

from a study of how customers react to different disclosures. However, given the likelihood that the average benefit of more disclosure to unaffected customers is less than the benefit to affected customers who are likely to be customers closer to the margin, I am inclined to believe that Apple has more than enough incentive to disclose.<sup>40</sup>

### C. Other Considerations When Examining the Costs and Benefits of Platforms and Other Multi-Attribute Products

Unfairness analysis also requires the Commission to consider the impact of contemplated remedies or changes in the incentives to innovate new product features upon consumers and competition.<sup>41</sup> I close by discussing some additional dimensions of an economic analysis of the costs and benefits of product disclosures in the context of complicated products and platforms with many attributes, like Apple's platform, where such disclosures are a critical component of the user experience and have considerable impact upon the value consumers derive from the product.

For complicated products—for example, a web-based platform for purchasing and interacting with potentially millions of items using a mobile device—there are many things that can negatively impact user experience. The number of potential issues for products that involve hardware, software, and a human interface is large. This is the nature of technology. When designing a complex product, it is prohibitively costly to try to anticipate *all* the things that might go wrong. Indeed, it is very likely impossible. Even when potential problems are found, it is sometimes hard to come up with solutions that one can be confident will fix the problem. Sometimes proposed solutions make it worse. In deciding how to allocate its scarce resources, the creator of a

complex product weighs the tradeoffs between (i) researching and testing to identify and determine whether to fix potential problems in advance, versus (ii) waiting to see what problems arise after the product hits the marketplace and issuing desirable fixes on an ongoing basis. We observe the latter strategy in action for virtually all software.

The relevant analysis of benefits and costs for allegedly unfair omissions requires weighing of the benefits and costs of discovering and fixing the issue that arose *in advance* versus the benefits and costs of finding the problem and fixing it *ex post*. These considerations fit comfortably within the unfairness framework laid out by the Commission.<sup>42</sup> The Commission also takes account of the various costs that a remedy would entail. These include not only the costs to the parties directly before the agency, but also the burdens on society in general in the form of increased regulatory burdens on the flow of information, reduced incentives to innovate and invest capital, and other social costs.<sup>43</sup>

Here, Apple did not anticipate the problems customers would have with children making in-app purchases that parents did not expect. When the problem arose in late 2010, press reports indicate that Apple developed a strategy for addressing the problem in a way that it believed made sense, and it also refunded customers that reported unintended purchases.<sup>44</sup> This is precisely the efficient strategy described above when complex products like Apple's platform develop problems that are difficult to anticipate and fix in advance. Establishing that it is "unfair" unless a firm anticipates and fixes such problems in advance—precisely what the Commission's complaint and consent order establishes today—is likely to impose significant costs in the context of complicated products with countless product attributes. These costs will be passed on to consumers and threaten consumer harm that is likely to dwarf the magnitude of consumer injury contemplated by the complaint.

This investigation began largely because of complaints that arose when in-app purchases were first introduced into the marketplace and Apple had not had enough experience with the platform to recognize how parents and

children would use the App Store. In late 2010, complaints began to emerge. In March 2011, Apple first altered its platform to address complaints about unauthorized in-app purchases. It is not unreasonable to surmise that as Apple has modified its policies based on experience, and customers have learned more about how to use the platform, unauthorized in-app purchases by children have most likely steadily declined.

The Commission has no foundation upon which to base a reasonable belief that consumers would be made better off if Apple modified its disclosures to confirm to the parameters of the consent order. Given the absence of such evidence, enforcement action here is neither warranted nor in consumers' best interest.

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## FEDERAL TRADE COMMISSION

### Revised Jurisdictional Thresholds for Section 8 of the Clayton Act

**AGENCY:** Federal Trade Commission.

**ACTION:** Notice.

**SUMMARY:** The Federal Trade Commission announces the revised thresholds for interlocking directorates required by the 1990 amendment of Section 8 of the Clayton Act. Section 8 prohibits, with certain exceptions, one person from serving as a director or officer of two competing corporations if two thresholds are met. Competitor corporations are covered by Section 8 if each one has capital, surplus, and undivided profits aggregating more than \$10,000,000, with the exception that no corporation is covered if the competitive sales of either corporation are less than \$1,000,000. Section 8(a)(5) requires the Federal Trade Commission to revise those thresholds annually, based on the change in gross national product. The new thresholds, which take effect immediately, are \$29,945,000 for Section 8(a)(1), and \$2,994,500 for Section 8(a)(2)(A).

**DATES:** Effective January 23, 2014.

**FOR FURTHER INFORMATION CONTACT:** James F. Mongoven, Bureau of Competition, Office of Policy and Coordination, (202) 326–2879.

**Authority:** 15 U.S.C. 19(a)(5).

By direction of the Commission.

**Donald S. Clark,**  
Secretary.

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<sup>40</sup> This argument does not, as Chairwoman Ramirez and Commissioner Brill suggest, "presuppose that a sufficient number of Apple customers will respond to the lack of adequate information by leaving Apple for other companies." Statement of Chairwoman Ramirez and Commissioner Brill at 5–6. Nor does the economic logic require any belief about the magnitude of switching costs. Rather, the analysis relies only upon the standard economic assumption that Apple chooses disclosure to maximize shareholder value, weighing how customers react to different disclosure policies. If Apple behaves this way, the average benefit of more disclosure to unaffected customers is less than the benefit to affected customers, and affected customers are more likely to be on the margin than unaffected customers, then economic theory implies that Apple is likely to have more than enough incentive to disclose.

<sup>41</sup> *Unfairness Statement, supra* note 7, at 1073–74.

<sup>42</sup> The Commission must take "account of the various costs that a remedy would entail" including "reduced incentives to innovation and capital formation, and similar matters." *Unfairness Statement, supra* note 7, at 1073–74.

<sup>43</sup> *Unfairness Statement, supra* note 7, at 1073–74.

<sup>44</sup> See Foresman, *supra* note 13.