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Hearings on Competition and Consumer Protection in the 21st Century	)	Project No. P181201

COMMENTS OF AT&T SERVICES INC.

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COMMENTS OF AT&T

On behalf of itself and its affiliates, AT&T Services Inc. applauds the Commission for holding these Hearings on Competition and Consumer Protection in the 21st Century[1] and welcomes this opportunity to submit initial comments. The timing is auspicious. Now that the Commission once again oversees "the entire Internet ecosystem," including broadband ISPs,[2] it should pursue two overarching objectives, which we summarize here and discuss more fully in response to the individual issues posed by the Commission.

First, the Commission should ensure a level playing field by harmonizing the competition and consumer protection frameworks applicable to broadband ISPs with the frameworks applicable to other participants in the internet marketplace, some of which now compete directly with ISPs in markets as diverse as subscription video services and digital advertising. With the rise of competition and convergence, there is no longer any empirical justification for ISP-only rules concerning privacy, "nondiscrimination," or any other topic of regulatory concern. To the contrary, ISP-specific regulatory burdens would harm consumers by weakening much-needed competition in markets now led by a handful of online giants. This Commission should seize this opportunity to restore competitive neutrality to the internet ecosystem now that all major participants are back within the Commission's jurisdiction.

Second, for all market actors, the Commission should place a renewed emphasis on regulatory consistency and predictability to the benefit of competition and consumers. Welfare-enhancing investment and innovation flourish best when all commercial actors know the rules of

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[1] Public Notice, *Hearings on Competition and Consumer Protection in the 21st Century*, Project Number P181201 (FTC June 20, 2018).

[2] *See* Order, *Restoring Internet Freedom*, 33 FCC Rcd 311 ¶ 142 n.514 (2018) ("*FCC Internet Freedom Order*"); *see also id.* ¶ 208 (noting "the return of jurisdiction to the Federal Trade Commission to police ISPs for anticompetitive acts or unfair and deceptive practices").

the road and can tailor their strategic decisions accordingly. Investment, innovation, and ultimately consumers suffer when regulators or enforcement authorities reserve discretion to maintain vague rules with uncertain application or impose unexpected new restrictions that frustrate settled expectations. This was a particular concern under the FCC's unpredictably intrusive "Title II" regime for broadband services. To avoid the destabilizing consequences of such open-ended regulatory intervention, this Commission should enhance the transparency and predictability of its enforcement decisions and the substantive rationales underlying them. And to avoid a patchwork quilt of state-by-state regulation, the Commission should also work with Congress to ensure national consistency in the rules applicable to the internet ecosystem.

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These comments are divided into five parts, each of which responds to particular issues posed by the Commission's June 20 Notice. We briefly summarize their basic points here.

1. ***Response to Issue 2 (oversight of communications and information markets).***

- Competition and technological convergence have undermined any rationale for the traditional siloed approach to internet policy, particularly now that communications infrastructure companies compete directly with online tech companies in a variety of market settings.

- The Commission should thus apply a unified, technology-neutral framework for analyzing competition and consumer-protection issues in this convergent environment.

2. ***Response to Issues 1 and 3 (role of consumer welfare standard in antitrust).***

- For several decades, American antitrust law has benefited from increasing doctrinal rigor rooted in sound economic analysis of consumer welfare. That rigor is a major reason why the world's technology leaders are headquartered in the United States rather than foreign jurisdictions.

- The Commission should remain a champion of consumer interests. It should thus reject proposals to revert to the more nebulous antitrust doctrine of the mid-twentieth century, when courts applied subjective value judgments to protect inefficient businesses against innovative or low-priced competitors at the expense of consumers.

- Platform markets are not new. Current antitrust doctrine is fully capable of addressing what types of enforcement action are appropriate to protect consumer welfare in connection with online platforms.

3. *Response to Issue 6 (merger analysis, including vertical mergers).*

- Any updated vertical merger guidelines should reflect the broad economic consensus that vertical mergers are usually procompetitive. Such guidelines should thus harmonize review of vertical integration by *merger* with the bright-line rules governing vertical integration by *contract.*

- Conduct remedies can be both appropriate and superior to structural remedies for the limited number of vertical mergers that do raise competitive concerns.

4. *Response to Issues 4 & 5 (privacy and data security).*

- The Commission's privacy and data-security framework has succeeded because it is both *measured*, in that it employs a risk-based cost-benefit analysis, and *collaborative*, in that it preserves an appropriately broad role for multi-stakeholder processes.

- There is no basis for subjecting broadband ISPs to a framework different from the one applicable to the rest of the internet ecosystem.

- The Commission should work with Congress to enact federal legislation that reinforces the Commission's leadership role in this area and ensures national consistency in privacy policy.

5. *Response to Issue 11 (agency processes).*

- The Commission should use public guidance as its primary tool for announcing new policy or enforcement positions, and it should avoid using novel enforcement actions as vehicles for doing so, especially where respondents subject to novel enforcement actions may lack notice of the agency's new policy perspectives.

- The Commission should expand its commendable recent internal efforts to streamline information requests and reduce unnecessary burdens imposed by consumer protection investigations.

- Commission Staff should more routinely provide respondents in consumer protection investigations with notice of contemplated complaint theories and an opportunity to engage in meaningful, substantive communications about the underlying merits of such theories prior to finalizing a draft complaint and proceeding with initial settlement negotiations.

- The Commission should provide greater transparency to respondents regarding the basis for its monetary remedy demands.

<u>RESPONSE TO ISSUE 2</u>:

> ***"Competition and consumer protection issues in communication, information, and media technology networks."***

1. Competition and Technological Convergence Have Undermined Any Rationale for the Traditional Siloed Approach to Internet Policy.

Section 5 of the FTC Act authorizes the Commission to police "[u]nfair methods of competition" and "unfair or deceptive acts and practices" throughout most of the economy. 15 U.S.C. § 45(a)(1). But Congress also subjected certain industries to comprehensive regulation by sector-specific agencies such as the Federal Communications Commission. *See*, *e.g.*, 47 U.S.C. § 201 *et seq*. That siloed approach may have been appropriate for most of the twentieth century, before competition took hold in communications markets. But it has become increasingly counterproductive as competition and convergence have transformed these markets beyond recognition and blurred the distinctions between them and various online service markets. And the FCC itself has now encouraged this Commission to fold ISPs into the larger Section 5 framework applicable to "the entire Internet ecosystem."[1]

That step is not only appropriate, but necessary, as technological convergence has placed communications infrastructure companies in direct competition with tech companies. The internet has created incalculable consumer benefits by enabling online upstarts to redraw traditional market boundaries and expose industry incumbents to disruptive and often fatal competition. Such disruption is now as prevalent in communications markets as any other.

Consider the video entertainment industry, which has traditionally been divided into three market levels: video production (studios), programming aggregation (broadcast and cable TV

[1] *See* Order, *Restoring Internet Freedom*, 33 FCC Rcd 311 ¶ 142 n.514 (2018) ("*FCC Internet Freedom Order*"); *see also id.* ¶ 208 (noting "the return of jurisdiction to the Federal Trade Commission to police ISPs for anticompetitive acts or unfair and deceptive practices").

networks), and subscription-based distribution (cable and satellite pay-TV providers).[2] Until recently, there has been only limited vertical integration between studios or programmers and distributors.[3] Today, however, online insurgents are erasing the distinctions between those long-stable categories of market participants. For example, Netflix is simultaneously the world's largest video distributor, with more than 130 million streaming subscribers,[4] and one of the world's preeminent content producers. Indeed, "Netflix will spend $12-13 billion on original programming this year," which is "vastly more than legacy studios are spending: HBO spent $2.5 billion on content in 2017, and even CBS spent just $4 billion."[5] And online video-streaming companies such as Netflix and Amazon "continue to gain market share in the video programming and distribution industry," while traditional cable and satellite TV providers "are losing subscribers at a steady clip."[6]

These online video providers are fundamentally reshaping the video entertainment industry, and they are succeeding largely because they are breaking down traditional industry distinctions. In particular, these online firms have used the data they glean from their millions of

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[2] Distributors include all companies that contract directly with consumers to deliver video content. Distributors today deliver that content either via their own dedicated physical transmission facilities (as traditional cable or satellite companies do) or "over the top" of internet infrastructure. The largest online video distributors, such as Netflix or Google, operate multi-billion dollar content-delivery networks that they use to ensure high-quality streaming experiences for their subscribers.

[3] There has, however, been considerable vertical integration between studios and aggregators (*e.g.*, ABC/Disney and NBC/Universal) since the 1990s, when the FCC eliminated regulatory restrictions designed to prop up "independent" programmers. *See Schurz Commc'ns, Inc. v. FCC*, 982 F.2d 1043 (7th Cir. 1992) (invalidating "financial interest and syndication" rules).

[4] Statista, *Number of Netflix streaming subscribers worldwide from 3rd quarter 2011 to 1st quarter 2018 (in millions)*, https://www.statista.com/statistics/250934/quarterly-number-of-netflix-streaming-subscribers-worldwide/ (visited Aug. 17, 2018).

[5] David Morris, *Netflix Is Expected to Spend up to $13 Billion on Original Programming This Year*, Fortune (July 8, 2018); *see also Netflix Is Moving Television Beyond Time-Slots and National Markets*, The Economist (June 30, 2018) (Netflix "will spend $12bn-13bn this year—more than any studio spends on films, or any television company lays out on stuff that isn't sport").

[6] *United States v. AT&T Inc.*, No. 17-2511, slip op. at 14 (D.D.C. June 12, 2018).

direct customer relationships as distributors to enhance the appeal of their programming—for example, by making content more responsive to the preferences of specific viewer categories and by fine-tuning personalized recommendations to individual subscribers.[7]

Much the same disruptive dynamic can be seen in the ascendance of digital advertising over conventional mass-media advertising models. Traditionally, television networks and, to a lesser extent, cable and satellite pay-TV companies have funded their operations by selling time slots to advertisers, who show the same commercials to everyone within a viewing area. That method guarantees broad distribution of each commercial but suffers from an obvious inefficiency: most viewers of any given commercial have no interest in the products being advertised. Google, Facebook, and other digital advertising giants are dramatically disrupting that traditional business model by using consumer data to target ads to the consumers most likely to respond favorably to them—and then supplying advertisers with valuable metrics on the success of these campaigns.[8]

Traditional communications companies must now respond to these competitive challenges by harnessing many of the same efficiencies that have propelled Netflix, Google, and Facebook to success in their respective markets. As discussed next, consumers benefit when policymakers and enforcement officials enable these communications companies to compete free from asymmetric regulatory burdens.

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[7] *Id.* at 19-20.

[8] *See*, *e.g.*, Dana Feldman, *U.S. TV Ad Spend Drops As Digital Ad Spend Climbs To $107B In 2018*, Forbes (Mar. 28, 2018), https://www.forbes.com/sites/danafeldman/2018/03/28/u-s-tv-ad-spend-drops-as-digital-ad-spend-climbs-to-107b-in-2018/ ("With the swift acceleration of cord-cutting and the upsurge of over-the-top (OTT) viewing, spending on TV ads will slip 0.5% in 2018 to $69.8 billion …. Meanwhile, total digital ad spending in the U.S. will climb 18.7% this year to $107.3 billion.").

2. The Commission Should Apply a Unified Framework for Analyzing Competition and Consumer-Protection Issues in This Convergent Environment.

Consumers benefit when policymakers eliminate outdated industry-specific restrictions and thereby enable traditional communications companies to compete on a level playing field with online giants. The FCC's recent elimination of intrusive broadband regulation is an important step in the right direction. As the FCC recognized, hamstringing ISPs with asymmetric regulatory burdens would serve no valid regulatory objective and would merely stifle competition with online incumbents to the detriment of consumers. This Commission should take account of the lessons the FCC has learned from its own excessively regulatory efforts to subject ISPs to radically different rules from the rest of the ecosystem on two critical subjects: privacy and net neutrality.

Privacy and data security. In its 2016 comments in the FCC's broadband privacy proceeding, this Commission's staff made two points of central importance here. First, because information is the fuel of the modern economy, policymakers must carefully tailor any intervention in the collection and use of consumer data to target genuinely harmful practices without undermining productive uses.[9] Second, any rules applicable to ISPs should be harmonized with the general privacy and data security framework long employed by this Commission.[10] Indeed, saddling ISPs with special privacy-related burdens would be particularly counterproductive because it would disable them from posing a much-needed competitive challenge to the digital advertising incumbents.

[9] *See*, *e.g.*, Comments of BCP Staff, FCC WC Docket No. 16-106, at 22-23 (May 27, 2016).

[10] *See id.* at 8; *see also id.* at 27 ("The FTC has taken a technology-neutral, process-based approach to security for two decades.").

The FCC did not heed that call for competitive neutrality and instead subjected one set of internet companies—ISPs—to a battery of onerous regulatory obligations. Congress quickly nullified those rules under the Congressional Review Act,[11] and the FCC's *Internet Freedom Order* has now "return[ed] jurisdiction to regulate broadband privacy and data security to [this Commission], the nation's premier consumer protection agency and the agency primarily responsible for these matters in the past."[12] As it resumes that role, the Commission should take an important lesson from the FCC's failed experiment with ISP-specific privacy rules. Those rules ultimately rested on the premise, pressed by FCC-focused interest groups, that ISPs have greater visibility into online user behavior than so-called "edge" providers. As we discuss in our separate response to Issues 4 and 5, that premise is demonstrably false, and there also is no other basis for subjecting ISPs to asymmetrically burdensome privacy or data security requirements.

Net neutrality. When the FCC restored ISP jurisdiction to this Commission in the *Internet Freedom Order*, it did so in the context of repealing an open-ended, ISP-specific set of regulatory prohibitions. This Commission should respect the policy judgment underlying that FCC decision.

AT&T and all other major ISPs have always supported core internet openness principles, such as transparency and no-blocking/no-throttling rules.[13] But the FCC superimposed on those unobjectionable requirements an additional battery of vague and intrusive rules rooted in the "dumb pipe" mode of public-utility-style regulation applicable to twentieth-century telephone

[11] Pub. L. No. 115-22, 131 Stat. 88 (2017), *nullifying* Report & Order, *Protecting the Privacy of Customers of Broadband and Other Telecommunications Services*, 31 FCC Rcd 13911 (2016).

[12] *FCC Internet Freedom Order* ¶ 181 (footnote omitted).

[13] *E.g.*, Randall Stephenson, AT&T Chairman and CEO, *Consumers Need an Internet Bill of Rights*, Jan. 24, 2018 ("Stephenson Letter"), https://www.attpublicpolicy.com/consumer-broadband/consumers-need-an-internet-bill-of-rights/.

monopolists. Those rules failed even the most basic cost-benefit analysis. As the FCC explained when rescinding them:

> [E]conomic theory, empirical studies, and observational evidence support reclassification of broadband Internet access service as an information service rather than the application of public-utility style regulation on ISPs. We find the [common carrier] classification likely has resulted, and will result, in considerable social cost, in terms of foregone investment and innovation. At the same time, [that] classification … has had no discernable incremental benefit …. The regulations promulgated under the Title II regime appear to have been a solution in search of a problem.[14]

In particular, these public-utility-style rules harmed consumers both because they were interpreted to ban business practices under a competitor-focused interpretation of "discrimination" that ignored consumer welfare and because unpredictability in the FCC's application of those rules suppressed innovative business models from their inception.[15] Moreover, any "neutrality" or "nondiscrimination" principles, insofar as they are imposed, should be not only predictable in application, but applied evenhandedly. With these concerns in mind, AT&T continues to urge Congress to enact an Internet Bill of Rights that would apply to all internet companies, preserve the open internet, and protect consumer privacy.[16]

The Commission should also recognize the work of industry stakeholders to develop "best practices" that can be enforced through voluntary commitments. For example, AT&T and

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[14] *FCC Internet Freedom Order* ¶ 87.

[15] For example, the FCC's Internet Conduct standard prohibited any business plan that, as viewed by a majority of FCC Commissioners, violated amorphous, eye-of-the-beholder principles of internet "openness" and "neutrality," as informed by half a dozen non-exhaustive "factors," such as "free expression" by edge providers. This radically indeterminate regime chilled ISPs from experimenting with innovative business models and prohibited them from offering optional service features—such as sponsored data—that demonstrably benefited consumers by offering them the economic equivalent of bundled discounts. *See* Comments of AT&T Servs., WC Docket No. 17-108, at 55-59 (FCC July 17, 2017), https://www.fcc.gov/ecfs/.

[16] *See* Stephenson Letter, *supra*.

other major ISPs have made public and enforceable commitments to core internet openness principles in their terms of service.[17] As this and similar initiatives illustrate, industry self-governance, combined with transparency and this Commission's oversight, can be a highly successful mechanism for protecting consumer interests.

[17] *See id.* ("AT&T is committed to an open internet. We don't block websites. We don't censor online content. And we don't throttle, discriminate, or degrade network performance based on content. Period.").

<u>RESPONSE TO ISSUES 1 AND 3</u>:

"The state of antitrust … law and enforcement," including "the continued viability of the consumer welfare standard," particularly for "platform business models."

For several decades, American antitrust law has benefited from increasing doctrinal rigor rooted in sound economic analysis, and this Commission has played a central role in that welcome development. Antitrust's focus on consumer welfare is a key reason why America has such a vibrant and innovative economy today—and why the world's technology leaders are headquartered in the United States rather than in foreign jurisdictions, where regulators more readily blur the line between harm to consumers and harm to competitors and are thus more likely to protect competitors at the expense of innovation and consumers.[1]

Nonetheless, various critics have attacked current antitrust doctrine precisely *because* it focuses singlemindedly on consumer welfare. As discussed below, these critics would fundamentally alter antitrust law to serve objectives apart from—and often inconsistent with—the interests of consumers, such as protecting inefficient or non-innovative businesses from vigorous competition by larger companies that are more efficient or more innovative. They express nostalgia for the antitrust policies of the 1950s and 1960s, when courts applied a loose collection of such incommensurable values to decide, on a case-by-case basis, whether to condemn a company's conduct as "unfair" or "predatory" even if it demonstrably benefited consumers. Acknowledging this critique, the Commission has now sought comment on "the continued viability of the consumer welfare standard for antitrust law enforcement and policy."

[1] *See*, *e.g.*, Remarks of Deborah Platt Majoras, Dep. Ass't A.G., *GE-Honeywell: The U.S. Decision* (Nov. 29, 2001) ("[W]e may have a fundamentally different view about the comparative ability of markets vs. government regulators to get it right.… Some have suggested … that the EU is much more receptive to complaints from competitors than are the Antitrust Division and the FTC."), https://www.justice.gov/atr/speech/ge-honeywell-us-decision; *see also* Daniel Sokol, *Troubled Waters Between U.S. and European Antitrust*, 115 Mich. L. Rev. 955 (2017).

The Commission should see this criticism of the consumer welfare standard for what it is: a well-intentioned but analytically unsound movement that, if applied, would harm consumers and threaten America's status as the world leader in innovation. Instead, this Commission should continue to champion the consumer welfare standard as the sole criterion for antitrust intervention in all settings, including online platform markets. And it should reaffirm the importance of economic rigor and empirical analysis in evaluating how best to measure and promote consumer welfare.

1. Remembering the Mistakes of the Past.

Fifty years ago, antitrust was an untenable hodgepodge of subjective value judgments, often applied to protect inefficient businesses against low-priced competitors at the expense of consumers. A brief sampling of some mid-century cases illustrates what happens when antitrust becomes unmoored from a serious economic inquiry into consumer welfare.

In *Brown Shoe Co. v. United States*,[2] the Supreme Court upheld an injunction barring the merger of a shoe manufacturer and a shoe distributor in part because the merger "foreclosed" competitors from 2%-5% of the relevant markets, which were unconcentrated. *Brown Shoe* is often cited for its irrational and now-superseded hostility to vertical integration.[3] But the most astonishing passage in *Brown Shoe* holds that sometimes the interests of inefficient competitors *should* trump consumer interests. While acknowledging that vertical integration can be

[2] 370 U.S. 294 (1962).

[3] *See*, *e.g.*, 7 Areeda, *Antitrust Law* ¶ 1511e2, at 517-18 (4th ed. 2017) (older Supreme Court precedent addressed vertical mergers "under an aggressive standard that struck down many mergers that would never be challenged today" because "our theory and most of our law of vertical integration have changed very considerably since that time"); *see also United States v. Von's Grocery Co.*, 384 U.S. 270, 272, 277 (1966) (condemning, as part of a "threatening trend toward concentration," a cost-reducing merger between two grocery chains that together accounted for 7.5% of the relevant market). AT&T discusses vertical integration in greater detail in its separate response to Issue 6.

"beneficial to consumers" by enabling the merged firm to increase its own efficiency and lower retail prices, the Court nonetheless considered it preferable "to promote competition through the protection of viable, small, locally owned business[es]" even though "occasional higher costs and prices might result from the maintenance of fragmented industries and markets."[4]

The Supreme Court's 1967 decision in *Utah Pie Co. v. Continental Baking Co.*[5] illustrates just how irrational antitrust enforcement could become under this approach. The Court there upheld a jury award against national frozen-pie companies that, without "cost justification," had selectively lowered their prices to compete more effectively with a local pie company that controlled two-thirds of the Salt Lake City market. The defendants were not engaged in "predatory pricing" under modern standards—for example, no defendant plausibly hoped to drive competitors from the market and then raise its own prices to monopoly levels.[6] Indeed, the "targeted" local company retained more than 45% of the market years after entry by the national companies.[7]

The Court nonetheless found it troubling that the national competitors had selectively lowered prices in Utah and not elsewhere in order to undersell the local incumbent, which—the Court took pains to note—was family-operated and had "only 18 employees."[8] Most remarkably, the Court held that antitrust should protect such incumbents from "the financial pinch" they feel when competition forces them to "reduce [their] price to a new all-time low in a

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[4] 370 U.S. at 344.

[5] 386 U.S. 685 (1967).

[6] *Cf. Brooke Grp. Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 224 (1993). *Brooke Group* dismissed *Utah Pie* as an "early judicial inquiry" and effectively overruled it. *Id.* at 221.

[7] 370 U.S. at 689.

[8] *Id.*

market of declining prices."[9] Antitrust scholars did not need to await the ascendance of the Chicago School a decade later to see the paradox. As Yale professor Ward Bowman remarked the same year, *Utah Pie* exemplified the Court's "disregard for the central purpose of antitrust, the promotion of consumer welfare through the promotion of a competitive market process."[10]

The Justice Department's successful war on supermarket chain A&P also vividly illustrates antitrust's mid-century disregard of economic logic. In the late 1940s, DOJ persuaded a district court and then the Eighth Circuit to hold A&P and its senior executives criminally liable for using the company's unmatched scale and scope to bypass food wholesalers and undersell smaller and less efficient grocery stores.[11] The government's basic submission was that A&P's aggressive tactics may have been good for its customers but were too hard on its retail competitors and the displaced middlemen. In the words of one prosecutor, "A&P sells food cheaply [to consumers] in its own stores because it is a gigantic blood sucker, taking its toll from all levels of the food industry."[12] The district court embraced that theme in a lengthy opinion devoid of limiting principles that would protect any large business from criminal liability for using its efficiencies to cut prices and win customers away from smaller competitors. Instead

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[9] *Id.* at 699-700.

[10] Ward S. Bowman, *Restraint of Trade by the Supreme Court: The Utah Pie Case*, 77 Yale L.J. 70, 70 (1967). Justice Stewart made much the same point in his *Utah Pie* dissent: "[T]he Court has fallen into the error of … protecting competitors, instead of competition …. [The] cases [on which defendants relied] are said [by the majority] to be inapposite because they involved 'no general decline in price structure,' and no 'lasting impact upon prices.' But lower prices are the hallmark of intensified competition." 386 U.S. at 705-06 (Stewart, J., dissenting).

[11] *United States v. N.Y. Great Atl. & Pac. Tea Co.*, 67 F. Supp. 626 (E.D. Ill. 1946), *aff'd*, 173 F.2d 79 (7th Cir. 1949). *See generally* Timothy Muris & Jonathan Nuechterlein, *Antitrust in the Internet Era: The Legacy of United States v. A&P*, Geo. Mason L. & Econ. Research Paper No. 18-15 (2018), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3186569.

[12] Marc Levinson, *The Great A&P and the Struggle for Small Business in America* 83 (2011). As one scholar noted a decade later, "the government lawyers, although competent in their profession, were so sadly illiterate in economic facts and economic analysis that they simply did not realize what they were saying." *See* Morris Adelman, *A&P: A Study in Price-Cost Behavior and Public Policy* 16 (1959).

of analysis, the district court offered impressionistic value judgments, often delivered with sensory metaphors: A&P's business model, it found, was "odorous" and "t[ook] on a polluted colored light," though only when "considered as a whole."[13]

Here, too, antitrust scholars did not need to wait for any particular "school" of antitrust to develop before recognizing that such decisions undermined consumer interests and thus the whole purpose of the antitrust laws. In 1949, a young Donald Turner—who later coauthored the leading antitrust treatise and led the Antitrust Division in the Johnson Administration—sharply criticized a "serious contradiction" in the *A&P* court's theory of liability.[14] As he noted, DOJ and the court had not even tried to "draw the line between 'predatory' and 'competitive' price cutting," and thus their "general broadside against A&P's reduction of gross profit rates is a direct attack on the competitive process.… Does the Government or the court feel that business should never risk a loss for the sake of ultimate gain? If so, a good share of competition must be consigned to limbo."[15]

2. The Commission Should Continue to Champion Antitrust's Singular Focus on Consumer Welfare, Including in "Platform" Markets.

The chilling effect of *A&P*, *Utah Pie*, and similar decisions did in fact "consign a good share of competition to limbo" throughout the mid-twentieth century. That approach harmed consumers and the economy at large by forcing consumers to pay higher prices simply to protect the margins of inefficient firms, suppressing the innovation permitted by scale economies and vertical integration, and creating a climate of radical regulatory uncertainty, given the absence of clear guidelines for lawful business conduct.

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[13] *A&P*, 67 F. Supp. at 658, 678.

[14] Note, *Trouble Begins in the "New" Sherman Act: The Perplexing Story of the A&P Case*, 58 Yale L.J. 969, 970 (1949); *see also* Adelman, *supra* (similar analysis).

[15] 58 Yale L.J. at 977.

Fortunately, current antitrust law, which this Commission has beneficially shaped for many decades, has replaced that doctrinal morass with a more coherent approach rooted firmly in economic analysis of consumer welfare. Among its basic precepts, current doctrine now encourages conduct that increases or reflects efficiency, including vertical integration;[16] observes bright-line rules that keep regulatory uncertainty from chilling discounts, investment, and innovation;[17] and overall elevates consumer interests over the interests of individual competitors.[18] Antitrust is a big tent, and there is obviously room for disagreement about which principles will best serve consumers over the long term. But there is broad consensus among serious antitrust lawyers and economists that antitrust should serve consumer welfare above competing values.[19]

Policymakers should continue following that consensus and heed the lessons of cases like *Utah Pie* and *A&P* as they consider proposals from both the left and the right for a return to antitrust populism disconnected from sound economics.[20] As BC Director Bruce Hoffman explains:

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[16] *See*, *e.g.*, *Comcast Cable Commc'ns, LLC v.* FCC, 717 F.3d 982, 990 (D.C. Cir. 2013) (Kavanaugh, J., concurring) (discussing evolution of case law regarding vertical transactions).

[17] *See*, *e.g.*, *Brooke Grp.*, 509 U.S. at 221-224; *Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko*, LLP, 540 U.S. 398, 408, 414 (2004).

[18] *See*, *e.g.*, *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 488 (1977).

[19] *See*, *e.g.*, Carl Shapiro, *Antitrust in a Time of Populism* (Oct. 24, 2017), https://faculty.haas.berkeley.edu/shapiro/antitrustpopulism.pdf; Herbert Hovenkamp, *Antitrust Policy and Inequality of Wealth*, CPI Antitrust Chron. 1 (Oct. 2017).

[20] *See*, *e.g.*, Barry Lynn, *No Free Parking for Monopoly Players: Time to Revive Anti-Trust Law*, The Nation (June 8, 2011) (criticizing antitrust for promoting "efficiency" and "the 'welfare' of the 'consumer'" rather than "protect[ing] the opportunity of the citizen producer") (some internal quotation marks omitted); Daniel Kishi, *Time for a Conservative Anti-Monopoly Movement*, The Am. Conservative, Sept. 19, 2017 (exhorting conservatives "to break from the principles of free market fundamentalism" and join "in a bipartisan war" against "modern-day robber barons").

> [T]he consumer welfare standard that is currently the touchstone for antitrust enforcement in the United States … is the result of decades of experience in the United States with failed standards, such as protecting competitors at the expense of consumers. This prolonged experiment is somewhat unique to United States, largely because we've had antitrust laws on the books and actively enforced them for so long that we've had lots of opportunities to get our approach wrong—opportunities that we have often taken. But having made those mistakes, we want to make sure we don't repeat them.[21]

Some critics argue that "a consumer welfare-based approach is failing to detect and deter anticompetitive harms in the context of internet platforms,"[22] implying that platform markets are a new phenomenon and that addressing them requires dispensing with consumer welfare as the main focus of antitrust analysis. But platform markets are not new. For example, A&P was a vertically integrated platform, intermediating between consumers and a vast range of suppliers. And current antitrust doctrine, based on consumer welfare, would have supplied a far better outcome in that case than did the competitor-focused doctrine to which today's critics would return. There is also an extensive economic scholarship today on multi-sided platforms, providing useful guidance for courts and enforcement authorities as they apply antitrust principles to online platform markets.[23] Again, reasonable economists and jurists can disagree about what types of intervention in those markets would promote consumer welfare, as illustrated by the majority and dissenting opinions in *American Express*.[24] But consumer welfare

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[21] Remarks of D. Bruce Hoffman, Acting BC Director, *Competition Policy and the Tech Industry—What's At Stake?*, CCIA, at 2 (Apr. 12, 2018) ("Hoffman CCIA Remarks").

[22] Lina Khan, *Amazon's Antitrust Paradox*, 126 Yale L.J. 710, 745 n.187 (2017).

[23] *See*, *e.g.*, Filistrucchi, Geradin, van Damme, & Affeldt, *Market Definition in Two–Sided Markets: Theory and Practice*, 10 J. Competition L. & Econ. 293 (2014); Evans & Schmalensee, *Markets With Two–Sided Platforms*, 1 Issues in Competition L. & Pol'y 667 (2008); Klein, Lerner, Murphy, & Plache, *Competition in Two–Sided Markets: The Antitrust Economics of Payment Card Interchange Fees*, 73 Antitrust L.J. 571 (2006); Muris, *Payment Card Regulation and the (Mis)Application of the Economics of Two–Sided Markets*, 2005 Colum. Bus. L. Rev. 515; Evans & Noel, *Defining Antitrust Markets When Firms Operate Two–Sided Platforms*, 2005 Colum. Bus. L. Rev. 667.

[24] *Ohio v. Am. Express Co.*, 138 S. Ct. 2274 (2018).

itself, as understood by modern economic analysis, can and should remain the focus of antitrust policy. "[A]ntitrust doctrine is supple enough, and its commitment to economic rationality strong enough, to take in stride the competitive issues presented by the new economy."[25]

At bottom, many of the new antitrust populists are not arguing about how best to promote consumer welfare in the first place, as they acknowledge. Instead, they seek to reshape antitrust to promote values *apart from* consumer welfare,[26] even at the expense of higher prices or more limited consumer choice. Whatever the merit of these critics' underlying policy objectives, use of *antitrust law* to pursue them would greatly reduce consumer welfare, both by deterring large firms from offering consumers a better deal than their rivals can match and also by injecting enormous uncertainty into what types of conduct will subject companies to enforcement actions. For example, at what point should a large, highly efficient firm be subject to treble-damages liability under the Sherman Act for persistently offering consumers low prices that are above its own costs but below those of less efficient mom-and-pop retailers? How is an enforcement agency or court to know how to balance the interests of consumers in low prices against the desire of less efficient retailers to face weaker competition from larger competitors? And how should this Commission weigh the consumer-benefiting efficiencies of a horizontal merger, which may well involve the elimination of redundant jobs, against a new policy objective of maintaining employment levels? There are no sensible competition policy answers to questions

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[25] Richard Posner, *Antitrust in the New Economy*, 68 ANTITRUST L.J. 925, 925 (2001); *see also* Hoffman CCIA Remarks at 12 ("[T]he antitrust laws are robust, forward-looking, and demonstrably capable of evolving with the times. Those laws are fully applicable to the technology industry."); Jonathan Jacobson, *Do We Need a "New Economy" Exception for Antitrust?*, ANTITRUST 89 (Fall 2001).

[26] *See*, *e.g.*, Khan, *supra*, at 737 (advocating that antitrust be reoriented to protect, *inter alia*, "our interests as workers" and "producers"); Lynn, *supra* (advocating that antitrust be reoriented to protect "liberty" rather than "more stuff").

like these, which explains why economists and legal scholars across the political spectrum broadly support maintenance of antitrust's singular focus on consumer welfare.

In sum, whatever the underlying merit of the policy concerns underlying the new populism, antitrust is not the appropriate means of addressing them. This Commission should hold fast to that point, both in its enforcement decisions and in its public advocacy.

<u>Response to Issue 6</u>:

"Evaluating the competitive effects of M&A", including "the economic and legal analysis of vertical … mergers" and "empirical validation of the analytical tools used to evaluate acquisitions and mergers."

Although the antitrust agencies have regularly updated the *Horizontal Merger Guidelines*, the *Non-Horizontal Merger Guidelines* have not been updated since their initial publication by the Justice Department in 1984.[1] There is widespread consensus that those 34-year-old guidelines "do not provide useful guidance for vertical mergers today."[2] Senior DOJ officials have now broached the possibility of formally revising them.[3] If such plans gain momentum, AT&T urges this Commission to play an active role in the drafting process, as it has consistently done for the last several revisions of the horizontal guidelines.

Below, we explain that any new set of vertical guidelines should (1) harmonize the approach to vertical integration by *merger* with well-established doctrine governing vertical integration by *contract*, thereby ensuring greater consistency and predictability in enforcement

[1] DOJ, *Non-Horizontal Merger Guidelines* § 4 (1984). Those guidelines addressed conglomerate as well as vertical mergers.

[2] Remarks of D. Bruce Hoffman, *Vertical Merger Enforcement at the FTC*, Credit Suisse 2018 Washington Perspectives Conference, at 4 n.9 (Jan. 10, 2018) ("Hoffman Vertical Merger Remarks"); *see also* Stephen Salop & Daniel Culley, *Revising the US Vertical Merger Guidelines: Policy Issues and an Interim Guide for Practitioners*, 4 J. Antitrust Enforcement 1 (2016) ("[The 1984 Guidelines] are now woefully out of date. They do not reflect current economic thinking about vertical mergers. Nor do they reflect current agency practice.") (footnote omitted); ABA Antitrust Section, *Comments Regarding the Federal Trade Commission and Department of Justice Horizontal Merger Review Project* 4 (Nov. 9, 2009) ("practitioners and businesses do not have any current guidance on how the Agencies will analyze such mergers").

[3] David Hatch, *DOJ Eyes Overhaul of Vertical Merger Guidelines: Delrahim*, The Deal (June 1, 2018), https://pipeline.thedeal.com/article/14608361/index.dl. *But cf.* Antitrust Modern. Comm'n, Report & Recommendations, at 423 (2007) (Separate Statement of Donald Kempf) ("Updating the Merger Guidelines to cover . . . non-horizontal mergers . . . strikes me as a bad idea. . . . [T]hose are almost never challenged. For good reason. An effort to 'explain' this carries with it the temptation to fashion 'creative' new theories as to when such mergers can be anticompetitive and should be challenged. Again, it would be better to leave well enough alone and let 'guidance,' to the extent it is needed at all, develop in the context of actual proposed transactions and . . . with the assistance of the courts if need be.").

decisions, and (2) recognize the appropriately central role that behavioral remedies can play in vertical merger enforcement.

1. Updated Vertical Merger Guidelines Should Reflect the Consensus that Vertical Integration Is Procompetitive Except in Limited Circumstances.

a. There is broad economic consensus that vertical mergers are usually procompetitive.

Vertical merger analysis should start from a point of broad consensus: vertical integration is generally procompetitive and poses concerns only in limited circumstances.[4] As Bureau of Competition Director Bruce Hoffman observes, "there are plenty of theories of anticompetitive harm from vertical mergers. But the problem is that those theories don't generally predict harm from vertical mergers; they simply show that harm is possible under certain conditions."[5] Moreover, although "[t]hese theoretical issues are important," "empirical data is also very important[, and] empirical work has tended to show that vertical mergers (and vertical restraints) are typically procompetitive."[6]

Two empirical papers vividly illustrate this point. The first is a study published in 2005 by Luke Froeb, Michael Vita, and other Commission economists, who surveyed "multiple studies of vertical mergers and restraints" and "found only one example where vertical integration harmed consumers, and multiple examples where vertical integration unambiguously

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[4] *See generally Comcast Cable Commc'ns, LLC v. FCC*, 717 F.3d 982, 990 (D.C. Cir. 2013) (Kavanaugh, J., concurring) (in general, "vertical integration and vertical contracts are *procompetitive*"); *Nat'l Fuel Gas Supply Corp. v. FERC*, 468 F.3d 831, 840 (D.C. Cir. 2006) ("[V]ertical integration creates efficiencies for consumers."); Salop & Culley, *supra*, at [5] (2014) ("Most vertical mergers do not raise competitive concerns and likely are procompetitive."); Hoffman Vertical Merger Remarks at 4 (noting the "broad consensus in competition policy and economic theory that the majority of vertical mergers are beneficial because they reduce costs and increase the intensity of interbrand competition").

[5] Hoffman Vertical Merger Remarks at 3 (footnote omitted).

[6] *Id.* at 4.

benefited consumers."[7] The second is a 2007 analysis coauthored by University of Michigan Professor Francine LaFontaine, who recently served as Director of the Commission's Bureau of Economics. She and coauthor Margaret Slade of the University of British Columbia "did not have a particular conclusion in mind when [they] began to collect the evidence," "tried to be fair in presenting the empirical regularities," and were "therefore somewhat surprised at what the weight of the evidence is telling us."[8] In particular, they found that, "under most circumstances, profit-maximizing vertical-integration decisions are efficient, not just from the firms' but also from the consumers' points of view. Although there are isolated studies that contradict this claim, the vast majority support it."[9]

Vertical mergers have this pro-competitive track record for two basic reasons, as Mr. Hoffman explained. First, "[w]here horizontal mergers reduce competition on their face—though that reduction could be minimal or more than offset by benefits—vertical mergers do not."[10] Second, "while efficiencies are often important in horizontal mergers, they are *much more intrinsic to a vertical transaction* .… Due to the elimination of double-marginalization and the resulting downward pressure on prices, vertical mergers come with a more built-in likelihood of improving competition than horizontal mergers."[11] These two features of vertical mergers have led the U.S. antitrust agencies to urge their foreign counterparts to adopt a strong presumption in favor of such mergers. In the words of a U.S. report to the OECD in 2007,

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[7] *Id.* (citing James C. Cooper, Luke M. Froeb, Dan O'Brien, & Michael G. Vita, *Vertical Antitrust Policy as Problem of Inference*, 23-7 Int. J. of Indus. Org. (2005), https://www.ftc.gov/public-statements/2005/02/vertical-antitrust-policy-problem-inference).

[8] Francine Lafontaine & Margaret Slade, *Vertical Integration and Firm Boundaries: The Evidence*, 45 *J. of Econ. Literature*, 629, 680 (2007).

[9] *Id.*

[10] Hoffman Vertical Merger Remarks at 3.

[11] *Id.* (emphasis added).

vertical mergers "generally raise fewer competitive concerns than do horizontal mergers," "merit a stronger presumption of being efficient than do horizontal mergers," and therefore "should be allowed to proceed except in those few cases where convincing, fact-based evidence relating to the specific circumstances of the vertical merger indicates likely competitive harm."[12]

b. Updated vertical merger guidelines should harmonize review of vertical integration by *merger* with precedent regarding vertical integration by *contract.*

Because vertical mergers by definition cause no increase in market concentration, they do not trigger the "structural presumption" of unlawfulness that applies to horizontal mergers between close competitors in concentrated markets. *See United States v. Baker Hughes, Inc.*, 908 F.2d 981, 982 (D.C. Cir. 1990). The antitrust agencies instead consider whether a vertical merger under review will have other types of "anticompetitive effects … , including the [merging parties'] ability to foreclose competitors' access to a critical input[.]"[13] Although the agencies have reviewed a number of vertical mergers in recent years, there is no recent judicial precedent on the legal framework for assessing such mergers: until the AT&T-Time Warner case, the federal government had not taken such a merger to trial for four decades. And the *AT&T/Time Warner* court itself avoided any big-picture doctrinal issues by deciding that case on narrow fact-based grounds.[14]

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[12] Note by the Delegation of the United States to the Organization for Economic Co-operation and Development, Competition Committee 2, 10 (Feb. 21-22, 2007), https://www.ftc.gov/sites/default/files/attachments/us-submissions-oecd-and-other-international-competition-fora/07RoundtableonVerticalMergers.pdf; *see also* Int'l Competition Network, *Vertical Mergers Survey Results* 11 (2018) ("ICN Report"), http://icn2018delhi.in/images/ICN-survey-report-on-vertical-mergers-17-03-18.pdf (noting view that "while efficiencies are often important in horizontal mergers, they are much more intrinsic to a vertical transaction due to the cost-reducing effects of most vertical mergers").

[13] *The FTC's Merger Remedies 2006-2012: A Report of the Bureaus of Competition and Economics*, at 11 n.20 (Jan. 2017) ("FTC Remedies Study").

[14] *See United States v. AT&T*, No. 17-2511, slip op. at 71 n.23 (D.D.C. June 12, 2018) (assuming *arguendo*, while expressing "serious doubts," that DOJ could establish a "substantial lessening of

It is nonetheless instructive to review *Brown Shoe*-era antitrust decisions concerning vertical transactions, when antitrust law generally was far more pro-plaintiff than it is today. Even during that era, vertical mergers were invalidated for harming rivals only if they caused the merging parties to stop dealing with those rivals to some extent *and* only if this exclusive dealing between the merging parties "foreclosed" the rivals from "a substantial share of [the] market."[15] For example, in *Ford/Autolite*, Ford's acquisition of a spark-plug manufacturer foreclosed third-party spark-plug makers from selling to Ford and thus reduced their potential scale.[16]

Today, modern antitrust law places even greater burdens on plaintiffs challenging vertical transactions because there is now a legal consensus matching the economic consensus that "vertical integration and vertical contracts are *procompetitive*."[17] In particular, courts require plaintiffs to show much larger foreclosure percentages than in the *Brown Shoe* era to satisfy the

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competition" under Section 7 simply by showing a 0.2% retail price increase, and concluding that this legal issue was unnecessary to reach because DOJ had failed "to show that there are likely to be *any* price increases" as a factual matter).

[15] *United States v. E.I. du Pont de Nemours & Co.*, 353 U.S. 586, 595 (1957) (ellipsis omitted) (quoting *Standard Oil Co. of Cal. v. United States*, 337 U.S. 293, 314 (1949)); *see, e.g.*, *Brown Shoe Co. v. United States*, 370 U.S. 294, 323-24 (1962); *Fruehauf Corp. v. FTC*, 603 F.2d 345, 352 & n.9 (2d Cir. 1979).

[16] *Ford Motor Co. v. United States*, 405 U.S. 562, 568 (1972). As these cases illustrate, foreclosure is a necessary element of claims that a vertical merger should be blocked because it disadvantages competitors. Foreclosure is obviously not a necessary element of unrelated theories for challenging vertical mergers, such as elimination of "potential competition" from one of the merged companies, *Non-Horizontal Merger Guidelines* § 4.1, or "facilitat[ing] collusion … by making it easier to monitor price," *id.* § 4.22. *See* Hoffman Vertical Merger Remarks at 6 (noting concern that "the integrated firm gains access that it didn't previously have to competitively sensitive business information of an upstream or downstream rival"). As discussed below, firewalls are often appropriate and effective remedies for such "collusion" concerns. *See id.*

[17] *Comcast*, 717 F.3d at 990 (Kavanaugh, J., concurring); *see id.* ("[b]eginning in the 1970s," the Supreme Court shifted to a favorable view of "vertical integration and vertical contracts").

"substantial share" requirement, and that foreclosure showing is no longer a sufficient basis for establishing liability.[18]

This precedential shift is evident in cases involving the type of vertical integration by contract most analogous to a vertical merger: an exclusive dealing arrangement, under which one company agrees to buy from (or sell to) another company exclusively.[19] Under modern precedent, exclusive dealing arrangements are lawful even if they do foreclose rivals from a substantial portion of the market unless they also leave the rivals "stunted" as competitors (*e.g.*, by keeping them below efficient scale), prevent them from "provid[ing] meaningful price competition," and thereby enable the defendant to charge more for its own products than it otherwise could.[20] This narrow theory of exclusive dealing liability underlay the Commission's *McWane* decision in 2014 and the Eleventh Circuit's affirmation of that decision in 2015.[21]

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[18] *See*, *e.g.*, 7 Areeda, *Antitrust Law* ¶ 1511e2, at 517-18 (4th ed. 2017) (older Supreme Court precedent addressed vertical mergers "under an aggressive standard that struck down many mergers that would never be challenged today" because "our theory and most of our law of vertical integration have changed very considerably since that time"); *see also Baker Hughes*, 908 F.2d at 990 n.12 ("The most important developments that cast doubt on the continued vitality of such [merger] cases as *Brown Shoe* . . . are found in [non-merger] cases, where the Supreme Court . . . has said repeatedly that the economic concept of competition, rather than any desire to preserve rivals as such, is the lodestar that shall guide the contemporary application of the antitrust laws, not excluding the Clayton Act.") (internal quotation marks omitted).

[19] *See*, *e.g.*, *McWane, Inc. v. FTC*, 783 F.3d 814, 838-39 (11th Cir. 2015); *United States v. Microsoft Corp.*, 253 F.3d 34, 71 (D.C. Cir. 2001) (en banc) (per curiam).

[20] *McWane*, 783 F.3d at 838-39; *see also Microsoft*, 253 F.3d at 71 (issue is whether exclusive dealing keeps competitors "below the critical level necessary . . . to pose a real threat" to defendant's market power); *Roland Mach. Co. v. Dresser Indus., Inc.*, 749 F.2d 380, 394 (7th Cir. 1984) ("The exclusion of competitors is cause for antitrust concern only if it impairs the health of the competitive process itself.").

[21] *See McWane, Inc.*, 2014-1 Trade Cas. (CCH) ¶ 78670 (FTC Jan. 30, 2014), *aff'd*, *McWane*, 783 F.3d at 838-39. *McWane* was analyzed under Section 2 the Sherman Act, whereas any merger is addressed under Section 7 of the Clayton Act. But that is a distinction without a difference. Historically, many exclusive dealing agreements were assessed under Section 3 of the Clayton Act, which contains the same operative language as Section 7 ("may substantially lessen competition"). The statutory scheme thus requires courts to align analysis of vertical mergers with analysis of exclusive dealing arrangements. *See Fruehauf Corp. v. FTC*, 603 F.2d 345, 352 & n.9 (2d Cir. 1979). If anything, the distinction between Section 2 and Section 7 cuts in favor of subjecting Section 7 plaintiffs to the same elements as required in

An example drives home the need to harmonize vertical merger review with this modern exclusive dealing precedent. Suppose that Supply Firm and Distribution Firm are choosing between (1) a long-term exclusive dealing arrangement and (2) a vertical merger that might involve some preferential treatment between the upstream and downstream components of the merged firm but *not* exclusive dealing. The exclusive dealing arrangement would disadvantage Distribution Firm's rivals more than the vertical merger would because, by definition, it would foreclose them from distributing Supply Firm's goods at all. *Even so*, a plaintiff could not challenge that exclusive dealing arrangement simply by introducing an abstract model predicting price increases for the distribution rivals (*e.g.*, because they must turn to more expensive suppliers), even if some percentage of those wholesale increases would be passed through to retail consumers. Instead, the plaintiff would have to prove *structural* harm to competition by showing that the transaction would foreclose a "substantial portion" of the input market from the distribution rivals, stunt them as competitors, and substantially increase Distribution Firm's market power, such that *it* could then charge higher prices than in the absence of the agreement.[22] Because those showings would be required for an exclusive dealing agreement, which by definition involves *some* foreclosure, it would be illogical to excuse a plaintiff from making those same showings as a basis for invalidating a vertical merger that involves *no* foreclosure.

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a Section 2 case. Section 2 applies only where, as in *McWane*, one of the parties has full-blown monopoly power, a fact that presents unusual competitive concerns. Those concerns are absent in Section 7 cases involving parties that *lack* monopoly power. It would be highly anomalous to subject non-monopolist Section 7 defendants, but not Section 2 monopolists, to special pro-plaintiff rules in otherwise analogous circumstances.

[22] *See McWane*, 783 F.3d at 838-39; *Microsoft Corp.*, 253 F.3d at 71.

2. Conduct Remedies Are Often Appropriate in Vertical Merger Cases.

In the unusual circumstance where a vertical merger does present genuine competitive concerns, the antitrust agencies should always carefully consider conduct (or "behavioral") remedies that negate those concerns without undermining the procompetitive efficiencies of the transaction itself. Structural remedies such as divestitures are often more appropriate in horizontal cases, where concerns typically arise from the prospect of undue concentration in particular markets and divestitures offer the only real solution. But such structural remedies are irrationally overbroad as vertical merger remedies when, as is often the case, they would undermine a merger's procompetitive rationale and conduct remedies are available as alternatives.

In future enforcement decisions, the Commission should reaffirm this basic point, which was not even seriously disputed until recently.[23] As BC Director Bruce Hoffman has noted, "we can, and we do, and we have fashioned conduct remedies in vertical mergers" because they are often the best enforcement outcome: "firewalls can prevent information sharing, and nondiscrimination clauses can eliminate incentives to disfavor rivals."[24] The Commission is particularly well-positioned to make such judgments because it has done the retrospective analysis needed to confirm the efficacy of vertical conduct remedies. As the 2017 *Remedy Study* found, "[a]ll the vertical mergers [in the 2006-2012 data set] were remedied with non-structural

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[23] *Cf.* Keynote Address of Ass't Atty. Gen. Makan Delrahim, ABA Antitrust Fall Forum (Nov. 16, 2017) ("That is not to say we would never accept behavioral remedies. In certain instances where an unlawful vertical transaction generates significant efficiencies that cannot be achieved without the merger or through a structural remedy, then there's a place for considering a behavioral remedy if it will completely cure the anticompetitive harms. It's a high standard to meet.").

[24] Hoffman Vertical Merger Remarks at 7 & n.17, 8 (citing, *inter alia*, *In re PepsiCo, Inc*., Dkt. C-4301 (complaint filed Feb. 26, 2010); *In re The Coca-Cola Company*, Dkt. C-4305 (complaint filed Sept. 27, 2010)); *In re Broadcom Limited*, Dkt. C-4622 (complaint filed Jul. 3, 2017)).

relief," and "[a]ll vertical merger orders were judged successful."[25] Those conclusions also comport with the nearly universal practice of foreign antitrust authorities. As the ICN recently noted, "[w]hen a merger is not unconditionally cleared as a result of vertical concerns, [national competition authorities] often impose behavioural remedies …. Structural remedies are rarely required[.]"[26]

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[25] FTC Remedies Study at 13, 17 n.34; *see also id.* at 2 ("[r]emedies addressing vertical mergers also succeeded"); *id.* at 20 n.37 ("[v]ertical merger remedies raised no reported process concerns"); *id.* at 20 n.37; Hoffman Vertical Merger Remarks at 8 ("The Commission's recent Remedy Study included four orders related to vertical mergers, and each one succeeded in maintaining competition at premerger levels.").

[26] ICN Report at 23.

<u>RESPONSE TO ISSUES 4 & 5</u>:

"The intersection between privacy, big data, and competition," including "the benefits and costs of privacy laws."

1. The Commission's Privacy Framework Has Succeeded Because It Is Measured and Collaborative.

The Commission has exercised highly effective leadership in the development of U.S. privacy policy by wearing several different hats. In its most obvious role as "cop on the beat," the Commission "has brought over 500 enforcement actions protecting the privacy of consumer information."[1] Yet the Commission plays an equally effective role when engaging directly with industry and other stakeholders more informally—through workshops and reports, when analyzing the complex issues raised by commercial uses of consumer data, when representing U.S. interests in foreign proceedings, and when recommending best practices in privacy-related disclosures to consumers.[2]

The Commission has succeeded in these multiple roles because it recognizes that privacy debates often present complex trade-offs in need of balanced solutions.[3] The Commission has thus long supported a measured approach that protects consumers from genuine privacy abuses while recognizing that consumer information fuels the modern internet, enabling companies to

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[1] FTC, *Privacy & Data Security Update: 2017*, at 2 (2018).

[2] *See*, *e.g.*, FTC Staff Report, *Mobile Privacy Disclosures: Building Trust Through Transparency* (Feb. 2013), https://www.ftc.gov/sites/default/files/documents/reports/mobile-privacy-disclosures-building-trust-through-transparency-federal-trade-commission-staff-report/130201mobileprivacyreport.pdf.

[3] There is broad bipartisan consensus on this point. *See* President's Council of Advisors on Science and Technology, *Big Data and Privacy: A Technological Perspective*, at x-xi (May 2014) ("The beneficial uses of near-ubiquitous data collection … fuel an increasingly important set of economic activities," and any "policy focus on limiting data collection" would not strike "the right balance between beneficial results and unintended negative consequences (such as inhibiting economic growth)."); FTC, *Protecting Consumer Privacy in an Era of Rapid Change*, at 2 (Mar. 2012) ("FTC 2012 Privacy Report") (noting that "the collection and use of consumer data has led to significant benefits in the form of new products and services").

offer consumers countless valuable services at deep discounts or for free. For example, the Commission has consistently opposed overbroad opt-in requirements for non-sensitive information, which foreclose productive uses of data without adequate justification.[4] This type of nuanced oversight is a key reason why the world's leading e-commerce companies, which have converted consumer data into trillions of dollars of consumer value, are headquartered in the United States rather than in foreign jurisdictions with more absolutist approaches.

Just as important, in developing the details of this framework, the Commission has properly relied on industry and multi-stakeholder processes rather than one-size-fits-all, top-down government regulation. One example is the process for determining what web-browsing data should be considered "sensitive" for notice-and-choice purposes. Companies typically rely on industry self-regulatory guidelines that preclude the use of categories of presumptively sensitive information—such as sensitive medical conditions—to target marketing at particular consumers.[5] These self-regulatory mechanisms are often superior to governmental mandates because, unlike prescriptive rules, multistakeholder processes provide the flexibility and speed necessary to address rapid technology and market changes.

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[4] *See*, *e.g.*, FTC 2012 Privacy Report at 15-16; Comments of FTC Staff, FCC WC Docket No. 16-106, at 22 (May 27, 2016). Opt-in is an appropriate mechanism for sensitive consumer data, such as medical or financial information, that many consumers would not want to be shared. But compulsory opt-in mechanisms can present serious costs when applied broadly to nonsensitive information. In that context, when consumers fail to opt in, they often do so not by considered choice, but because they do not wish to take the time needed to make a choice and do not fully internalize the broader economic costs of that non-choice. *See*, *e.g.*, Joshua D. Wright, *An Economic Analysis of the FCC's Proposed Regulation of Broadband Privacy*, at 18-20 (May 27, 2016) (submitted by the United States Telecom Association in FCC WC Docket No. 16-106 and available at https://www.fcc.gov/ecfs/).

[5] *See, e.g.*, Digital Advertising Alliance, *Application of Self-Regulatory Principles to the Mobile Environment* (July 2013), http://www.aboutads.info/DAA_Mobile_Guidance.pdf; Network Advertising Initiative Code of Conduct (2013), https://www.networkadvertising.org/2013_Principles.pdf.

2. Any Privacy Framework Should Promote Competitive Parity and National Consistency.

As AT&T discusses in its separate response to Issue 2, the Commission should pursue both competitive parity and regulatory predictability on all competition and consumer protection topics within its jurisdiction. Privacy and data security rules are a case in point. As discussed below, (1) there is no basis for subjecting ISPs to more onerous privacy restrictions than those applicable to leading online competitors such as Google and Facebook, and (2) the Commission should work with Congress to enact new legislation restoring predictability and national consistency to privacy oversight in the United States.

a. Any privacy framework should apply consistently to providers throughout the internet ecosystem.

As noted in our Issue 2 response, any privacy and data security framework should apply consistently to all internet companies, and there is no basis for imposing unusually stringent restrictions on ISPs in particular. That conclusion appears to be gaining some measure of consensus. For example, despite their many flaws, the recent privacy mandates issued by both the European Commission (the General Data Protection Regulation) and California (the California Consumer Privacy Act of 2018) at least avoid subjecting ISPs to more intrusive regulation than other internet companies. That said, calls for ISP-specific privacy restrictions remain stubbornly persistent in some quarters,[6] and they remain as baseless as before.

For many years, FCC-focused interest groups have sought to justify such asymmetric regulation on the premise that ISPs have greater visibility into online user behavior than so-called "edge" providers such as Google and Facebook. That premise stands reality on its head.

[6] *See*, *e.g.*, Salome Viljoen, *Facebook's Surveillance Is Nothing Compared with Comcast, AT&T and Verizon*, The Guardian (Apr. 6, 2018); Karl Bode, *Given Facebook's Privacy Backlash, Why Aren't We Angrier with the Broadband Industry?*, Motherboard (Mar 20, 2018).

First, the now-pervasive use of encryption blinds ISPs but *not* the operators of browsers, operating systems, and social networks to most of a given user's online activities.[7] Those "edge" providers also typically have continuous visibility into a user's activities, whereas any given user typically shifts from one ISP to another (home, cellular, office) during the course of a day.[8] As University of Pennsylvania Professor Michael Kearns explains, the leading edge providers' "combination of data volume, diversity, intimacy and [predictive] modeling provides insights about consumers … that are historically unrivaled and are still rapidly expanding," whereas data gleaned by ISPs are "more limited" and "in many ways less comprehensive and valuable."[9] It also makes no sense to defend ISP-specific privacy burdens on the theory that ISPs face less retail competition and thus less accountability to end users than edge platform providers do. If anything, it is easier to switch from one mobile provider to another than from one operating system to another—a choice that requires abandoning one's smartphone and all its apps.

Indeed, saddling ISPs with special privacy-related burdens would be affirmatively anticompetitive because it would disable them from bringing much-needed competition to leading online companies. Information is a crucial competitive advantage in many markets, from

[7] *See* Peter Swire et al., *Online Privacy and ISPs: ISP Access to Consumer Data is Limited and Often Less than Access by Others* (Geo. Tech. Inst. for Info. Sec. & Privacy, May 2016). According to Google's most recent Transparency Report providing a snapshot of HTTP encryption on the web, 85% of web pages downloaded in the U.S. using Chrome (which is the most popular web browser) are encrypted. *See* Google, *HTTPS Encryption on the Web*, https://transparencyreport.google.com/https/overview?hl=en (last viewed Aug. 16, 2018).

[8] *See*, *e.g.*, Comments of the Electronic Privacy Information Center, FCC WC Docket No. 16-106, at 16 (filed July 17, 2016) (available at https://www.fcc.gov/ecfs/) ("Internet users routinely shift from one ISP to another, as they move between home, office, mobile, and open WiFi services. However, all pathways lead to essentially one Internet search company and one social network company. … [I]t is obvious that the more substantial privacy threats for consumers are not the ISPs.").

[9] Michael Kearns, *Data Intimacy, Machine Learning, and Consumer Privacy*, at 2 (Penn. Law/CTIC 2018), https://www.law.upenn.edu/live/files/7952-kearns-finalpdf.

digital advertising to streaming video.[10] Restricting ISPs' ability to access, collect, and use data in responsible ways could only enhance the market power of the online companies that have converted their unrivaled stores of consumer data into dominance of various online markets. AT&T's objective is not to limit the ability of those companies to continue collecting and using such data (assuming they do so in a responsible manner). But the Commission should ensure that potential rivals, including ISPs, can compete with those data incumbents by making productive and responsible use of consumer information on a level playing field.

b. The need for a unified national privacy framework.

As the Commission is aware, the California legislature recently enacted the California Consumer Privacy Act of 2018, which is scheduled to take effect in 2020. Unless it is substantially amended, this new statute will subject companies to more stringent privacy restrictions than any other U.S. law, past or present.[11] The California legislation and similar initiatives in other states threaten to create a highly problematic patchwork quilt of privacy regulation. Internet communications are by nature geography-agnostic, and providers cannot feasibly tailor online services to the disparate rules of many different U.S. jurisdictions. As a result, balkanized state-by-state privacy regulation would lead all providers to tailor their practices nationwide to the most restrictive elements of the various state laws, irrespective of the balance that any given state may have struck between restrictions and permissions, and no matter how oblivious those laws may be to a careful cost-benefit analysis.

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[10] *See* AT&T Response to Issue 2 (discussing importance of consumer data in media markets).

[11] *See*, *e.g.*, Sidley Austin LLP, *California Enacts Broad Privacy Laws Modeled on GDPR* (June 29, 2018), https://www.sidley.com/en/insights/newsupdates/2018/06/california-enacts-broad-privacy-laws-modeled-on-gdpr.

For that reason, these laws may well violate the dormant Commerce Clause, which requires states to balance their regulatory interests against the burden on interstate commerce and prohibits them from regulating activity occurring "wholly outside of the State's borders."[12] But the federal government should not await the outcome of multiyear litigation to restore consistency and predictability to the U.S. privacy framework. Instead, as AT&T and others have proposed, the Commission should work with Congress to enact federal legislation that reinforces the Commission's leadership role in this area and ensures national consistency in privacy policy.

[12] *Healy v. Beer Inst.*, 491 U.S. 324, 336 (1989); *see Am. Libraries Ass'n v. Pataki*, 969 F. Supp. 160, 180 (S.D.N.Y. 1997); *see also Am. Booksellers Found. v. Dean*, 342 F.3d 96, 103 (2d Cir. 2003); *ACLU v. Johnson*, 194 F.3d 1149, 1160-61 (10th Cir. 1999).

<u>Response to Issue 11</u>:

"The agency's investigation, enforcement, and remedial processes."

1. The Commission Should Use Guidance as Its Primary Tool for Announcing New Policy or Enforcement Positions.

In a number of important policy areas, including social media and influencer marketing and the Children's Online Privacy Protection Act ("COPPA"), the Commission has issued public statements to signal planned changes in its policy and/or enforcement practices. The Commission should more consistently apply, and indeed expand, this practice. When the Commission seeks to broaden its policy interpretations, or enforce preexisting policies in novel ways or in new areas, issuing some form of public guidance well prior to pursuing enforcement actions serves an important and valuable notice function, enabling responsible companies to take measure of their own practices and to make adjustments as needed to conform with the FTC's policy directives. This approach benefits not only companies subject to FTC oversight, but the Commission as well, because with relatively little expenditure of resources the Commission—through issuing guidance—can prompt voluntary changes in business practices. Subsequent enforcement actions could then be limited to firms that disregard the FTC's public guidance.

There are myriad examples of the Commission following the approach of issuing guidance announcing a shift in policy or enforcement focus. Prior to pursuing enforcement actions related to the use of endorsers in social media and influencer marketing, the Commission, in April 2017, sent more than 90 letters reminding influencers that they must clearly disclose their relationships to brands when promoting or endorsing products through social media.[1] In September 2017, the Commission updated its Endorsement Guides to more thoroughly address

[1] *See* FTC, *FTC Staff Reminds Influencers and Brands to Clearly Disclose Relationship* (April 19, 2017), https://www.ftc.gov/news-events/press-releases/2017/04/ftc-staff-reminds-influencers-brands-clearly-disclose.

how preexisting agency rules apply to social media, providing specific examples and expressing the agency's views of preexisting practices by companies like YouTube and Instagram.[2] Shortly thereafter, the Commission sent "warning" letters to 21 of the 90 influencers who previously had received a letter reminding them of Commission policy. These subsequent warning letters cited specific social media posts that Commission Staff believed might be non-compliant and requested that the influencers disclose any material connections to the brands in the identified posts and outline steps to ensure they disclose such connections in the future.[3] The Commission also published a blog post analyzing "[t]hree FTC actions of interest to influencers" and summarizing its various informal outreach efforts.[4] The Commission's actions in this regard conveyed valuable compliance-related information to affected actors, enabling them to make voluntary changes as needed to comply with FTC policy.

The Commission adopted a similar approach with respect to COPPA, which dictates what operators of websites and online services must do to protect children's privacy and safety online. When changes to COPPA took effect in July 2013, the Commission quickly revised its fulsome COPPA FAQ guidance to explain the changes.[5] In March 2015, the Commission again updated

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[2] *See* FTC, *The FTC's Endorsement Guides: What People Are Asking* (Sept. 2017), https://www.ftc.gov/tips-advice/business-center/guidance/ftcs-endorsement-guides-what-people-are-asking.

[3] *See* FTC, *Instagram Influencer Warning Letter Template* (Sept. 6, 2017), https://www.ftc.gov/system/files/attachments/press-releases/los-propietarios-de-csgo-lotto-resuelven-la-primera-demanda-jamas-entablada-contra-influyentes-de/instagram_influencer_warning_letter_template_9-6-17.pdf.

[4] *See* Lesley Fair, *Three FTC actions of interest to influencers* (Sept. 7, 2017), https://www.ftc.gov/news-events/blogs/business-blog/2017/09/three-ftc-actions-interest-influencers.

[5] *See* FTC, *Complying with COPPA: Frequently Asked Questions* (last updated March 2015), https://www.ftc.gov/tips-advice/business-center/guidance/complying-coppa-frequently-asked-questions.

its FAQ guidance to include information about the interplay between COPPA and schools.[6] And in June 2017, the Commission updated its guidance to address how COPPA applies to new businesses and products and to explain new methods for obtaining parental consent.[7]

Providing public guidance prior to pursuing novel enforcement actions generates significant benefits for all stakeholders. Such an approach benefits the Commission in particular, as issuing public guidance is perhaps the most efficient means to advance the agency's mission and effect positive industry changes.[8] This approach also permits the Commission to be more nuanced in its articulation of policy positions than is possible in fact-specific enforcement actions or litigation. In addition, this approach makes it more likely that the Commission will prevail in the subsequent enforcement actions it does elect to pursue, in part by reducing concerns about procedural unfairness and lack of appropriate agency guidance.[9]

This approach also benefits entities subject to FTC oversight. When the Commission speaks, responsible industry participants can be expected to listen attentively, spurring positive

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[6] *See* Lesley Fair, *COPPA and schools: Updated FAQs from FTC staff* (March 20, 2015), https://www.ftc.gov/news-events/blogs/business-blog/2015/03/coppa-schools-updated-faqs-ftc-staff.

[7] *See* Kristin Cohen and Peder Magee, *FTC updates COPPA compliance plan for business* (June 21, 2017), https://www.ftc.gov/news-events/blogs/business-blog/2017/06/ftc-updates-coppa-compliance-plan-busines.

[8] Dissenting Statement of Commissioner Joshua D. Wright, *In the Matter of Apple, Inc.*, FTC File No. 1123108 at 3 (Jan. 15, 2014) ("Wright Apple Statement") (the absence of guidance "can be counterproductive to the FTC's competition mission, raising issues of fundamental fairness and potentially deterring consumer welfare-enhancing conduct").

[9] The Supreme Court has acknowledged more than once that a lack of prior authoritative guidance from the Commission militates in favor of finding that a respondent's own actions and related statutory interpretations are not objectively unreasonable, and thus not appropriately subject to FTC enforcement. *See Safeco Insurance Co. of America v. Burr*, 551 U.S. 47, 69-70 (2007) (concluding that interpretations with a "foundation in the statutory text" are not objectively unreasonable, particularly in the absence "of guidance from the courts of appeals or the [FTC] that might have warned [the defendant] away from" its reading); *see also Steed v. Equifax Info. Servs.*, No. 1:14-cv-00437, 2016 WL 7888040 (N.D. Ga. July 15, 2016) (finding that the defendant's interpretation of a statute was not objectively unreasonable in the absence of "any authoritative regulatory guidance from the FTC . . . issued before or during the time period at issue in [the] lawsuit").

dialogue within industry groups and appropriate internal reviews. Clear agency guidance also empowers corporate legal and compliance personnel to successfully advocate for needed changes to internal policies and practices. In short, companies subject to FTC oversight are better able to align their practices with FTC standards when they have greater clarity "about whether the conduct they wish to engage in" could "trigger a Commission investigation."[10]

As former Commissioner Joshua D. Wright explained, consumers also benefit when the Commission allows companies to find efficient strategies to address problems that are "difficult to anticipate and fix in advance."[11]

2. The Commission Should Expand Its Commendable Recent Efforts to Streamline Information Requests and Reduce Unnecessary Investigatory Burdens.

In recent years, numerous constituencies have raised concerns about the unnecessary burdens often imposed by the Commission's consumer protection investigations. Members of Congress have specifically cautioned the Commission against overburdening businesses, with some going so far as to sponsor bills that would reform and shorten agency investigations.[12] Journalists, academics, and agency targets have also stressed that the investigatory costs borne by respondents can be substantial, even at times debilitating.[13] And the American Bar

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[10] Joshua D. Wright, *Recalibrating Section 5: A Response to the CPI Symposium*, CPI Antitrust Chronicle at 2 (Nov. 2013), https://www.ftc.gov/sites/default/files/documents/public_statements/recalibrating-section-5-response-cpi-symposium/1311section5.pdf/.

[11] Wright Apple Statement at 16.

[12] *See Statement of Senator John D. Rockefeller IV, Hr'g Before Senate Subcommittee on Commerce, Science, and Transportation 112-469*, at 57 (Nov. 15, 2011) ("[T]he FTC should be careful not to overburden business and should respect self-regulation"); *Statement of Congressman Fred Upton*, Meeting of Cong. Subcommittee on Commerce, Manufacturing, and Trade Subcommittee (June 22, 2016) (stating that proposed bill H.R. 5510, which would shorten and reform FTC investigations, sought to "modernize the FTC for the 21st century").

[13] *See, e.g.*, Daniel Castro and Alan McQuinn, *4 Ways New Chairman Can Create An Innovation-Friendly FTC*, Law360 (Feb. 26, 2018) (recommending that the Commission "reduce

Association recently expressed similar concerns about overbroad, “generic” agency investigations in its January 2017 Presidential Transition Report.[14]

Recognizing these concerns, in July 2017 then-Acting FTC Chairman Maureen K. Ohlhausen announced internal reforms intended to “streamline information requests and improve transparency” in the agency’s consumer protection investigations.[15] The announcement indicated that the Bureau of Consumer Protection would (i) provide “plain language” descriptions of the civil investigative demand (“CID”) process; (ii) provide “more detailed” descriptions of the scope and purpose of investigations; (iii) limit the relevant time periods covered by CIDs; (iv) “significantly” reduce the length and complexity of CID instructions for producing electronically stored data; and (v) increase the time available to respond to CIDs.

These reforms are welcome, but relatively modest. Additional, more substantial changes would give greater effect to the Commission’s goals of “protect[ing] consumers and promot[ing] competition without unduly burdening legitimate business activity” in all of its investigations.[16] In particular, the Commission should consider the following additional steps to clarify the scope of two of these previously announced changes.

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unnecessary burdens on businesses and workers . . . [because] FTC investigations can impose substantial costs on companies”); May Tal Gongolevsky and Csilla Boga-Lofaro, *FTC Announces Internal Process Reforms in Connection with Civil Investigative Demands*, Data Privacy Monitor (July 27, 2017) (stating that “CID requests can be lengthy, broad and complex, and can seek multiple types of data and information” and can generate “friction between compliance with requests and conducting day-to-day business”).

[14] American Bar Association Section of Antitrust Law, *Presidential Transition Report: The State of Antitrust Enforcement* (Jan. 2017) (noting the “trend in recent years toward generic and overly-broad CIDs that are not tailored to the nature of the business or the practices at issue”).

[15] FTC, *FTC Chairman Ohlhausen Announces Internal Process Reforms: Reducing Burdens and Improving Transparency in Agency Investigations* (July 17, 2017), https://www.ftc.gov/news-events/press-releases/2017/07/acting-ftc-chairman-ohlhausen-announces-internal-process-reforms.

[16] *Id.*

First, the Commission's commitment to "limiting the relevant time periods" defined in CIDs is commendable, but the Commission should specify by how much it intends to limit the relevant time periods.[17] AT&T suggests that the Commission establish a reasonable presumptive benchmark for the maximum time period a CID will cover, absent unusual circumstances. In the context of antitrust merger investigations, the FTC's Model Second Request incorporates a default two- or three-year time period, depending on the nature of the inquiry and type of information at issue.[18] A similar approach to limited CIDs and other information requests in the consumer protection context seems appropriate.

Second, the Commission committed to "increasing response times for CIDs," with examples that suggest the agency intends to offer fairly brief extensions—"21 days to 30 days for targets, and 14 days to 21 days for third parties."[19] While increasing response times is a beneficial reform, respondents, and the investigatory process more generally, would benefit from substantially longer extensions in investigations where the requests are voluminous or burdensome. Bureau of Consumer Protection Staff regularly grant extensions of 30 days, 60 days, or longer where the agency has requested a large volume of materials and the respondent is producing materials on a rolling basis. AT&T suggests that the Commission memorialize a policy of granting longer extensions when appropriate.

In order to build on these reforms, the Commission should adopt a policy against requiring respondents to produce a full, "by-document" privilege log that includes information for each document withheld or redacted on privilege grounds, especially where the focus of the

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[17] *Id.*

[18] FTC, *Model Request for Additional Information and Documentary Material (Second Request)* (Revised August 2015), https://www.ftc.gov/system/files/attachments/merger-review/guide3.pdf.

[19] *Id.*

investigation does not directly concern materials that are likely to be privileged. A policy of waiving the requirement of a privilege log altogether, or requiring only a partial or categorical log, absent some specific need to examine the respondent's privilege assertions, would allow the Commission to significantly reduce the burden on respondents without negatively impacting the agency's fact-finding efforts.

The Commission also should consider adopting a policy against requests that seek "all documents" relating to each issue encompassed by a CID whenever doing so will not unduly prejudice the investigation. For example, at present, the Bureau of Consumer Protection's CIDs often include such requests by default, which typically require expensive and time-consuming custodial searches. Modern technology has caused AT&T, like virtually all businesses, to generate an extraordinary and ever-growing volume of materials in its operations, and "all documents"-style requests that contemplate searching each type of document or company repository can be incredibly burdensome. More targeted requests seeking, for example, documents "sufficient to show" allow respondents to produce the most relevant information more efficiently, which benefits both the respondent and the FTC. The Federal Rules of Civil Procedure were recently modified to address this issue, instituting a standard of proportionality to mitigate the increasing burdens of productions,[20] and the Commission should follow suit by requiring Staff to justify any "all documents" request in a CID or other information request.

3. Commission Staff Should Follow a More Routine Practice of Apprising Respondents in Advance of Potential Complaint Theories.

Industry experience with the Bureau of Consumer Protection suggests that Staff can vary significantly from one matter to another in the degree to which they communicate with the

[20] *See* Michael J. Miles, *Proportionality Under Amended Rule 26(b)(1): A New Mindset*, American Bar Association Section of Litigation (May 18, 2016).

respondent about core issues of concern to Staff prior to commencing the "consent" (i.e., settlement) negotiation process. Very often, the process proceeds according to the following general timeline:

- The Commission serves the respondent with an initial discovery request (a CID or a voluntary access letter).
- The respondent and Commission Staff negotiate the scope and timing of the response.
- The respondent provides a rolling production of documents and interrogatory responses.
- Commission Staff ask, and the respondent addresses, clarifying questions relating to the respondent's submissions.
- Commission Staff then "go dark" for a period of time, sometimes for several months or longer, without any substantive communication with the respondent or its counsel.
- Then, often without notice, Commission Staff present the respondent with formal correspondence attaching a draft complaint and proposed consent order, triggering a time-limited period of consent negotiations, during which Staff may refuse to engage in any dialogue concerning the substantive merits of the complaint's claims and allegations, taking the position that the consent period is reserved solely for negotiation of potential settlement terms.

Handling consumer protection investigations in this manner injects into the process an unnecessary element of surprise, and deprives the respondent of any meaningful opportunity to engage in a constructive, substantive dialogue with Staff prior to the matter progressing to the point of a fully drafted complaint. This, in turn, can result in Staff and the Bureau being somewhat more wedded to their complaint theories than might otherwise be the case, and somewhat less open to entertaining advocacy from the respondent. In short, the process can lead Commission personnel to lock themselves into positions based on less-than-complete information, creating impediments to an efficient, successful outcome.

Allowing respondents to address Commission Staff's specific concerns and contemplated complaint theories *before* the matter advances to the consent negotiation stage would yield more thorough and accurate investigative results. Numerous agency officials have acknowledged the value of such transparency, both as a matter of best practices and fundamental fairness, including former Chairwoman Edith Ramirez, who noted that "transparent and meaningful dialogue between parties and agencies about procedures, working theories, and the nature of the evidence" is "not only essential to safeguard rights of parties, but enables better informed agency decisions."[21]

4. The Commission Should Provide Greater Transparency to Respondents Regarding the Basis for Its Monetary Remedy Demands.

Although Section 13(b) of the FTC Act[22] does not expressly reference monetary relief, a number of federal circuit courts have concluded that the Commission may obtain various forms of equitable monetary relief under Section 13(b), including restitution and disgorgement.[23] However, Section 13(b) itself provides no guidance regarding how equitable monetary remedies may be determined, and both the Commission and the courts[24] have employed a wide variety of methodologies when calculating and assessing such remedies.

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[21] *Keynote Address of Chairwoman Edith Ramirez*, 7th Annual Global Antitrust Enforcement Symposium (Sept. 25, 2013); *see also* Remarks of Commissioner Terrell McSweeny, *Procedural Fairness in Competition Law Enforcement and the FTC Experience* (Oct. 23, 2015) ("Transparency of decisionmaking and fairness of process reinforce public confidence in competition enforcement and bolsters the credibility of an agency's mission."); Presentation of Andrew J. Heimert, FTC Office of International Affairs, *Lessons on Procedural Fairness from U.S. Antitrust Enforcement* (Nov. 30, 2015) ("Transparency and engagement can make investigations more efficient.").

[22] *See* 15 U.S.C. § 53(b)(2).

[23] *See, e.g.*, *FTC v. Ross*, 743 F.3d 886, 891 (4th Cir. 2014) (holding that courts may award equitable monetary relief under the FTC Act and stating that arguments otherwise "are not entirely unpersuasive, but they have ultimately been rejected by every other federal appellate court that has considered this issue") (citing cases).

[24] Many courts follow a "two-step" framework for calculating restitution that "requires the FTC to first show that its calculations "reasonably approximated" the defendant's "*unjust* gains," after which the burden shifts to the defendant to show that the demand is inaccurate. *FTC v. Bronson Partners, LLC*, 654 F.3d 359, 368 (2d Cir. 2011) (emphasis added). While most courts require the Commission to attempt to exclude from its demand funds paid for legitimately valuable products or services and permit the defendant to show that the demand wrongly includes legitimate revenues or profits, in practice courts often permit the agency to submit a very rough "approximation." *See, e.g.*, *FTC v. RCA Credit Servs.*,

The Commission's policy statements provide little, if any, additional clarity regarding how the agency calculates monetary relief demands. In the Commission's 2003 "Policy Statement on Monetary Equitable Remedies in Competition Cases," the agency described disgorgement remedies as "designed to deprive a wrongdoer of his unjust enrichment and to deter others from future violations," and described restitution remedies as "intended to restore the victims of a violation to the position they would have been in without the violation, often by refunding overpayments made as a result of the violation."[25] But with respect to how the Commission calculates these remedies, the 2003 Policy Statement stated only that the agency "will not seek a monetary equitable remedy when there is no reasonable basis for calculating the amount," and that "a reasonable basis for calculation does not require undue precision."[26] The Commission withdrew this Policy Statement in 2012, stating that it "create[d] an overly restrictive view of the Commission's options for equitable remedies," and that the agency would instead "rely instead upon existing law."[27] And since 2012, the Commission has not issued any formal guidance regarding equitable monetary remedies. In this landscape, respondents in a given investigation have very little ability to predict how the Commission will approach and calculate a monetary remedy demand.

In some Commission matters, because the product or service at issue lacks genuine value, the agency can credibly assert that *all* revenues obtained by the respondent are properly the

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LLC, 727 F. Supp. 2d 1320, 1337 (M.D. Fla. 2010) ("The [FTC's] calculation may be properly based on estimates because sometimes that is the only information reasonably available.").

[25] FTC, *Policy Statement on Monetary Equitable Remedies in Competition Cases* (July 31, 2003), https://www.ftc.gov/public-statements/2003/07/policy-statement-monetary-equitable-remedies-including-particular.

[26] *Id.*

[27] FTC, *Withdrawal of the Commission's Policy Statement on Monetary Equitable Remedies in Competition Cases*, at 2 (July 31, 2012).

subject of restitution or disgorgement.[28] Anticipating how the Commission will approach calculating monetary relief in such matters is correspondingly straightforward. But in a growing number of Commission matters, the product or service at issue has produced a large volume of sales that are unaffected by the challenged conduct, and/or the product or service brings significant value to some or even all consumers, notwithstanding the allegedly deceptive or unfair practice. In such matters, there are often very significant methodological questions regarding the proper way to approach the calculation of a monetary remedy. For example:

- Should the calculations be approached from the perspective of restitution, disgorgement, or some other form of consumer redress?
- Should equitable monetary relief account for value consumers received from the product or service?
- Should equitable monetary relief include sales to consumers whose purchase decisions were not affected by the challenged conduct?
- Should equitable monetary relief includes sales to consumers who would have continued to purchase the product or service at issue absent the challenged conduct?

The answers to these questions can materially affect the amount of the monetary relief at issue. And, because the Commission has not signaled a consistent approach to these questions, either through its enforcement actions or policy statements, respondents are unable to predict or evaluate the Commission's monetary remedy demands, absent a fulsome explanation from the Commission itself.

The Commission's desire to maintain flexibility in how it approaches monetary demands in a given investigation certainly is understandable. However, the Commission should adopt a consistent practice of informing respondents in particular cases how it has calculated its

[28] *See, e.g.*, *FTC v. QT, Inc.*, 512 F.3d 858, 864 (2008) ("Although defendants complain that the magistrate judge failed to separate ill-got gains from legitimate profits, they offer no reason to think that any of their profits are 'legitimate.'").

monetary relief demands, including explaining its methodology and data sources. Such a practice would generate several benefits for both the Commission and companies subject to potential enforcement actions.

Most importantly, this practice would increase the effectiveness of the Commission's consent order negotiation process. It does not appear to be uncommon for Commission Staff to open settlement negotiations by transmitting to respondents a proposed consent order that includes a very large, if not unrealistic, monetary demand, or by indicating that monetary relief will be sought but omitting any specific reference to the proposed amount of such relief, much less the rationale for such relief. In the scenario of a draft consent order that specifies a unrealistically large monetary demand, Staff often take the initial position that the agency is theoretically entitled to a remedy reflecting all revenues associated with the product or service at issue during the relevant time period. But even when Staff commences consent negotiations with such an exalted monetary relief demand, Staff will often negotiate for a far lesser amount of monetary relief, yet without transparency regarding the underlying methodology, if any, for the negotiated reductions. Voluntary settlements are often reached in this manner, and the consent of the respondent suggests that the ultimate amount was deemed acceptable. However, even when settlement negotiations are successful, the process can leave respondents feeling that the ultimate outcome was more a product of relative bargaining leverage and horse-trading than a result tethered to any objective facts or legal/economic principles.

In the scenario in which Staff initially declines to specify a monetary demand in the proposed consent order while at the same time signaling that the Commission will require some amount of monetary relief, consent negotiations can proceed on a basis that is even less moored to any particular methodology. This approach is particularly unsatisfactory when, as sometimes occurs, the Commission waits until the very final stages of negotiations, when the prospect of litigation is imminent, to surface a concrete monetary demand.

Such opaque processes raise procedural fairness concerns. Consent negotiations typically occur in the shadow of a possible enforcement action, and when the Commission declines to substantively engage over the proper monetary remedy methodology, or provides very limited time for the respondent to even consider a concrete monetary relief demand prior to potentially imminent litigation, respondents may feel the process is akin to a hold-up and that the monetary terms of any settlement were arbitrarily determined under duress.

A better practice for the Commission to follow in these circumstances would be to clearly present any monetary demand in the initial draft of the proposed consent order shared with the respondent, and for Staff to be authorized to provide at that time a reasoned explanation of the basis for the demand. Providing such transparency and engaging with respondents on monetary demands early in the negotiation process would be far more efficient, allow the Commission to achieve better reasoned and more defensible outcomes, provide more meaningful guidance to affected parties and industries, and likely lead to more settlements. It would also help establish a common framework for assessing monetary remedies, leading to greater transparency and consistency across matters over time. All of this arguably would enhance the Commission's credibility and advance its overall mission. And respondents would benefit as well from a more consistent, principled, and transparent process. Among other things, this approach would allow respondents to better predict outcomes and engage in more meaningful research of prior Commission precedents, which again could facilitate more efficient settlement outcomes.