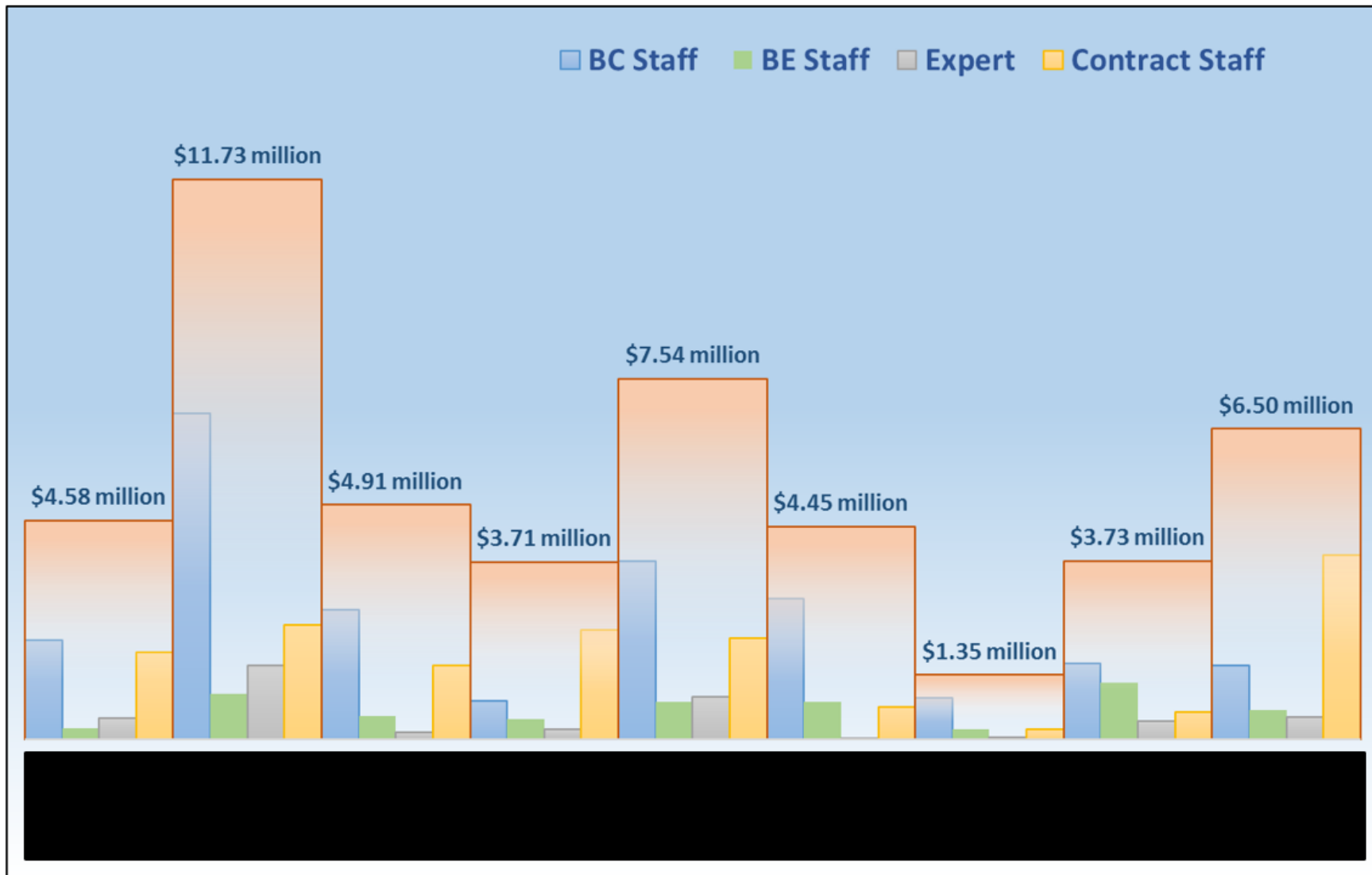
²¹ ██████████
²² The FMO Contracting Officer designates an individual responsible for executing the COR functions in accordance with the Designation (Appointment) Letter.

APPENDIX C: EXPERT WITNESS CONTRACT FILES TESTED

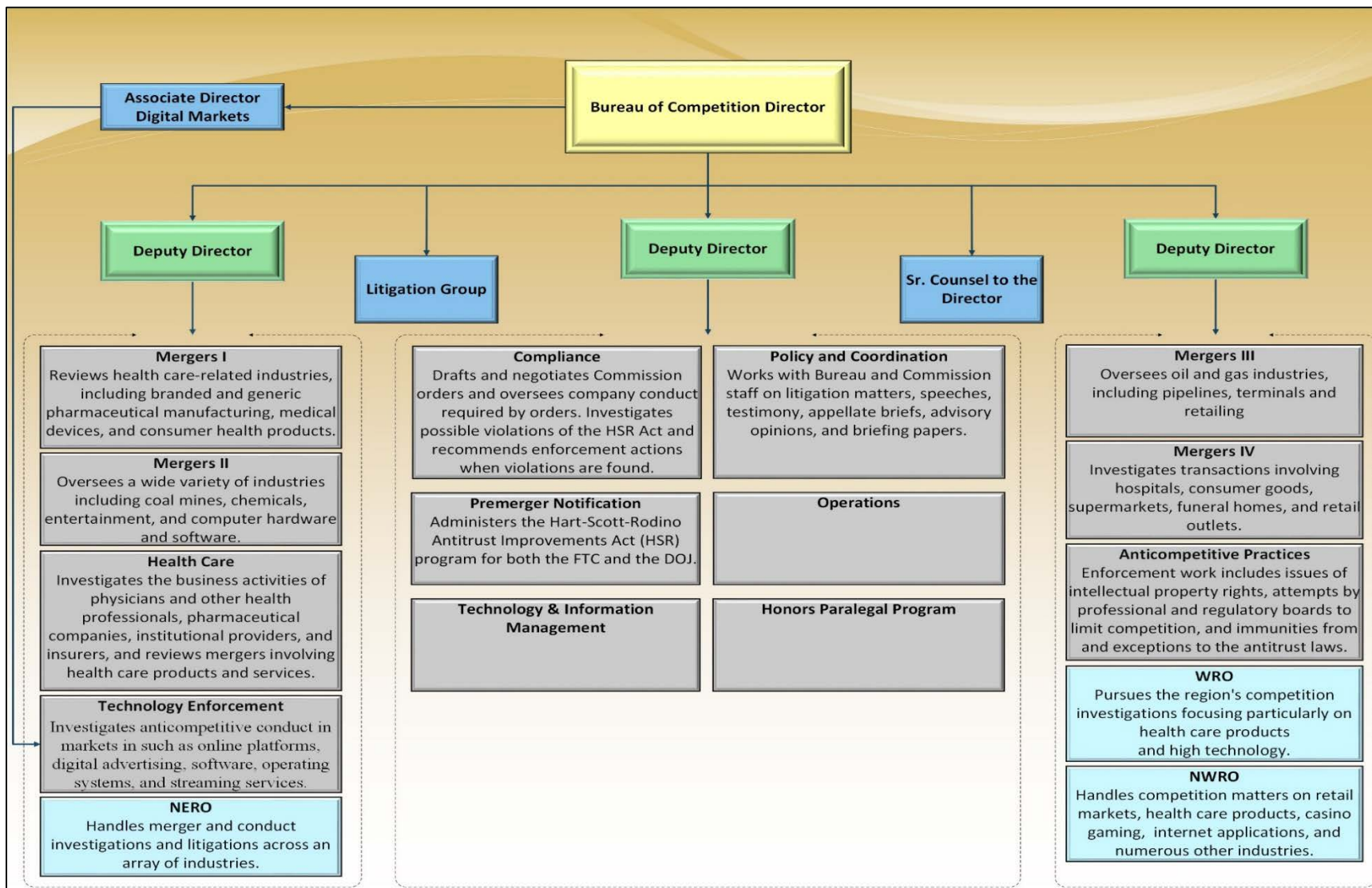
Contract PIID	Vendor Name	Division	Project Name	2018 Obligations	2017 Obligations	Amount Obligated
29FTC118P0009	Cornerstone Research, Inc.	Mergers II	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
29FTC117P0008	Bates White, LLC	Anticompetitive Practices	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
29FTC118P0010	CRA International, Inc.	Mergers I	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
29FTC117P0084	Bates White, LLC	Mergers II	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
29FTC117P0037	Compass Lexecon LLC	Mergers IV	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
29FTC118P0021	Cornerstone Research, Inc.	Mergers I	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
29FTC116P0038	Keystone Strategy LLC	Anticompetitive Practices	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
29FTC116P0010	Global Economics Group, LLC	Anticompetitive Practices	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
29FTC118P0017	CRA International, Inc.	Mergers II	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
29FTC117P0001	CRA International, Inc.	Mergers I	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
29FTC118P0060	Compass Lexecon LLC	Mergers IV	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
29FTC117P0048	Baker McKenzie L.L.P.	Mergers IV	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
FTC16H6069	Shapiro, Carl	Anticompetitive Practices	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
29FTC117P0051	Analysis Group, Inc.	Mergers IV	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
29FTC118P0029	Analysis Group, Inc.	Mergers II	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
Total Obligations of Expert Witness Contracts Tested				\$ 8,934,275	\$ 11,175,985	\$ 20,110,260

Source: IBC Oracle Federal Financials Systems (FOCUS)

APPENDIX D: BREAKDOWN OF TOTAL COSTS OF MATTERS INCLUDED IN THE AUDIT

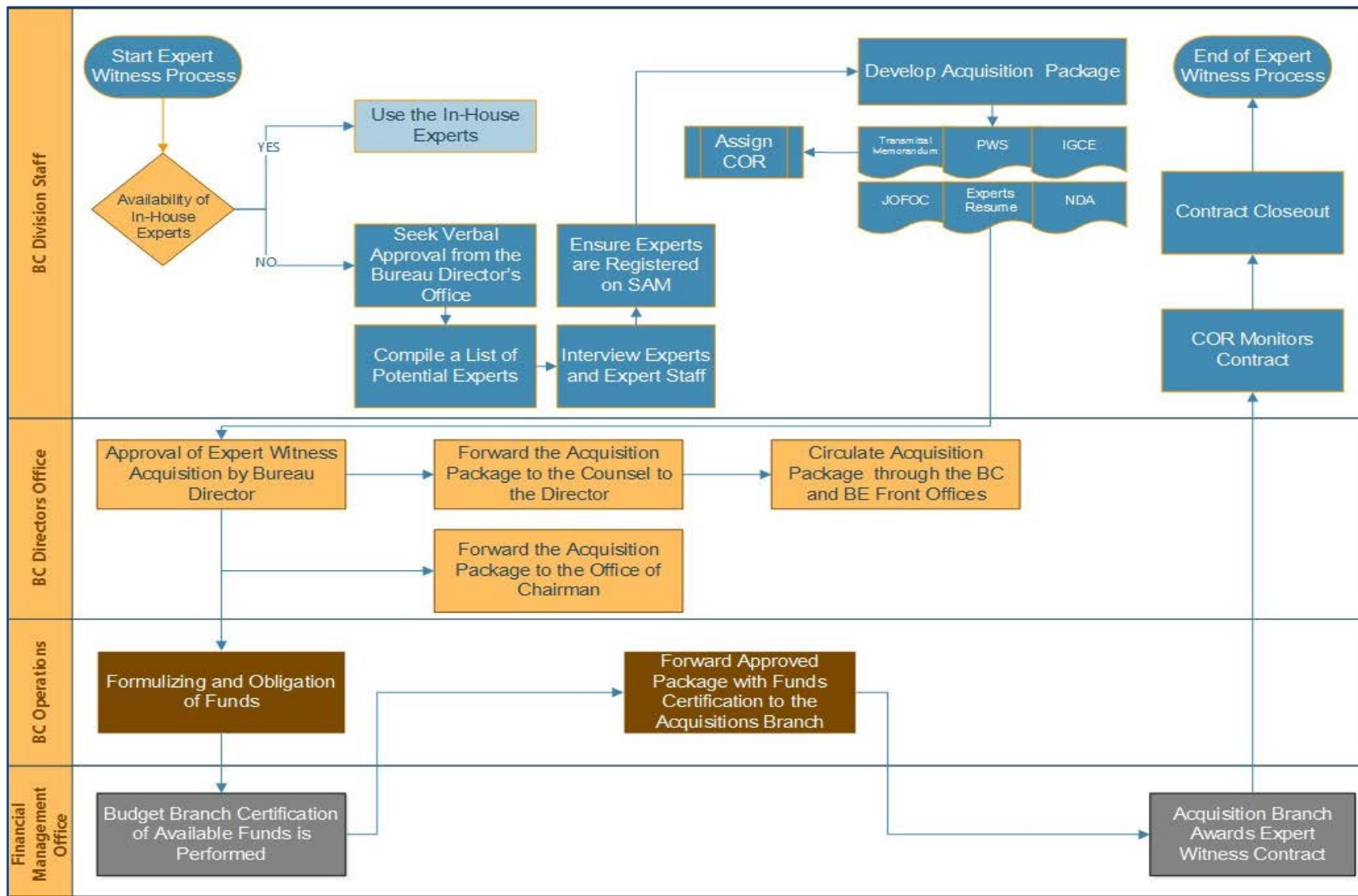


APPENDIX E: BUREAU OF COMPETITION ORGANIZATIONAL DIAGRAM BY FUNCTION



Source: FTC OIG adaptation of the Bureau of Competition Organization Chart with added descriptions

APPENDIX F: THE BUREAU OF COMPETITION EXPERT WITNESS CONTRACT PROCESS



APPENDIX G: COMPETITION ENFORCEMENT ACTIVITIES

ACTIVITY	DESCRIPTION OF ACTIVITY
Premerger Notification	To identify potentially anticompetitive mergers, the FTC relies primarily on the premerger notification program prescribed by the Hart-Scott-Rodino (HSR) Act, which requires entities meeting certain thresholds to file notifications with the FTC and the Department of Justice and to wait a prescribed period of time before consummating their transactions.
Merger and Joint Venture Enforcement	The Merger and Joint Venture Enforcement Program seeks to prevent these effects in any market in which the FTC has reason to believe a merger is likely to substantially lessen competition, including high-priority areas for consumers such as health care (including pharmaceuticals), energy, technology, and retail goods and services.
Merger and Joint Venture Compliance	The Merger and Joint Venture Compliance program implements Commission remedies via consent orders and monitors party compliance with order provisions.
Nonmerger Enforcement	The Commission monitors business practices that make it more difficult for other firms to enter the market or that enable existing competitors to collude. The FTC challenges a wide variety of business practices that may harm consumers by allowing firms to raise prices beyond competitive levels, or to reduce output, quality, innovation, or consumer choice.
Nonmerger Compliance	The Commission obtains orders in its Nonmerger Enforcement Program to preserve or restore competition. Nonmerger order provisions are generally prohibitive, requiring a party to “cease and desist” from specified conduct. Conduct remedies can be quickly implemented once an order is entered and emphasis is placed on enjoining anticompetitive conduct before it can cause significant and potentially irreparable harm.
Antitrust Policy Analysis	Antitrust policy analysis includes the design and completion of economic and other research that improves our understanding of markets and enables the FTC to identify markets and circumstances in which law enforcement actions would make the greatest impact.
Other Direct	Other functions within the Competition Mission that directly support our primary law enforcement and competition policy work include Recruiting, Development and Training, Investigation, Litigation Support, and Electronic Filing.
Support	Support consists of management and support activities within the FTC to foster and help achieve the agency’s goals of Protecting Consumers and Promoting Competition.

Source: FTC 2019 Congressional Budget Justification

APPENDIX H: RESULTS OF EXPERT WITNESS CONTRACT TESTING

Vendor Name	PIID	Amount Obligated	Consideration of Internal Expert Documented	Multiple Sources Considered	Obligated within Reasonable Range of the IGCE?	Significant Staff Hours Charged?	Costs Determined to be Fair and Reasonable?	Proper Approvals Included in Contract File
Cornerstone Research, Inc.	29FTC118P0009	██████████	No	Yes	Yes	Yes	Yes	Yes
Bates White, LLC ¹	29FTC117P0008	██████████	No	No	Yes	Yes	Yes	Yes
CRA International, Inc.	29FTC118P0010	██████████	Yes	Yes	Yes	Yes	Yes	Yes
Bates White, LLC	29FTC117P0084	██████████	No	Yes	Yes	Yes	Yes	Yes
Compass Lexecon LLC	29FTC117P0037	██████████	No	Yes	Yes	Yes	Yes	Yes
Cornerstone Research, Inc.	29FTC118P0021	██████████	Yes	Yes	Yes	Yes	Yes	Yes
Keystone Strategy LLC	29FTC116P0038	██████████	No	No	Yes	Yes	Yes	Yes
Global Economics Group, LLC	29FTC116P0010	██████████	No	No	No	Yes	Yes	Yes
CRA International, Inc.	29FTC118P0017	██████████	No	Yes	Yes	Yes	Yes	Yes
CRA International, Inc.	29FTC117P0001	██████████	No	Yes	No	Yes	Yes	Yes
Compass Lexecon LLC	29FTC118P0060	██████████	Yes	Yes	No	Yes	Yes	Yes
Baker McKenzie L.L.P.	29FTC117P0048	██████████	Yes	Yes	Yes	No	Yes	Yes
Shapiro, Carl	FTC16H6069	██████████	No	No	Yes	No	Yes	Yes
Analysis Group, Inc.	29FTC117P0051	██████████	Yes	No	Yes	Yes	Yes	Yes
Analysis Group, Inc.	29FTC118P0029	██████████	No	Yes	No	Yes	Yes	Yes

¹ Bates White LLC provided staff hours as support services to Carl Shapiro in his work as a consulting witness

APPENDIX I: ACRONYMS AND ABBREVIATIONS

BC	Bureau of Competition
BCP	Bureau of Consumer Protection
BE	Bureau of Economics
COR	Contracting Officer's Representative
DOJ	Department of Justice
GAO	Government Accountability Office
FAR	Federal Acquisition Regulation
FMO	Financial Management Office
FTC	Federal Trade Commission
FY	Fiscal Year
HSR	Hart-Scott-Rodino Antitrust Improvements Act (1976)
IBC	Interior Business Center
OIG	Office of Inspector General
OMB	Office of Management and Budget
STAR	Staff Time and Activity Reporting System

APPENDIX J: MANAGEMENT RESPONSE



UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
WASHINGTON, D.C. 20580

October 25, 2019

MEMORANDUM

TO: Andrew Katsaros
Inspector General

FROM: David B Robbins
Executive Director

Bruce Hoffman
Director, Bureau of Competition

Bruce Kobayashi
Director, Bureau of Economics

SUBJECT: FTC Response to the OIG's Draft Report on Audit of Federal Trade Commission
Expert Witness Services

On September 30, 2019, we received from the Office of the Inspector General ("OIG") the Draft Report on the Audit of Federal Trade Commission Expert Witness Services (hereinafter "OIG Draft Report"). The OIG Draft Report examines the FTC's use of expert witness services and the associated costs of those engagements. Management is keenly aware of the issues raised by OIG in the Draft Report; we have previously considered, and in some situations implemented, many of the Draft Report's recommendations.

Expert witness expenses comprise a significant portion of the agency's budget. The OIG conducted an audit of our expert expenditures to assess how well the agency managed those expenditures. After conducting its investigation, OIG succinctly identified the main driver of our expert cost problem: "Significant merger activity throughout several sectors of industry, as well as increasing complexity of matters, has placed pressure on FTC resources."¹ And while our expert witness costs have grown dramatically, our current level of funding "has not kept pace," but rather when "adjusted for inflation, the FTC's overall funding has actually fallen since 2010."²

¹ Fed. Trade Comm'n, Office of Inspector General, *Draft Report on Audit of Federal Trade Commission Expert Witness Services*, OIG Report No. A-20-02 at 2 (Sept. 30, 2019).

² *Id.* at 4.

This problem has not gone unnoticed. For over a decade, the FTC has focused significant resources on managing these costs, and in exploring ways to control and minimize them. Over the years, this work has resulted in improvements in the process of selecting and managing experts, the strategic use of internal experts and support staff, the overall strengthening of internal controls, and improvements in forecasting and budget requests. Shortly after Chairman Simons was confirmed in May 2018, he commenced a plan to intensify this work.



To date, staff either are starting to implement these proposals or have already implemented them.

* * * * *

The OIG Draft Report contains two specific recommendations. FTC management concurs with both.

Recommendation # 1: The BE Director, in collaboration with the Human Capital Management Office (“HCMO”), should develop and maintain a strategy, updated at least annually, for considering internal expert witness service capacity on future matters.

Management Response: We concur with this recommendation. We will review the OIG’s findings and recommendations as we understand them and, within the next twelve months, will develop a strategy to focus on the issues raised in the OIG Draft Report.

Recommendation # 2: The BC Director should implement requirements for documenting the processes and considerations involved with expert witness contracting decisions to consider the availability of in-house experts.

Management Response: We concur with this recommendation. In fact, we have already taken steps to implement the changes that the OIG has identified. More specifically, BC has put in place requirements for documenting expert witness contracting decisions, including the use of in-house experts. BC has always considered the use of in-house experts and, in response to an earlier draft of the OIG Draft Report, has updated its [REDACTED] to provide guidance for developing written documentation of what was previously a more informal process due to the close working relationship between BC and BE. BC will continue to work with the Financial Management Office should additional documentation be necessary.

Despite agreement in several key areas, there are places where we would like to add some nuance to the OIG Draft Report’s findings. Specifically:

- The OIG Report references a draft internal analysis claiming to show that “additional staff with in-house testifying experience could enhance options for using BE staff in future enforcement actions.”³ Subsequent analysis has shown that the most relevant constraint is BE’s capacity to support experts. Specifically, analysis has shown that (1) there are sufficient staff with the ability to act as testifying experts, but (2) the expert support staff are the more significant cost driver in our expert engagements.
- The OIG Draft Report also recommends using the BE economists as the Contracting Officer’s Representative (“COR”). While that approach might in theory be beneficial, in practice the COR is not the only person on the litigation team in charge of managing the engagement. Consistent with the recommendations from the Chairman’s office, we believe enlisting our BE economists as more active co-managers of the expert engagement will achieve the same result as designating a BE economist as the COR.

* * * * *

³ *Id.* at 6.

We thank you for the opportunity to review and provide feedback on this OIG Draft Report. If you have any questions, please contact David Rebich at (202) 326-2201.