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FEDERAL TRADE COMMISSION  
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Prepared Remarks of  
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Before beginning, I note that my remarks do not necessarily reflect the policy or views of the Commission or of any individual Commissioner.

A revolution in antitrust and consumer protection law began fifty years ago. The foundation of that revolution was the recommendation of President Johnson's Task Force on Antitrust Policy (the "Neal Report") that the antitrust laws be used and strengthened to effect a significant restructuring of the American economy. The Neal Report, completed in July 1968 and made public in May 1969, found that "highly concentrated industries represent a significant segment of the American economy."<sup>1</sup>

In support of "effective antitrust," the Neal Report recommended legislation to give antitrust enforcement authorities a "clear mandate to use established techniques of divestiture to reduce concentration in industries where monopoly power is shared by a few very large firms."<sup>2</sup> The Neal Report also recommended legislation that would prohibit mergers in which a "very

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<sup>1</sup> PHIL C. NEAL ET AL., WHITE HOUSE TASK FORCE REPORT ON ANTITRUST POLICY 3 (1969) [hereinafter 1969 NEAL REPORT], *reprinted in* 411 ANTITRUST & TRADE REGULATION REPORT (May 27, 1969) (Special Supplement). President Nixon appointed a task force in 1969 to do a study of the same issue. The report of that task force came to significantly different conclusions from those reached by the Johnson Task Force. *See* GEORGE J. STIGLER ET AL., REPORT OF THE TASK FORCE ON PRODUCTIVITY AND COMPETITION (1969), *reprinted in* 413 ANTITRUST & TRADE REGULATION REPORT X-1 (June 10, 1969).

<sup>2</sup> 1969 NEAL REPORT, *supra* note 1, at 3.

large firm acquires one of the leading firms in a concentrated industry.”<sup>3</sup> The task force recognized that the primary impact of the legislation would be on “diversification” or “conglomerate” mergers and explained that the basis for this recommendation was their understanding that Section 7 of the Clayton Act was not effective against mergers where the detection of adverse effects would depend on “factual and theoretical judgments” that “are highly speculative.”<sup>4</sup>

The spark of the revolution was two reports that concluded that the FTC was failing in its mission to protect consumers and maintain competitive markets. The NADER REPORT ON THE FEDERAL TRADE COMMISSION,<sup>5</sup> the summer work project of a small handful of law students, criticized the Commission’s consumer protection program. Although some practitioners and agency officials found the report’s findings unfair, they also recognized the criticisms as “nothing new.”<sup>6</sup>

The Kirkpatrick Report—more formally the 1969 REPORT OF THE AMERICAN BAR ASSOCIATION COMMISSION TO STUDY THE FEDERAL TRADE COMMISSION, published fifty years ago this coming Sunday, September 15, heavily criticized the FTC’s application of its antitrust and consumer protection authority.<sup>7</sup> It found that the agency largely pursued trivial matters, and, absent a radical change and significant redirection, believed Congressional action to shutter and replace the agency would be appropriate.<sup>8</sup>

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<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

<sup>5</sup> See EDWARD F. COX ET AL., “THE NADER REPORT” ON THE FEDERAL TRADE COMMISSION (1969).

<sup>6</sup> *Panel At Advertising Meeting Agrees Attack By Nader Associates Says “Nothing New,”* 398 ANTITRUST & TRADE REGULATION REPORT, Feb. 25, 1969, at A-5-6.

<sup>7</sup> See MILES W. KIRKPATRICK ET AL, REPORT OF THE ABA COMMISSION TO STUDY THE FEDERAL TRADE COMMISSION (1969) [hereinafter KIRKPATRICK REPORT], reprinted in 427 ANTITRUST & TRADE REGULATION REPORT (Sept. 16, 1969) (Special Supplement); see also Richard A. Posner, *The Federal Trade Commission*, 37 U. CHI. L. REV. 47 (1969-70).

<sup>8</sup> The Kirkpatrick Report described the work of the Bureau of Economics as “of substantial value.” KIRKPATRICK REPORT, *supra* note 7, at 2.

In response, the FTC began a decade-long effort to deconcentrate significant sectors of the U.S. economy, and to expand significantly its industrywide consumer protection trade regulation rules. Bill Kovacic identifies a partial list of the firms and industries caught up in the FTC's monopolization and attempted monopolization claims and industry restructuring efforts:

Exxon, Mobil, Chevron, Amoco, Gulf, Atlantic Richfield, Shell, Texaco; Borden, Coca-Cola, Pepsi-Cola, Crush, Seven-Up; IT&T, General Foods, Kellogg, General Mills, Sunkist; the American Medical Association; Levi Strauss; Boise Cascade, Weyerhaeuser; General Motors; Boeing, Lockheed, McDonnell Douglas; Xerox; Hertz, Avis, and National Car Rental.<sup>9</sup>

Further, in response to the ABA and Nader reports' questions concerning the FTC's vigor and utility, the agency initiated a significant rule-making effort and completed six major consumer protection trade-regulation rules between 1969 and 1977 (and had an additional 16 such rules pending in the period 1973-1976).<sup>10</sup> The appointment of Michael Pertschuk as Chairman in 1977 added a boost to the FTC's expansive use of its antitrust and consumer protection authority. Chairman Pertschuk wanted to use the Commission's authority to restructure the economy "into line with the nation's democratic political and social ideals" on issues such as "social and environmental harms," including "resource depletion, energy waste, environmental contamination, worker alienation, and the psychological and social consequences of marketing-stimulated demands."<sup>11</sup> He called for the new sources of professional expertise – such as tax policy and planning, business planning, marketing science, sociology, psychology, history, and

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<sup>9</sup> William E. Kovacic, "Competition Policy in Its Broadest Sense:" *Michael Pertschuk's Chairmanship of the Federal Trade Commission 1977-1981*, 60 WM. & MARY L. REV. 1269, 1287 (2019).

<sup>10</sup> *Id.* at 1289–91. For a complete list of rulemakings during the 1970s, see William MacLeod et al., *Three Rules and a Constitution: Consumer Protection Finds its Limits in Competition Policy*, 72 ANTITRUST L.J. 943, 953 & n.57 (2005).

<sup>11</sup> Kovacic, *supra* note 9, at 1294–95 (quoting Michael Pertschuk, Chairman, Fed. Trade Comm'n, New Directions for the FTC, Remarks Before the Eleventh New England Antitrust Conference (Nov. 18, 1977), *reprinted in* 840 ANTITRUST & TRADE REGULATION REPORT F-1 (Nov. 24, 1977).

political science—to help formulate competition policy, and anticipated the expansive use of the “actual potential competition theory in future cases.”<sup>12</sup>

By the early 1980s, the revolution had run its course, with the agency having very little to show for its efforts to restructure the U.S. economy and better oversee consumers’ and firms’ market interactions. Starting with the Reagan administration, the FTC, across politically different administrations, has pursued sharply more defined and restrained antitrust and consumer protection missions.<sup>13</sup>

Today there is a strong body of opinion that challenges the enforcement choices and performance of the Commission and the Department of Justice of the last 20-40 years—Republican and Democratic administrations both. Advocates call for a program of antitrust enforcement that would, among other things:

- (i) more aggressively investigate, challenge, and reverse the conduct and transactions of significant and otherwise successful tech firms;<sup>14</sup>
- (ii) undertake a review and restructuring of the investment choices of the multi-trillion-dollar investment industry;<sup>15</sup>
- (iii) substantially increase legal challenges to vertical integration by acquisition,<sup>16</sup> and break-up or prevent certain firms from being both vertically integrated and a supplier of services to competitors;<sup>17</sup>

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<sup>12</sup> *Id.* at F-1, F-2.

<sup>13</sup> See THE REGULATORY REVOLUTION AT THE FTC: A THIRTY-YEAR PERSPECTIVE ON COMPETITION AND CONSUMER PROTECTION (James Campbell Cooper ed., 2013).

<sup>14</sup> See, e.g., *A Better Deal – Crack Down on Corporate Monopolies & the Abuse of Economic and Political Power*, HOUSE DEMOCRATS [hereinafter *A Better Deal*, HOUSE DEMOCRATS], <https://abetterdeal.democraticleader.gov/the-proposals/crack-down-on-abuse-of-power/> (last visited Sept. 10, 2019); Diana L. Moss, American Antitrust Inst., *The Record of Weak U.S. Merger Enforcement in Big Tech* (July 8, 2019), [https://www.antitrustinstitute.org/wp-content/uploads/2019/07/Merger-Enforcement\\_Big-Tech\\_7.8.19.pdf](https://www.antitrustinstitute.org/wp-content/uploads/2019/07/Merger-Enforcement_Big-Tech_7.8.19.pdf).

<sup>15</sup> See, e.g., Fiona Scott Morton & Herbert Hovenkamp, *Horizontal Shareholding and Antitrust Policy*, 127 YALE L.J. 2026 (2018); Eric A. Posner, Fiona Scott Morton, & E. Glen Weyl, *A Proposal to Limit the Anti-Competitive Power of Institutional Investors*, 81 ANTITRUST L.J. 669 (2017); Einer Elhauge, *Horizontal Shareholding*, 129 HARV. L. REV. 1267 (2016).

- (iv) evaluate much more closely, or in some cases bar, the acquisition of relatively small but growing firms on the speculative concern that such acquisitions may eliminate unique and significant competitive threats to the acquiring firm;<sup>18</sup>
- (v) address concerns about economic mobility, and about income and wealth disparities, through the prohibition of firm expansion, organically or through acquisition;<sup>19</sup>
- (vi) limit the amount of personal information collected and retained by firms;<sup>20</sup> and,
- (vii) recognize and remediate the alleged power of large corporations to shape legislation, regulation, and political outcomes.<sup>21</sup>

If you are familiar with our hearings, you know we sought comment on whether current antitrust and consumer protection law and doctrine could put such a program into force, and how best to enforce antitrust law in response to concerns over novel forms of anticompetitive conduct, anticompetitive transactions, and the allegedly diminished competitiveness of U.S. markets.

If we are to revisit issues from four and five decades ago, it seemed sensible to determine what we could learn from that experience. In the footnotes, I cite to published works of Bill

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<sup>16</sup> See, e.g., Steven C. Salop, *Invigorating Vertical Merger Enforcement*, 127 YALE L.J. 1962 (2018); Senator Elizabeth Warren, *Reigniting Competition in the American Economy* at 6 (Jun. 29, 2016), [https://www.warren.senate.gov/files/documents/2016-6-29\\_Warren\\_Antitrust\\_Speech.pdf](https://www.warren.senate.gov/files/documents/2016-6-29_Warren_Antitrust_Speech.pdf) (calling for an update of the 1984 vertical merger guidelines).

<sup>17</sup> Elizabeth Warren, *How We Can Break Up Big Tech*, MEDIUM (Mar. 8, 2019), <https://medium.com/@teamwarren/heres-how-we-can-break-up-big-tech-9ad9e0da324c>.

<sup>18</sup> See, e.g., Carl Shapiro, *Protecting Competition in the American Economy: Merger Control, Tech Titans, Labor Markets*, 33 J. ECON. PERSP. 69, 78 (2019); Moss, *supra* note 14, at 7; Press Release, Open Markets Institute Calls on the FTC to Block All Facebook Acquisitions (Nov. 1, 2017), <https://openmarketsinstitute.org/releases/open-markets-institute-calls-on-the-ftc-to-block-all-facebook-acquisitions/>.

<sup>19</sup> See, e.g., JOSEPH E. STIGLITZ, *THE PRICE OF INEQUALITY: HOW TODAY'S DIVIDED SOCIETY ENDANGERS OUR FUTURE* 44-45 (2012); Jonathan B. Baker & Steven C. Salop, *Antitrust, Competition Policy, and Inequality*, 104 GEO. L.J. ONLINE 1 (2015).

<sup>20</sup> See, e.g., Allen P. Grunes & Maurice E. Stucke, *No Mistake About It: The Important Role of Antitrust in the Era of Big Data*, ANTITRUST SOURCE, Apr. 2015.

<sup>21</sup> See, e.g., *A Better Deal*, HOUSE DEMOCRATS, *supra* note 14; JONATHAN B. BAKER, *THE ANTITRUST PARADIGM: RESTORING A COMPETITIVE ECONOMY* 55 (2019).

Kovacic,<sup>22</sup> Tim Muris,<sup>23</sup> Bob Pitofsky<sup>24</sup>—all former Chairmen—and Robert Katzmann,<sup>25</sup> now Chief Judge of the U.S. Court of Appeals for the Second Circuit. Those writings recount the history of, and analyze, the FTC’s activities during the 1970s. A review of those works, and some others—including the 1980 Report of the ABA Section of Antitrust Law Concerning Federal Trade Commission Structures, Powers and Procedures—was instructive.<sup>26</sup>

What stood out was not the breadth of the FTC actions but the nearly unanimous agreement that the agency embarked upon its efforts to reshape whole industries without a clear framework to guide what it was looking for and how it would analyze what it found. For example, Bob Pitofsky concluded that “[i]ndustry-wide investigations and cases were initiated under section 2 with no clear theory of what constituted monopolizing behavior.”<sup>27</sup> Jim Liebeler, a former head of the FTC’s Office of Policy Planning and Evaluation, wrote similarly: “[M]ost industry-wide matters have been instituted without any clear articulation of a theory of how successful prosecution of the case will improve economic welfare.”<sup>28</sup> Such conclusions are common to the literature evaluating the FTC’s antitrust and consumer protection program in the 1970s.<sup>29</sup>

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<sup>22</sup> See Kovacic, *supra* note 9; William E. Kovacic, *The Modern Evolution of U.S. Competition Policy Enforcement Norms*, 71 ANTITRUST L. J. 377 (2003); William E. Kovacic, *Failed Expectations: The Troubled Past and Uncertain Future of the Sherman Act as a Tool for Deconcentration*, 74 IOWA L. REV. 1105 (1989); William E. Kovacic, *The Federal Trade Commission and Congressional Oversight of Antitrust Enforcement*, 17 TULSA L. REV. 587 (1982).

<sup>23</sup> See THE FEDERAL TRADE COMMISSION SINCE 1970: ECONOMIC REGULATION AND BUREAUCRATIC BEHAVIOR (Kenneth W. Clarkson & Timothy J. Muris eds., 1981) [hereinafter FTC SINCE 1970]; Timothy J. Muris, Chairman, Fed. Trade Comm’n, Looking Forward: The Federal Trade Commission and the Future Development of U.S. Competition Policy, Remarks before the Milton Handler Annual Antitrust Review (Dec. 10, 2002).

<sup>24</sup> See Robert Pitofsky, *Does Antitrust Have a Future?* 76 GEO. L. J. 321 (1987).

<sup>25</sup> See ROBERT A. KATZMANN, REGULATORY BUREAUCRACY: THE FEDERAL TRADE COMMISSION AND ANTITRUST POLICY (1980).

<sup>26</sup> See *Report Of The Section Concerning Federal Trade Commission Structures, Powers, And Procedures*, 49 ANTITRUST L.J. 323 (1980).

<sup>27</sup> Pitofsky, *supra* note 24, at 324 (emphasis added).

<sup>28</sup> Wesley J. Liebeler, *Bureau of Competition: Antitrust Enforcement Activities in FTC SINCE 1970*, 65, 72-73.

<sup>29</sup> See, e.g., the materials cited, *supra*, notes 22-24.

Some are advancing a new narrative—that the antitrust challenges of the 1970s, while not successful, were important to changing the behavior of the targeted firms such that new firms could enter and make markets more competitive. An example of this is Professor Tim Wu’s discussion of the Department of Justice’s unsuccessful thirteen-year prosecution of antitrust claims against IBM. In Professor Wu’s view, that case changed IBM’s behavior sufficiently to allow the entry of new firms into its markets, thus accomplishing what a successful prosecution would have achieved.<sup>30</sup> As a rationale for the filing of an antitrust complaint, this strikes me as an abuse of prosecutorial power. I think if it came from someone other than the always amiable and provocative Professor Wu, we would immediately recognize it as a highly problematic rationale for initiating and continuing an investigation.

Proceeding as such today—without a clear theory, without an articulation of a theory—is inconsistent with stewardship of the Commission’s resources and contrary to the public good. It is neither good government nor good enforcement policy and raises the concern that more fruitful enforcement opportunities would be lost through such misallocation of Commission resources.

The antitrust law enforcement entities—the Commission, the Department of Justice, and the states—may be at the early stage of a series of significant single-firm conduct investigations. There is also Congressional interest in revamping existing antitrust law to accomplish both the de-concentration goals of the 1960s and 1970s and broader current societal and political objectives.<sup>31</sup>

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<sup>30</sup> See Tim Wu, *Tech Dominance and the Policeman at the Elbow* (Columbia Public Law Research Paper No. 14-623), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3342598](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3342598).

<sup>31</sup> See, e.g., *A Better Deal*, HOUSE DEMOCRATS, *supra* note 14; Designing Accounting Safeguards to Help Broaden Oversight And Regulations on Data (DASHBOARD) Act, S. 1951, 116th Cong. (2019) (sponsored by Senators Mark Warner (D-VA) and Josh Hawley (R-MO)); Merger Enforcement Improvement Act, S. 306, 116th Cong. (2019) (sponsored by Senator Klobuchar (D-MN)); Consolidation Prevention and Competition Promotion Act, S. 307, 116th Cong. (2019) (sponsored by Senator Klobuchar (D-MN)).

Given this, it seemed to us that the most beneficial next step in our Competition and Consumer Protection Hearings is the articulation and publication of a clear analytical framework for the evaluation of:

- (i) unilateral conduct by allegedly dominant technology platforms;
- (ii) vertical integration through acquisition or merger;
- (iii) certain horizontal merger transactions;
- (iv) whether common ownership has demonstrably anticompetitive effects;
- (v) the authority of the FTC, and the limitations on that authority, to identify and prohibit or remedy anticompetitive and unfair or deceptive acts or practices within the broadband industry; and,
- (vi) the consumer welfare standard—and alternatives to the consumer welfare standard—as organizing principle of antitrust analysis.

This effort will help us identify areas where the case law could be clarified or improved to allow for more certain and successful challenge to unfair, anticompetitive conduct. The Commission can achieve that clarification or improvement through its own case selection and amicus participation—the development of the common law—or through a request or support for legislative action. It may also strengthen the basis and direction of ongoing or future investigations of dominant firm conduct or anticompetitive mergers, through the development of the case law and agency practice.

Our models for this type of output are the Guidelines and Commentary the agencies have periodically issued (and updated) in the areas of horizontal mergers, competitor collaborations, and intellectual property rights, and statements the Commission has issued with respect to its application of Section 5.



In addition, the Office of Policy Planning, in conjunction with the Bureau of Economics, is reviewing the economic literature that supports some of the arguments for a more expansive and structure-based antitrust enforcement regime.<sup>32</sup> Our intention is to advise on whether this research provides sufficient or strong support for a significantly broader commitment of resources to antitrust enforcement in general and to certain industries or practices in particular.

In that spirit, here is what we are working on.

Our highest priority is to complete and release a guidance document on the application of the antitrust laws to conduct by technology platforms. These guidelines will be similar in form, structure, and purpose to the Competitor Collaboration Guidelines.<sup>33</sup> If we are successful, this document will identify an analytic framework for identifying, evaluating and remedying conduct by dominant technology platform companies. It will help the Commission and interested parties to understand better whether there are limitations in antitrust law that prevent the agencies from prohibiting or successfully remedying anticompetitive or unfair conduct.

It will support, if appropriate, efforts by the Commission to develop the law through case selection and amicus participation. The executive and legislative branches may find this document helpful as each considers whether new laws or new regulations are appropriate and necessary with respect to single-firm conduct by large tech platforms in order to maintain or create competitive markets. The hurdle, of course, is whether we can articulate a framework for evaluating single-firm conduct in this area, in the same way the Competitor Collaboration Guidelines were successful in doing so for competitor collaborations.

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<sup>32</sup> This literature is surveyed in Chad Syverson, *Macroeconomics and Market Power: Facts, Potential Explanations, and Open Questions*, Brookings Institution, Jan. 2019; Susanto Basu, *Are Price-Cost Markups Rising in the United States? A Discussion of the Evidence*," 33 J. ECON. PERSP. 3 (2019); Chad Syverson, *Macroeconomics and Market Power: Context, Implications, and Open Questions*, 33 J. ECON. PERSP. 23 (2019); Steven Berry et al., *Do Increasing Markups Matter? Lessons from Empirical Industrial Organization*, 33 J. ECON. PERSP. 44 (2019).

<sup>33</sup> See FED. TRADE COMM'N & U.S. DEP'T OF JUSTICE, ANTITRUST GUIDELINES FOR COLLABORATIONS AMONG COMPETITORS (2000), [https://www.ftc.gov/sites/default/files/documents/public\\_events/joint-venture-hearings-antitrust-guidelines-collaboration-among-competitors/ftcdojguidelines-2.pdf](https://www.ftc.gov/sites/default/files/documents/public_events/joint-venture-hearings-antitrust-guidelines-collaboration-among-competitors/ftcdojguidelines-2.pdf).

We did hear some concern that we do not have much experience applying the antitrust laws to platforms. I think that is incorrect. Two-sided markets are not new to antitrust. And, there are significant guideposts in Sherman Act Section 2 and FTC Act Section 5 law that we can apply. The document will also discuss the application of Sherman Act Section 1.

We also heard that if we did not advance, or even affirmatively dismissed, a particular theory of harm or interpretation of law in the guidance document, then that might make it more difficult to advance that theory or interpretation even if it would be helpful to prosecution of a particular enforcement action. This is a legitimate concern in the abstract. But open-ended law enforcement or application of vague or speculative theories is not good practice; this, I think, is what professors Pitofsky and Liebler were in part referring to in the quotes I referenced earlier. The collective intellectual effort to define a framework and the manner in which that framework may be applied will strengthen our investigation and prosecution of conduct and transaction claims.

The contemplated guidance document is an enforcement document. It will support the immediate and long-term enforcement efforts of the Commission. In this respect, it will have a similar purpose as the Horizontal Merger Guidelines,<sup>34</sup> the Intellectual Property Guidelines,<sup>35</sup> and the Competitor Collaboration Guidelines.<sup>36</sup> Each of those documents: (i) state the federal antitrust agencies' enforcement intentions, (ii) lay out an analytic framework without fixing, as

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<sup>34</sup> See U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N, HORIZONTAL MERGER GUIDELINES (2010), <https://www.ftc.gov/sites/default/files/attachments/merger-review/100819hmg.pdf> [hereinafter 2010 HORIZONTAL MERGER GUIDELINES].

<sup>35</sup> See U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N, ANTITRUST GUIDELINES FOR THE LICENSING OF INTELLECTUAL PROPERTY (2017), [https://www.ftc.gov/system/files/documents/public\\_statements/1049793/ip\\_guidelines\\_2017.pdf](https://www.ftc.gov/system/files/documents/public_statements/1049793/ip_guidelines_2017.pdf) [hereinafter 2017 IP GUIDELINES].

<sup>36</sup> See FED. TRADE COMM'N & U.S. DEP'T OF JUSTICE, ANTITRUST GUIDELINES FOR COLLABORATIONS AMONG COMPETITORS, *supra* note 33.

static, the application of the framework, and (iii) allow for changes through updates and revisions consistent with developments in agency practice and case law.

I do not want to discuss the substance of this document yet but do want to identify and highlight a foundational principle for us in OPP. *OPP believes it is necessary for the Commission (and courts) to start with a careful evaluation of the effect of conduct under review, not its label.* Characterizing a platform as an “essential facility” or a platform’s conduct as “an exclusive deal,” a “refusal to deal,” or a “product design decision” may be helpful in identifying relevant prior case law and in identifying the appropriate legal framework. Such labeling should not distract from the focus of the Commission’s inquiry, which should be on whether and how the conduct affects competition—including competition for inputs—and consumers. We want to apply our enforcement resources to deter, identify, prohibit and remediate practices only those that actually restrict competition and actually injure consumers.

Proposals to regulate the operational decisions of platform companies because of competitive concerns seem to me insufficiently confident in the strength, vitality and dynamism of the federal antitrust laws and of the common law’s ability to integrate new or refreshed economic concepts. This guidance document will make clear, or perhaps just clearer, whether this view is correct and whether and where the utility-style regulation proposed by some is appropriate or necessary.<sup>37</sup>

Also well up in the queue is guidance on the analytical framework used to evaluate vertical mergers. In conjunction with staff from the Bureau of Economics and Bureau of

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<sup>37</sup> See, e.g., GEORGE J. STIGLER CENTER FOR THE STUDY OF THE ECONOMY AND THE STATE, REPORT ON MARKET STRUCTURE AND ANTITRUST SUBCOMMITTEE (2019), <https://research.chicagobooth.edu/-/media/research/stigler/pdfs/market-structure-report.pdf?la=en&hash=E08C7C9AA7367F2D612DE24F814074BA43CAED8C>; Ganesh Sitaraman, *How To Regulate Tech Platforms*, THE AMERICAN PROSPECT, Nov. 8, 2018, <https://prospect.org/article/how-regulate-tech-platforms>; K. Sabeel Rahman, *The New Utilities: Private Power, Social Infrastructure, and the Revival of the Public Utility Concept*, 39 CARDOZO L. REV. 1621 (2018).

Competition, we are drafting a “vertical merger commentary,” similar in form and purpose to the 2006 Commentary on Horizontal Merger Guidelines.<sup>38</sup> The Antitrust Division’s litigation of the AT&T/Time Warner case identified substantial misconceptions about the antitrust agencies’ interest in and willingness to challenge vertical mergers.<sup>39</sup>

This commentary, which could serve as a substitute for, or complement to, vertical merger guidelines, is intended to articulate and explain the Commission staff’s analytic framework for reviewing, analyzing and remedying what might be an anticompetitive vertical merger, and will include case examples.

Unlike the 2006 Horizontal Merger Commentary, we do not have an up-to-date set of U.S. vertical merger guidelines to structure our analysis.<sup>40</sup> Thus, the structure the commentary sets out could support a path to updated and joint FTC/DOJ vertical merger guidelines. The commentary will likely include a legal overview of the application of Section 7 to mergers, a discussion of the relevance of market definition and market shares, sources of evidence, and, more substantively, theories of unilateral and coordinated harm, the treatment of efficiencies, and consideration and adoption of remedies sufficient to address competitive harms.

Whether the Commission ought to be challenging more (or fewer) vertical merger transactions is a reasonable question to ask, but this document will not take a position on that question. Viewers of our hearing session on vertical mergers will recall that BE Director

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<sup>38</sup> See U.S. DEP’T OF JUSTICE & FED. TRADE COMM’N, COMMENTARY ON THE HORIZONTAL MERGER GUIDELINES (2006),

<https://www.ftc.gov/sites/default/files/attachments/merger-review/commentaryonthehorizontalmergerguidelinesmarch2006.pdf>.

<sup>39</sup> See *United States v. AT&T, Inc.*, 916 F.3d 1029 (D.C. Cir. 2019); see also Makan Delrahim, Assistant Attorney Gen., U.S. Dep’t of Justice, *Harder Better Faster Stronger: Evaluating EDM as a Defense in Vertical Mergers* (Feb. 15, 2019), <https://www.justice.gov/opa/speech/file/1132831/download>; Jon Sallet, Deputy Assistant Attorney General, *The Interesting Case of the Vertical Merger* (Nov. 17, 2016), <https://www.justice.gov/opa/speech/file/938236/download>.

<sup>40</sup> U.S. DEP’T OF JUSTICE, NON-HORIZONTAL MERGER GUIDELINES (1984), <https://www.justice.gov/atr/page/file/1175141/download>.

Kobayashi expressed his and the Chairman’s interest in vertical merger retrospectives. The more than two dozen retrospectives the Bureau has done—all available on the Commission’s website—have focused on horizontal transactions.<sup>41</sup> Extending the merger retrospective program to include vertical merger transactions is a significant priority for the Chairman and Director Kobayashi. We are also considering how best to do retrospectives that help us identify conditions or situations where we might unnecessarily block or force divestiture as a condition to clearance.

We intend to prepare an update or addendum to the 2006 Commentary on the Horizontal Merger Guidelines, addressing at least the following topics:

- (i) elimination of future, nascent or potential competition;
- (ii) acquisitions where the concern is diminished competition for non-price attributes;
- (iii) acquisitions where “data” is a key asset or output of one or both parties, or a key input to competitors of the combining firms;
- (iv) buyer and monopsony power, acquired through acquisition (including but not limited to labor markets); and,
- (v) mergers and acquisitions that enhance and diversify the merged firm’s “portfolio” of products or intellectual property rights.

These are all topics that have come up in the Commission’s previous horizontal merger reviews.

We think that a clear explication of the theory of competitive harm, the framework for identifying and remedying such harm, and the incorporation of case summaries will be useful in

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<sup>41</sup> See Fed. Trade Comm’n, Hearing Transcript of Competition and Consumer Protection in the 21st Century 86:5-7 (Bruce Kobayashi) (Nov. 1, 2018), [https://www.ftc.gov/system/files/documents/public\\_events/1415284/ftc\\_hearings\\_session\\_5\\_transcript\\_11-1-18.pdf](https://www.ftc.gov/system/files/documents/public_events/1415284/ftc_hearings_session_5_transcript_11-1-18.pdf); *List of FTC Bureau of Economics Retrospective Studies*, FED. TRADE COMM’N, [https://www.ftc.gov/system/files/attachments/press-releases/ftc-announces-agenda-14th-session-its-hearings-competition-consumer-protection-21st-century/list\\_of\\_be\\_retrospective\\_studies.pdf](https://www.ftc.gov/system/files/attachments/press-releases/ftc-announces-agenda-14th-session-its-hearings-competition-consumer-protection-21st-century/list_of_be_retrospective_studies.pdf) (last visited Sept. 10, 2019).

identifying whether existing merger law and practice successfully and sufficiently takes account of these concerns.

Participants at our hearing session on nascent competition made the point that the large tech firms—defined usually to include or to be limited to Alphabet, Amazon, Apple, Facebook and Microsoft—have made hundreds of acquisitions in the past decade, some of which they suggest must have been anticompetitive.<sup>42</sup> Recent reports have found the same.<sup>43</sup> Whether or not tech firms do more acquisitions than non-tech firms, we know that only a relatively small percentage of those “hundreds” of transactions were the subject of a Hart-Scott-Rodino filing. This may be consistent with existing law and rules. A transaction may not have met the jurisdictional thresholds. A rule-based exemption (or the interpretation of a rule or statutory exemption) may have exempted a transaction from the notification and waiting period requirements of the HSR Act.

This issue may be a relevant to our scheduled review of the HSR Act rules.<sup>44</sup> Perhaps it is time to consider whether the Commission’s current rules implementing the Act sufficiently take account of jurisdictional issues associated with acquisitions of potential future competitors.<sup>45</sup> The Congress has previously amended the HSR Act to address this concern. The December 2000

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<sup>42</sup> Fed. Trade Comm’n, Hearing Transcript of Competition and Consumer Protection in the 21st Century 254:12-17 (Diana Moss) (Oct. 17, 2018); *id.* at 265:8-14 (Sally Hubbard), [https://www.ftc.gov/system/files/documents/public\\_events/1413712/ftc\\_hearings\\_session\\_3\\_transcript\\_day\\_3\\_10-17-18\\_0.pdf](https://www.ftc.gov/system/files/documents/public_events/1413712/ftc_hearings_session_3_transcript_day_3_10-17-18_0.pdf).

<sup>43</sup> See DIG. COMPETITION EXPERT PANEL (UK), UNLOCKING DIGITAL COMPETITION: REPORT OF THE DIGITAL COMPETITION EXPERT PANEL 12 (2019).

<sup>44</sup> The Commission’s rule review schedule brings the HSR rules up for consideration in 2020. Federal Trade Commission, REGULATORY REVIEW SCHEDULE, 84 F.R. 18746-48 (May 2, 2019), available at <https://www.govinfo.gov/content/pkg/FR-2019-05-02/pdf/2019-08936.pdf>.

<sup>45</sup> Any future review should bear in mind that the nexus requirements for merger notification determinations should incorporate a material nexus to the jurisdiction and be based on clear and objective thresholds. See e.g., ICN Recommended Practices for Merger Notification and Review Procedures, [https://www.internationalcompetitionnetwork.org/wp-content/uploads/2018/09/MWG\\_NPRecPractices2018.pdf](https://www.internationalcompetitionnetwork.org/wp-content/uploads/2018/09/MWG_NPRecPractices2018.pdf), and the OECD Recommendation on Merger Review, <https://www.oecd.org/daf/competition/oecdrecommendationonmergerreview.htm>. This principle is appropriate and necessary to provide certainty as to the filing obligations of merging parties trying to determine where and whether they must file a merger notification.

legislative changes to the HSR Act eliminated notification and waiting period requirements for relatively small dollar transactions unlikely to raise competitive concerns. The December 2000 changes also removed the “size-of-person” jurisdictional threshold for transactions valued in excess of \$200 million (adjusted annually). This change captured within the Act’s notification and waiting period requirements certain acquisitions that would not previously have been subject to the Act – acquisitions of companies with limited current sales and assets but that might nevertheless be a future competitive threat to the acquiring firm.<sup>46</sup>

We are preparing an analysis of the “consumer welfare standard” and alternatives to the consumer welfare standard as the proper organizing principle of judicial and agency antitrust review. This analysis will include a review and evaluation of the recent literature on trends in concentration in product and labor markets and in profits and margins. This recent empirical work is relied on to support arguments that the consumer welfare standard is an insufficient organizing principle for maintaining competitive markets or addressing issues not clearly associated with antitrust review.<sup>47</sup> This research formed the basis for many of the comments we received questioning the current and recent historical direction of antitrust enforcement.<sup>48</sup>

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<sup>46</sup> See Hart-Scott-Rodino Antitrust Improvements Act of 1976, 15 U.S.C. § 18a; *see also* 146 CONG. REC. S10,989-90 (daily ed. Oct. 25, 2000) (statement of Sen. Hatch on S. 1854, The 21<sup>st</sup> Century Acquisition Reform and Improvement Act of 2000), <https://www.congress.gov/crec/2000/10/25/CREC-2000-10-25-pt1-PgS10989.pdf>.

<sup>47</sup> *See, e.g.*, Fed. Trade Comm’n, Hearing Transcript of Competition and Consumer Protection in the 21st Century 14:1-35:17 (Joseph E. Stiglitz) (Sept. 21, 2018), [https://www.ftc.gov/system/files/documents/public\\_events/1408208/ftc\\_hearings\\_session\\_2\\_transcript\\_9-21-18.pdf](https://www.ftc.gov/system/files/documents/public_events/1408208/ftc_hearings_session_2_transcript_9-21-18.pdf); *id.* at 112:1-124:3 (Jonathan B. Baker) (Sept. 13, 2018), [https://www.ftc.gov/system/files/documents/public\\_events/1398386/ftc\\_hearings\\_session\\_1\\_transcript\\_9-13-18\\_1.pdf](https://www.ftc.gov/system/files/documents/public_events/1398386/ftc_hearings_session_1_transcript_9-13-18_1.pdf); *see also* WILLIAM A. GALSTON & CLARA HENDRICKSON, BROOKINGS INST., A POLICY AT PEACE WITH ITSELF: ANTITRUST REMEDIES FOR OUR CONCENTRATED, UNCOMPETITIVE ECONOMY (2018), <https://www.brookings.edu/research/a-policy-at-peace-with-itself-antitrust-remedies-for-our-concentrated-uncompetitive-economy/>.

<sup>48</sup> *See, e.g.*, Comment of Tim Wu, Columbia Law School (Nov. 1, 2018), [https://www.ftc.gov/system/files/documents/public\\_comments/2018/11/ftc-2018-0091-d-0008-156114.pdf](https://www.ftc.gov/system/files/documents/public_comments/2018/11/ftc-2018-0091-d-0008-156114.pdf); Comment of Robert Weissman, Public Citizen (Aug. 20, 2018), [https://www.ftc.gov/system/files/documents/public\\_comments/2018/08/ftc-2018-0048-d-0062-155233.pdf](https://www.ftc.gov/system/files/documents/public_comments/2018/08/ftc-2018-0048-d-0062-155233.pdf); Comment of Justice Catalyst, Towards Justice, & Eric Posner, Univ. Chi. Law Sch. (Dec. 14, 2018), [https://www.ftc.gov/system/files/documents/public\\_comments/2018/12/ftc-2018-0088-d-0016-163103.pdf](https://www.ftc.gov/system/files/documents/public_comments/2018/12/ftc-2018-0088-d-0016-163103.pdf).

The research has been the subject of commentary by economists and lawyers familiar with antitrust analysis.<sup>49</sup> It bears similarities to the Structure-Conduct-Performance research of the 1950s and 1960s, which formed the overarching basis for the FTC’s industrywide cases of the 1970s.<sup>50</sup> Some reviews have found the results of this empirical research, because of methodological limitations of the studies, to be insufficient to serve as a basis for a change in antitrust policy. OPP and BE are reviewing this work with fresh eyes and will come to our own conclusions.<sup>51</sup>

To the extent that courts and agencies believe that application of the consumer welfare standard turns solely or substantially on short-term price effects, we intend to correct this view. FTC enforcement actions do not conform to this alleged limitation and I do not think the staff views itself as acting outside the law.

Whether the consumer welfare standard is otherwise still too narrow to address all competitive harms that can be associated with business conduct or transactions is something we will consider. There was a robust discussion of this issue at our hearing session on the consumer welfare standard, and we intend to take the concerns and alternative proposals expressed at that session seriously.<sup>52</sup> Our recommendations and conclusions should be of interest to the judicial

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<sup>49</sup> See, e.g., A. Douglas Melamed & Nicolas Petit, *The Misguided Assault on the Consumer Welfare Standard in the Age of Platform Markets*, 54 REV. INDUS. ORG. 741 (2019); Joshua D. Wright et al., *Requiem for a Paradox: The Dubious Rise and Inevitable Fall of Hipster Antitrust*, 51 ARIZ. ST. L.J. 293 (2019); Carl Shapiro, *Antitrust in a Time of Populism*, 61 INT’L J. INDUS. ORG. 714 (2018).

<sup>50</sup> See generally JOE S. BAIN, INDUSTRIAL ORGANIZATION (1959). For a review of the literature and the reconsideration of the SCP and concentration-profit relationship, see Michael Salinger, *The Concentration-Margins Relationship Reconsidered*, 21 BROOKINGS PAPERS ON ECON. ACTIVITY 287 (1990); Timothy F. Bresnahan, *Empirical Studies of Industries with Market Power*, in 2 HANDBOOK OF INDUSTRIAL ORGANIZATION 1011 (Richard Schmalensee & Robert Willig eds., 1989); Richard Schmalensee, *Inter-Industry Studies of Structure and Performance*, in 2 HANDBOOK OF INDUSTRIAL ORGANIZATION 1011 (Richard Schmalensee & Robert Willig eds., 1989); Harold Demsetz, *Industry Structure, Market Rivalry, and Public Policy*, 16 J.L. & ECON. 1 (1973).

<sup>51</sup> See, e.g., Melamed & Petit, *supra* note 49; Wright et al., *supra* note 49; Shapiro, *supra* note 49.

<sup>52</sup> Fed. Trade Comm’n, Hearing Transcript of Competition and Consumer Protection in the 21st Century 162-289 (Nov. 1, 2018),

[https://www.ftc.gov/system/files/documents/public\\_events/1415284/ftc\\_hearings\\_session\\_5\\_transcript\\_11-1-18.pdf](https://www.ftc.gov/system/files/documents/public_events/1415284/ftc_hearings_session_5_transcript_11-1-18.pdf).



and legislative branches. Our conclusions may also help flesh out the Commission’s Statement of Enforcement Principles Regarding “Unfair Methods of Competition” Under Section 5 of the FTC Act.<sup>53</sup>

Antitrust law recognizes that minority ownership and cross-ownership—ownership stakes in a competing company—can have anticompetitive consequences.<sup>54</sup> Some early empirical literature on common ownership and horizontal shareholding of airlines and banking firms suggests the possibility of a long-term, broad drag on competitive behavior.<sup>55</sup> While other empirical studies have not reached the same conclusion, we place a high priority on determining the merits of this position and of any proposed remedies.<sup>56</sup> Some observers have suggested the Commission use its 6(b) authority to undertake a broad study of this issue; before determining whether our resources should be so used, we are reviewing the empirical work.<sup>57</sup>

With the support of the Bureau of Economics, we are preparing an OPP staff paper evaluating and analyzing the empirical and theoretical literature on horizontal shareholding and common ownership. Appearing at our hearing on this issue, Professor Martin Schmalz criticized the characterization of these empirical papers as outliers.<sup>58</sup> In his comments, he stated that there are dozens of economic and legal papers that broadly support concerns about the competitive impact of common ownership.

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<sup>53</sup> FED. TRADE COMM’N, STATEMENT OF ENFORCEMENT PRINCIPLES REGARDING “UNFAIR METHODS OF COMPETITION” UNDER SECTION 5 OF THE FTC ACT (2015), [https://www.ftc.gov/system/files/documents/public\\_statements/735201/150813section5enforcement.pdf](https://www.ftc.gov/system/files/documents/public_statements/735201/150813section5enforcement.pdf).

<sup>54</sup> See, e.g., 2010 HORIZONTAL MERGER GUIDELINES, *supra* note 34.

<sup>55</sup> See, e.g., José Azar, Martin C. Schmalz & Isabel Tecu, *Anticompetitive Effects of Common Ownership*, 73 J. FIN. 1513 (2018); José Azar, Sahil Raina & Martin C. Schmalz, *Ultimate Ownership and Bank Competition* (May 8, 2019) (Working Paper), <https://ssrn.com/abstract=2710252>.

<sup>56</sup> For one review of the literature, see Matthew Backus et al., *The Common Ownership Hypothesis: Theory and Evidence* (Brookings Institution, Working Paper 2019), [https://www.brookings.edu/wp-content/uploads/2019/02/ES\\_20190205\\_Common-Ownership.pdf](https://www.brookings.edu/wp-content/uploads/2019/02/ES_20190205_Common-Ownership.pdf).

<sup>57</sup> See, e.g., Fed. Trade Comm’n, *Hearing Transcript of Competition and Consumer Protection in the 21st Century* 225:15-226:1, 244:16-22 (Fiona M. Scott Morton) (Dec. 6, 2018), [https://www.ftc.gov/system/files/documents/public\\_events/1422929/ftc\\_hearings\\_session\\_8\\_transcript\\_12-6-18.pdf](https://www.ftc.gov/system/files/documents/public_events/1422929/ftc_hearings_session_8_transcript_12-6-18.pdf); *id.* at 285:8-12 (Serafin J. Grundl); *id.* at 304:9-25 (Martin Schmalz).

<sup>58</sup> *Id.* at 195:1-7 (Martin Schmalz).

We are taking his criticism to heart in conducting our own review. We are doing a deep dive into those dozens of papers—he is referring to about sixty papers, mostly referenced in his work—to determine whether they are closely applicable to the theory; we are also reviewing the newest economic literature on this topic.<sup>59</sup> We will advise the Commission whether this literature is sufficient to support or require the broad enforcement, policy, and remedial changes that proponents of the competitive theory have called for.

Our planned addendum to the 2006 COMMENTARY ON THE HORIZONTAL MERGER GUIDELINES may articulate the theories of harm that could arise from the ownership of small minority interests in a firm, cross-ownership, and from passive or active common ownership stakes, and provide an analytic framework for considering the possibility and likelihood of such harm. I hasten to add that the theories are interesting but surveys of the literature find that the evidence of anticompetitive common ownership appears to be limited, but for a few empirical studies.<sup>60</sup>

Our hearing session on competition and consumer protection issues in U.S. broadband markets was done in conjunction with all the bureaus of the agency, and our output is going to focus on the competition and consumer protection topics discussed at the hearing session and in our questions for comment. In part, where useful and relevant, our output will update the Commission's 2007 Broadband Connectivity Competition Policy Report.<sup>61</sup> However, our focus will be on addressing the technological, consumer protection, and competition oriented questions we put out for comment.

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<sup>59</sup> A partial bibliography is provided in Matthew Backus et al., *supra* note 56, and in the papers cited, *supra* note 55.

<sup>60</sup> See, e.g., Backus, Conlon & Sinkinson, *supra* note 56.

<sup>61</sup> FED. TRADE COMM'N, BROADBAND CONNECTIVITY COMPETITION POLICY (June 2007), <https://www.ftc.gov/sites/default/files/documents/reports/broadband-connectivity-competition-policy/v070000report.pdf>.

We have not yet settled on the scope of our output related to our hearing sessions and questions in two areas where competition and consumer protection concerns are closely intertwined: big data and artificial intelligence, including “machine learning” and “machine based” decision making. Here are a few areas of interest.

- Should we, and how would we, account for privacy considerations in antitrust matters, especially merger review?
- How should harm to privacy, in a competition matter, be defined and measured?
- Are the Commission’s statements on unfairness, deception, and unfair methods of competition sufficiently flexible to address consumer and competitive harms (if any) associated with the use of data, artificial intelligence and machine learning?

What are those harms?

In a few weeks, we will articulate more clearly our approach to these two topics. Similarly, we are thinking about, but have not yet settled on, the scope of our output with respect to privacy and data security.

On all of the projects I have announced, where there are overlaps in authority or enforcement responsibility, we are consulting with the Antitrust Division to get the benefit of their thinking and to achieve consistency in analytic frameworks, if possible.

I have laid out quite a lot here, but before finishing up, I want to make sure I note that there are other, non-hearings related projects in our shop. We continue to be active in reviewing proposed state legislation and federal regulations for comment where such legislation or regulations may have anticompetitive effects or otherwise diminish protections available to consumers, and we are also considering our policy and enforcement agenda for when our hearings projects are completed.

We are quite busy in OPP. I said last year when we opened our hearings that I have the best job in the agency and that I work with a great group in OPP, and within the agency. I still believe it. The Chairman and I are grateful for all the hard work by the OPP team—a band of consummate professionals.