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COMMENTS OF AT&T SERVICES INC.

RESPONSE TO ISSUE 11

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<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

[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.