Pardon the Interruption: Competition and Disruptive Business Models

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Thank you for the opportunity to come to my favorite part of the country and speak about some of the interesting aspects of antitrust enforcement by the Federal Trade Commission. When I think of the Pacific Northwest, what comes to mind are the many innovative technology companies located here. I think of not only well-known companies with strong national or even global brands, but also lesser known and emerging companies that are changing the dynamics of their respective marketplaces. It seems fitting that in this hotbed of innovation I've come to discuss a subject matter that animates virtually every competition investigation the FTC pursues: the role of disruptive business models in U.S. antitrust analysis.

Of course, the antitrust laws have been the touchstone of America's economic policy for 125 years, starting with the enactment of the Sherman Act in 1890. Together with the Federal Trade Commission Act and the Clayton Act, the antitrust laws remain a central feature of our national economic policy, setting standards for vigorous competition and preventing the undue accumulation of market power that threatens consumer welfare and stymies economic growth. It may be tempting to think that century-old laws can't keep pace with the rate of change in fast-paced, dynamic markets. Yet despite profound changes in the American economy, the antitrust laws have stood the test of time by relying on a fact-based, analytically sound approach that accounts for changing market environments and new economic learning.

[*] The views expressed in this speech are my own and not necessarily those of the Commission or any Commissioner. I am grateful for the invaluable assistance that Kelly Signs of the Bureau of Competition's Office of Policy & Coordination provided in the preparation of these remarks.

Today I'd like to discuss the various ways in which so-called disruptive business models play a role in our investigations and enforcement decisions. While the term "disruptive business model" is a term that might mean something slightly different to different people, I consider a disruptive business model to mean a relatively new and efficient form of production, marketing, or distribution that provides an alternative to, and potentially threatens to erode the sales of, incumbent firms.

I will discuss how the emergence of disruptive business models may affect our analysis of a proposed merger—and indicate situations in which arguments about the likely impact of such models were pressed to no avail. I will also discuss our view of business conduct that is designed to forestall emerging threats from newcomers, and finally mention a couple of the FTC's competition advocacy efforts aimed at reducing regulatory barriers to new platforms or business models in markets characterized by long-standing (and possibly outdated) regulatory regimes.

Merger Analysis: Assessing the Impact of Disruptive Competition

In a typical merger transaction, the FTC investigates whether the proposed combination of two direct competitors is likely to substantially reduce competition in any market by eliminating one of those competitors. The central question of merger review in this situation is whether the elimination of that direct competition is likely substantially to lessen competition. As part of that analysis, we look at whether the transaction will affect not only competition on price, but also other dimensions of competition such as quality, service, or innovation.

I would note that historically—and in many cases today—the focus of antitrust concerns is on the likely price effect of a proposed merger. This focus on price makes the most sense when dealing with commodity products such as oil, steel or aluminum, and this is where early antitrust enforcers focused their efforts. But today's economy looks very different. Many of the markets we encounter today are not simple, commodity markets. Rather, most producers of finished goods actually compete with each other multi-dimensionally, and this is even more true in service markets, which can be highly differentiated. In these markets, price is just one dimension of the competitive rivalry, along with quality, service, reputation, innovation, and a host of other factors that distinguishes the offering of one competitor from another.[1]

To analyze a merger between two long-standing competitors, we typically start by examining historical facts. We look at what market shares have been in past years, whether the companies have marketed or bid against each other before and what factors influenced the prices they set. In a market where competitive conditions are stable, those historical facts may provide most if not all the information we need to feel comfortable in our predictions of the future. But where the fortunes of a competitor are likely to change – for better or for worse – we need to take a closer look.

In addition, because Section 7 of the Clayton Act is forward-looking, the agencies must also assess whether firms not currently selling products or services should be included as "market participants" for purposes of the competitive analysis. We also consider whether there are other firms not currently in the market that are likely to enter the market or expand their operations in a way that will counteract the potential for anticompetitive harm from the merger. Assessing competitive conditions in the near future is standard fare for our merger reviews, but,

[1] Even in markets with multi-dimensional competition, price may work as a proxy for the other variables of competition. As described in the Horizontal Merger Guidelines, we typically focus on price effects, although enhanced market power can also be manifested in non-price terms and conditions that adversely affect customers, including reduced product quality, reduced product variety, reduced service, or diminished innovation. Such non-price effects can coexist with price effects, or can arise in their absence. When the Agencies investigate whether a merger may lead to a substantial lessening of competition, they employ an approach analogous to that used to evaluate price competition. U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N, HORIZONTAL MERGER GUIDELINES, § 1 (2010), *available at* https://www.ftc.gov/sites/default/files/attachments/merger-review/100819hmg.pdf.

invariably, we are encouraged to examine some development lurking at the fringes of the market that creates uncertainty about competition in the future. For instance, we often hear claims that new or existing competitors are competing with a different mix of products or delivery options in a way that that threatens to upend current market dynamics. And where the facts bear that out, we are likely to close a merger investigation without action.

For instance, several years ago, when we reviewed Google's proposed acquisition of AdMob, we were initially concerned that the loss of head-to-head competition between the two leading mobile advertising networks would harm competition. At the time, the market for the development of advertising on mobile devices was just emerging, with changes occurring on many fronts, and our initial concerns ultimately were overshadowed by two subsequent developments in the market: (1) Apple's acquisition of the third largest mobile ad network, Quattro Wireless, and (2) Apple's introduction of its own mobile advertising network, iAd, as part of its iPhone applications package. Because of these changing circumstances, the Commission concluded that Apple quickly would become a strong mobile advertising network. The timing and impact of Apple's entry in the market led the Commission to conclude that AdMob's success to date on the iPhone platform was unlikely to be an accurate predictor of AdMob's competitive significance going forward, whether AdMob was owned by Google or not. Accordingly, the Commission unanimously voted to close its investigation without taking action against the merger.[2]

In the retail sector, we often hear that pressure from online businesses is shifting sales away from traditional brick-and-mortar stores, and this dynamic can affect our market analysis in certain retail sectors. For example, last year, the Commission modified an existing 1998 conduct

[2]FTC Press Release, *FTC Closes its Investigation of Google AdMob Deal*, (May 21, 2010), *available at* https://www.ftc.gov/news-events/press-releases/2010/05/ftc-closes-its-investigation-google-admob-deal.

order against Toys“R”Us because the company no longer has market power in the retail sale of toys, mainly due to the growth of toy sales through online retailers.[3] But, sometimes, existing competition among brick-and-mortar retailers is sufficient to prevent a merger from resulting in higher prices or other anticompetitive effects, with or without additional pressure from online competitors. This was our conclusion after looking at the merger of Men’s Wearhouse and Jos. A. Bank. Our conclusion was that, although consumers can buy suits online and that those sales were beginning to have some impact on traditional brick-and-mortar suit sellers, the transaction was not likely to harm consumers because there was significant competition from a number of brick-and-mortar retailers for both tailored suits and tuxedo rentals. In that case, the competition among traditional retailers was sufficient to prevent a post-merger price increase.[4]

Not every claim of disruptive competition survives close examination. For instance, the FTC recently succeeded in blocking the merger of the two largest foodservice distributors in the country, Sysco Corporation and US Foods, Inc.[5] The $231 billion foodservice industry supplies food and related products to restaurants, hotels and resorts, hospitals, government agencies, and school and workplace cafeterias. After an eight-day hearing on our motion for a preliminary injunction, the federal district court found that the FTC was likely to succeed in proving that the proposed acquisition may substantially lessen competition in two relevant markets – broadline foodservice distribution to national customers and broadline foodservice distribution to local customers.[6] To rebut our evidence that broadline distributors are different from other types of

[3] FTC Press Release, *FTC Approves Toys”R”Us Petition to Reopen and Modify 1998 Final Commission Order*, (April 15, 2014), *available at* https://www.ftc.gov/news-events/press-releases/2014/04/ftc-approves-toys-r-us-petition-reopen-modify-1998-final.
[4] FTC blog post, “Sometimes brick & mortar competition is enough” (May 30, 2014), *available at* https://www.ftc.gov/news-events/blogs/competition-matters/2014/05/sometimes-brick-mortar-competition-enough.
[5] Complaint, *In re Sysco Corp.*, Dkt. No. 9364 (F.T.C. Feb. 19, 2015), *available at* https://www.ftc.gov/system/files/documents/cases/150219syscopt3cmpt.pdf.
[6] *FTC v. Sysco Corp.*, --- F. Supp. 3d ----, 2015 WL 3958568 (D.D.C. June 23, 2015) [hereinafter *Sysco* Opinion].

food distributors, the companies claimed that a combined Sysco/US Foods would face growing competition from a disruptive business model called "cash and carry" outlets and club stores—places like Restaurant Depot and Costco. The parties argued that, by moving (or threatening to move) business to these suppliers, local customers could avoid a price increase by Sysco/US Foods. Defendants cited to Restaurant Depot offering "creative distribution options," such as reimbursing customers for the cost of leasing their vehicle if the customer hit certain spending thresholds, and Costco offering delivery to businesses in select metropolitan areas.[7] But the court found that broadline distribution customers have distinct needs that could not be met by other types of suppliers, such as product breadth and diversity, dedicated account reps, timely and reliable delivery, and value-added services such as menu and meal planning.[8] The court noted that the effect of "cash and carry" alternatives was limited and that this business model would not discipline broadline foodservice distributors, certainly not at any time in the near future.[9] Shortly after the court granted the preliminary injunction preventing the merger, the parties announced they were abandoning their merger plans.

Similarly, in health care markets, parties have made the argument that the Affordable Care Act set in motion dramatic changes, and that in order to compete in the changing marketplace, firms must merge. For instance, in the FTC's recent challenge to St. Luke Health System's acquisition of the 41-member Saltzer Medical Group, the parties claimed that the acquisition was necessary to advance their effort to transform health care from a fragmented, fee-for-service model that rewards providers based on volume, to a financially and clinically integrated, risk-based system rewarding successful patient outcomes. Such a system could only

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[7] See *FTC v. Sysco Corporation,* No. 1:15-cv-00256 (D.D.C. Feb. 20, 2015), Defendants' Proposed Findings of Fact and Conclusions of Law (redacted) at 94-95.

[8] *Sysco* Opinion at *12-18.

[9] *Sysco* Opinion at *53.

succeed, they claimed, if the hospital employed a critical mass of doctors. We argued at trial that the evidence did not show that employing physicians is necessary to achieving integrated care.[10]

After four weeks of trial, the federal district court in Boise held that St. Luke's acquisition of Saltzer would substantially lessen competition among adult primary care physicians and ordered a divestiture. While the trial court acknowledged that moving toward more integrated care and the greater use of electronic medical records can improve patient outcomes, it found that those goals could be achieved in ways other than the acquisition of a physician practice group which created a substantial risk of higher prices for patients in the area around Nampa, Idaho. The court emphasized "St. Luke's is to be applauded for its efforts to improve the delivery of health care in Treasure Valley. But there are other ways to achieve the same effect that do not run afoul of the antitrust laws and do not run such a risk of increased costs."[11]

Looking to the Future: Elimination of Competition for Emerging Products

In other cases, the development of new platforms or technology is at the heart of our competitive concerns. For instance, in December, the Commission filed an administrative complaint and authorized staff to seek a preliminary injunction to prevent Verisk Analytics, Inc.'s proposed $650 million acquisition of EagleView Technology Corporation. We alleged that the proposed transaction would likely reduce competition and result in a virtual monopoly in the U.S. market for rooftop aerial measurement products used by the insurance industry to

[10] *St. Alphonsus Med. Center-Nampa Inc. v. St. Luke's Health Sys., Ltd.*, 1:13-CV-00116-BLW, Plaintiffs' Amended Corrected Proposed Facts and Conclusions of Law, 72 – 123.
[11] *St. Luke's Health Sys.*, 1:13-CV-00116-BLW, Memorandum Decision and Order at 3 (Jan. 24, 2014) , *aff'd*, 778 F.3d 775 (9th Cir. 2015).

estimate repair costs for property damage claims.[12] Until 2008 – when EagleView first offered its roof reports using proprietary software to analyze aerial images – insurance adjusters climbed on roofs to measure the perimeter, slope, and other dimensions by hand. But EagleView's rooftop aerial measurement products offered a technology solution that was safer, faster, and more accurate than traditional manual measurement. Its products quickly became the industry standard: at the time of the proposed merger, EagleView products had garnered approximately 90% share of the market for rooftop aerial measurement products sold to insurance companies.

According to our complaint, the only company that was in a position to challenge EagleView's market position was Verisk, the owner of the dominant software platform used by insurers to convert rooftop aerial measurement products into estimated property damage claims. When Verisk entered the market in 2012 to compete with EagleView with innovative aerial measurement products of its own, it provided insurance customers with a lower-cost alternative consisting in significant part of higher-resolution aerial images. In our view, the merger would have eliminated emerging competition from Verisk, cementing the company's position as the market leader with no other meaningful challengers. After the Commission filed its complaint, the parties decided to abandon their merger plans.

The Commission also acted to preserve competition in an emerging market for products in development in connection with Nielsen's proposed acquisition of Arbitron Inc. Nielsen is a well-known global media measurement and research firm, and the dominant provider of U.S. television audience measurement services. Arbitron also is a media measurement and research firm, and provided audience ratings for radio that are similar to Nielsen's television ratings.

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[12] FTC Press Release, "*FTC Challenges Verisk Analytic's Inc.'s Proposed Acquisition of EagleView Technology Corporation*," (Dec. 16, 2014), *available at* https://www.ftc.gov/news-events/press-releases/2014/12/ftc-challenges-verisk-analytics-incs-proposed-acquisition.

Both companies were developing cross-platform measurement services, which measure viewership across TV, the Internet, and other platforms. Both firms had developed plans, invested money and reached out to customers to begin marketing those products, albeit in beta form.

Customers confirmed that while other companies can provide estimates of aggregate cross-platform viewership, only Nielsen and Arbitron provide individual demographic data that is valuable to measure effective advertising spends. Moreover, each firm was approaching a complete solution from its unique competitive position. Nielsen already offered products that combined television and online viewing. Arbitron was collaborating to combine demographic data from its radio panel with data from set-top boxes and online measurements. Based on these independent efforts, customers believed that Nielsen and Arbitron eventually would compete directly in any national syndicated cross-platform measurement services.[13] The Commission based its decision not on crystal-ball gazing about what might happen, but on evidence from the merging firms about what they were doing and from customers about their expectations of those development plans. From this fact-based analysis, the Commission concluded that each company could be considered a likely future entrant, and that the elimination of the future offering of one would likely result in a lessening of competition.

To resolve these competitive concerns, the Commission required Arbitron to divest assets related to its ongoing development efforts, including audience data with individual-level

[13] A national syndicated cross-platform audience measurement service is one that provides all subscribers with the same universe of data, showing the relative national audiences for various programming and advertising. Complaint, *In the Matter of Nielsen Holdings, N.V. and Arbitron Inc.*, Dkt. C-4439 (F.T.C. Sept. 20, 2013), *available at* http://www.ftc.gov/sites/default/files/documents/cases/2013/09/130920nielsenarbitroncmpt.pdf.

demographic information, as well as related technology, software and IP.[14] The Commission eventually approved comScore as the buyer of those assets, and recent news reports indicate that comScore continues to challenge Nielsen in this emerging product space.

As we found out recently, sometimes the evidence related to disruptive products-in-development is hard to pin down. In September, a federal district court denied our motion to enjoin Steris Corporation's $1.9 billion acquisition of Synergy Health.[15] Steris and Synergy are the second- and third-largest providers of product sterilization services in the world. Sterilization is critical step in the manufacture of a number of healthcare products, and is required by the U.S. Food and Drug Administration. Steris and the market-leader Sterigenics offer gamma sterilization, which uses Cobalt 60, a radioactive isotope that is increasingly hard to find. Synergy offers e-beam and ethylene oxide gas sterilization services to U.S. customers, but had plans to open sterilization facilities offering x-ray sterilization in the United States. We alleged that after the merger, Steris planned to halt Synergy's x-ray development program, which had the potential to substantially improve competition for contract sterilization services provided to U.S. customers. The essence of our case was that, but for the merger, Synergy would have entered the U.S. sterilization market with new disruptive technology that would have challenged the existing Steris/Sterigenics duopoly and benefitted customers.

As the judge noted in his decision denying the preliminary injunction, the case hinged on whether Synergy likely would have entered the U.S. with x-ray sterilization services within a reasonable period of time—soon enough to be considered a competitor worth preserving. While we agree that this was the decisive question before the court, we disagreed on what the evidence

[14] Statement of the Commission, *In the Matter of Nielsen Holdings, N.V. and Arbitron, Inc*., Dkt. C-4439 (F.T.C. Sept. 20, 2013), *available at* https://www.ftc.gov/system/files/documents/public_statements/297661/140228nielsenholdingstatement.pdf.
[15] *FTC v. Steris Corp.*, Case No. 1:15 cv 1080 (N.D. Ohio Sept. 24, 2015).

showed. The outcome of this latest case reminds us that it can be hard to prove what is likely to happen in the future, and the farther out into the future, the harder that task is. Notwithstanding this loss, the Commission will continue to challenge transactions that eliminate future competition in violation of Section 7.

Preserving existing and emerging competition in technology sectors can be especially important to ensure that technological advances continue to drive growth in the economy, creating jobs and introducing more efficient products and processes into the marketplace. It is therefore important that we examine dynamic industries as we do any others – with rigorous fact-finding and analysis. Some firms may need to expend more effort, either in terms of time or sunk costs, to begin making sales in the relevant market, and the competitive significance of such firms will depend on how far along they are in the variety of concrete steps needed to begin actual sales and the likelihood such entry will occur.[16] This is a fact-specific inquiry, with the outcome of the analysis highly dependent on how far along the newcomer is with its plans to enter. We ask: What are firms doing? Are they developing new products? What do the firms' documents say about those developments? What are third parties doing? Compared to the merging parties, are third parties advantaged or disadvantaged in their efforts to develop a product and then compete in the future? What do customers say about competition in the future based on what they want in next-gen products and what they know about firms' ability to develop them? What is the timeline for these entry developments?

For anyone who doubts that blocking a merger can actually be good for competition and innovation, consider the fortunes of T-Mobile after both the Department of Justice and the FCC

[16] Section 9 of the HMG identifies various elements of an entry effort: "planning, design, and management; permitting, licensing, or other approvals; construction, debugging, and operation of production facilities; and promotion (including necessary introductory discounts), marketing, distribution, and satisfaction of customer testing and qualification requirements."

raised concerns about its proposed merger with AT&T. As you probably know, the parties abandoned their merger plans in December 2011 after the DOJ sued to block the $39 billion deal over concerns that the merger would reduce competition among wireless carriers. After the deal fell through, T-Mobile was once again the smallest of the four national wireless carriers. Since then, however, T-Mobile has shaken up the wireless world, with new service plans and expanded coverage for its network. Calling itself the "Un-Carrier," T-Mobile's new strategy has appealed to consumers and its market share has grown accordingly.

Business Conduct Aimed at Forestalling Disruptive Entry

In addition to merger review, the FTC also seeks to identify and challenge business practices that impede competition without offering countervailing benefits to consumers. We are especially attentive to collective actions by incumbents aimed at excluding new competitors who threaten the status quo or raising their costs of entry. I'll mention a few examples of FTC enforcement involving collective action to exclude new and potentially disruptive forms of competition.

If you've been in the market to buy or sell a house lately, you know that things have changed, probably since the last time you bought or sold a house. Instead of browsing through newspaper listings or driving to weekend open houses, today's home buyers can go online to any number of websites where they can sort and search for homes to buy—complete with panoramic pictures, comparable listings, and recent home sales.

But the transition to this new way of buying and selling houses did not occur overnight. Starting in the 1980's, the Commission investigated a variety of anticompetitive practices in the real estate industry, including efforts by real estate broker trade associations to disadvantage brokers who used non-traditional listing agreements. Once home sellers were able to use new methods to perform tasks that once were the exclusive domain of brokers, there was increased demand for innovative, non-traditional brokerage services. In a typical limited-service brokerage package, a home seller might choose to pay a broker only for the service of listing the home in the local Multiple Listing Service and placing advertisements, while the seller would handle negotiations and paperwork with the buyer. These limited-service models gave home sellers the chance to save potentially thousands of dollars in commissions in exchange for taking on more work.

But as alternative brokerage models caught on, they provoked a reaction from traditional real estate brokers. Some of this conduct led to FTC enforcement actions. In October 2006, the Commission challenged seven different real estate groups operating MLS services with illegally restraining competition by limiting consumers' ability to use low-cost real estate brokers.[17] Six of these groups settled the charges by agreeing to abandon their restrictive rules, but one, Realcomp II, contested the charges, which resulted in an appellate court decision condemning Realcomp's rules.

At the time of the FTC's complaint, Realcomp was an association of local real estate associations located in southeastern Michigan, and its members were local real estate agents and brokers. The FTC alleged that Realcomp enforced a policy that prohibited information from nontraditional listings in Realcomp's MLS from being transmitted to public real estate websites via the MLS feed.[18] After the Commission ruled that Realcomp's website policy created an illegal barrier to discount listings, the Sixth Circuit confirmed on appeal that the website policy

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[17] FTC Press Release, *FTC Charges Real Estate Groups with Anticompetitive Conduct in Limiting Consumers' Choice in Real Estate Services*, Oct. 12, 2006, *available at* https://www.ftc.gov/news-events/press-releases/2006/10/ftc-charges-real-estate-groups-anticompetitive-conduct-limiting.

[18] *In re Realcomp II*, Dkt. 9320 (F.T.C. Oct. 12, 2006), *available at* https://www.ftc.gov/enforcement/cases-proceedings/061-0088/realcomp-ii-ltd-matter.

amounted to a concerted refusal to deal with nontraditional listings on substantially equal terms, which likely protected full-service brokers from competitive pricing pressure on commissions. According to the court, "[r]estricting the online dissemination of home listings is especially pernicious because of the emerging competitive impact of the internet and of discounted brokerage services on the residential real-estate market."[19]

More recently, the FTC challenged the conduct of a professional licensing board for attempts to exclude competition from non-dentists for teeth-whitening services. In 2010, the Commission charged that the North Carolina State Board of Dental Examiners violated the federal antitrust laws by sending cease-and-desist letters to non-dentists providing teeth whitening services in competition with the state's licensed dentists.[20] NC Board is a state agency established under North Carolina law and charged with administering and enforcing a licensing system for dentists. A majority of the members of the Board are themselves practicing dentists, and thus they have a private incentive to limit competition from non-dentist providers of teeth whitening services. When non-licensed teeth whitening practitioners began offering teeth whitening services at a lower prices than dentists, the Board took action, declaring that teeth whitening constitutes the practice of dentistry, and informing the non-licensed practitioners that they must stop providing those services.

The Board argued that, because it is a state agency, its actions were shielded from federal antitrust law by the state action doctrine. Earlier this year, the Supreme Court rejected that argument, and allowed the Commission's decision to stand: because the Board was not actively supervised by uninterested state officials, its efforts to fend off competition from lower cost providers of teeth whitening services were akin to an illegal agreement among competitors to

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[19] *Realcomp II v. FTC*, 635 F.3d 815, 830 (6th Cir. 2011).
[20] Complaint, I*n re North Carolina Board of Dental Examiners*, Dkt. No. 9343 (F.T.C. Jun. 17, 2010).

deny would-be competitors access to the market.[21] Consumers in North Carolina can once again choose to use non-dentist providers of teeth whitening services.

As a final note, it is important to remember that even though new products and new business models seem far removed from the smoke-stack industries that animated early antitrust enforcement, the antitrust laws still apply to businesses and individuals competing for customers in the marketplace no matter how or where they do business. This spring, DOJ announced its first criminal case involving wholly online commerce, charging a former executive of an e-commerce seller of art with fixing prices for certain posters sold through Amazon Marketplace.[22] In a similar case last year, the FTC ordered two Internet resellers of UPC barcodes to stop inviting competitors to join in a collusive scheme to raise the prices charged for barcodes sold online.[23]

Advocacy Initiatives

The FTC has tools other than enforcement—namely, research and advocacy—to advance free market principles and encourage competition and innovation. We conduct studies, host workshops, and provide comments to state and local governments about the benefits of vigorous competition and the pitfalls of adopting policies that favor one group of competitors over another. As a general rule, the Commission strongly believes that competition should only be restricted when clearly necessary to achieve some countervailing benefit such as protecting the public from significant harm. That principle should apply when considering new regulations, but it should also motivate policymakers to review existing restrictions on competition to ensure that

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[21] *N.C. State Bd. of Dental Exam'rs v. FTC*, 135 S. Ct. 1101 (2015).
[22] DOJ Press Release, "*Former E-Commerce Executive Charged with Price Fixing in the Antitrust Division's First Online Marketplace Prosecution,*" Apr. 6, 2015, available at http://www.justice.gov/opa/pr/former-e-commerce-executive-charged-price-fixing-antitrust-divisions-first-online-marketplace.
[23] *In re 680 Digital, Inc., d/b/a/ Nationwide Barcode*, C-4484 (F.T.C. Jul. 21, 2014) and *In re Jacob J. Alifraghis, d/b/a/ InstantUPCCodes.com*, C-4483 (F.T.C. Jul. 21, 2014).

they are still justified, especially in markets where new business models have emerged to challenge the status quo. As part of its mission to promote competition for the benefit of consumers, we often urge policymakers to adopt a flexible regulatory framework that promotes innovation and informed consumer choice.

In market sectors undergoing dynamic change from new businesses and new business models, we have generally cautioned state and local governments not to impose legacy regulations on new business models simply because they happen to fall outside of existing regulatory schemes. As an example, the threshold question for policymakers examining new peer-to-peer businesses should be whether there is a public policy justification for regulating the service at all, either through an expansion of existing regulatory schemes or entirely new ones. If there is no public policy rationale justifying regulation, policymakers should allow competition to proceed without interference. Our experience tells us that consumers generally benefit from the competition that arises between traditional and new business models.

Nowhere is the tension between old and new business models more acute than in the growing "sharing economy," where peer-to-peer digital platforms help unite buyers and sellers, mainly via apps widely available on smartphones. Think Airbnb, TaskRabbit, and, of course, Uber. Peer-to-peer platforms have been around for a while, dating back to the early days of Ebay, but they have really taken off of late, fueled by the popularity of smartphones and increasing willingness of consumers to conduct transactions online.

In particular, we raise concerns if existing regulatory schemes tend to favor traditional business models and thereby chill innovation. Indeed, we have seen Uber and Airbnb face lawsuits and other challenges in this country and around the world for allegedly engaging in "unfair competition." Regulatory schemes, to the extent they are needed, should be flexible enough to allow new forms of competition. Often, the existing regulations governing the traditional industry (e.g., taxicabs or hotels) have been in place for decades without much change. In our advocacy letters, we often encourage policymakers to periodically review and, if necessary, revise their regulatory schemes to facilitate and encourage the emergence of new forms of competition that would benefit consumers.

In addition, any regulatory response should be narrowly tailored to the specific public policy goals that have been identified. In general, we recommend that regulations should allow for flexibility and adaptation in response to new and innovative methods of competition, while still maintaining appropriate consumer protections. For instance, regulation of vehicle transportation, including those that use new computer and phone-based applications to arrange rides, should focus primarily on ensuring qualified drivers, safe and clean vehicles, sufficient liability insurance, transparency of fare information, and compliance with other applicable laws.[24]

In a recent letter to the Chicago City Council, FTC staff raised concerns that new proposals to require licensing for "transportation network providers," including new software applications, may unnecessarily impede competition, and limit consumer benefits that these new services would otherwise provide.[25] These applications support digital dispatch services, which allow consumers to easily locate, arrange and pay for a ride, as compared to traditional methods

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[24] *See* FTC Staff Comments Before the Colorado Public Utilities Commission *In The Matter of The Proposed Rules Regulating Transportation By Motor Vehicle*, 4 Code of Colorado Regulations 723-6 (Mar. 6, 2013), *available at* http://www.ftc.gov/policy/policy-actions/advocacy-filings/2013/03/ftc-staff-comment-colorado-public-utilities.

[25] FTC Staff Comment to the Honorable Brendan Reilly Concerning Proposed Ordinance O2014-1367 Regarding the A Regulatory Framework Providing for the Licensing and Operation of Transportation Network Providers in Chicago, Illinois (Apr. 15, 2014), *available at* https://www.ftc.gov/system/files/documents/advocacy_documents/ftc-staff-comment-honorable-brendan-reilly-concerning-chicago-proposed-ordinance-o2014-1367/140421chicagoridesharing.pdf.

such as hailing a cab or calling a dispatch service. As anyone who has used one of these apps to arrange a ride can attest, they are convenient and easy to use.

In our comment, we urged the City Council to carefully consider the justification for an annual fee of $25,000 per license, plus $25 for each driver, as well as the proposal to restrict the way that fees are calculated. Along with minimum insurance requirements, a ban on airport pick up and drop off, and a prohibition on owning the vehicles used for transport, FTC staff cautioned that the new restrictions may unnecessarily impede competition without providing any apparent consumer protection benefits.

The FTC staff has also encouraged states to update old regulatory schemes to allow for new innovative business models. For example, many states have automobile distribution laws that prohibit cars to be sold directly by manufacturers to consumers. These laws were originally intended to protect both the car dealers from abuse by auto manufacturers and also to guarantee that consumers would have a local auto outlet where they could take their car for service, including warranty service. Then came new car companies like Tesla and Elio Motors that are attempting to create new models of distribution and service without using local franchised dealers. In many states, these companies have faced legislative actions and litigation to prevent them from pursuing direct-to-consumer sales.

The FTC staff has pointed out repeatedly in letters to state legislatures and government officials that laws requiring auto manufacturers to use a network of dealers should be relaxed.[26] We urge these changes (and oppose new restrictions) so that car buyers can not only choose which car to buy but how to buy them. Manufacturers can still choose to rely on independent

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[26] See, e.g., FTC Staff Comment Before the Missouri House of Representatives Regarding House Bill 1124, Which Would Expand the Current Prohibition on Direct-to-Consumer Sales by Manufacturers of Automobiles (May 2014), *available at* https://www.ftc.gov/policy/policy-actions/advocacy-filings/2014/05/ftc-staff-comment-missouri-house-representatives-0.

dealers as the best method of distribution for their products based on consumer preferences and other business considerations. But other manufacturers might decide to develop new distribution models that offer potential efficiencies that could be passed on to consumers in the form of better pricing or quality of service. As in other areas of the economy, without a blanket restriction on direct distribution, we would likely see a combination of dealer distribution and direct sales—or perhaps some entirely different mode of distribution that is only now on the drawing board.

Our advocacy in this area appears to be paying off—at least for Tesla and at least in New Jersey. The state legislature there recently passed legislation that specifically allows Tesla to operate a handful of direct sales outlets in the state. Time will tell if other states reexamine their restrictions on direct-to-consumer sales, especially if consumer interest in that option grows.

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It has been a pleasure speaking in front of you today. Thank you.