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From: Clark, Donald S.
Sent: 13 Jan 2017 11:10:50 -0500
To: WebTeam; Cooper, Brittany
Cc: OSBC; Jin, Ginger; Koslov, Tara Isa; Munck, Suzanne
Subject: Additional Document (Commissioner Ohlhausen's Statement) For High Noon Today: Antitrust Guidelines For the Licensing of Intellectual Property
Attachments: P161201 MKO Statement IP Guidelines.pdf
Web Team and Brittany, when you take the steps below at 12 Noon today, please also post the attached copy of the Statement of Commissioner Ohlhausen. Thanks!

... Don

From: Clark, Donald S.
Sent: Thursday, January 12, 2017 5:29 PM
To: WebTeam; Cooper, Brittany
Cc: OSBC; Jin, Ginger; Koslov, Tara Isa; Munck, Suzanne
Subject: For High Noon Tomorrow, Friday, January 13th: Antitrust Guidelines For the Licensing of Intellectual Property & Statement of Commissioner Ohlhausen

Web Team and Brittany, at 12 noon tomorrow (but as usual not before the press release describing the Antitrust Guidelines For the Licensing of Intellectual Property), please place the attached document at the top of the Commission Actions page, and at the top of the Policy Statements page, at the following URL:

<https://www.ftc.gov/policy/policy-statements>

and in the Related Items column of the press release, and use the following caption:

Antitrust Guidelines For the Licensing of Intellectual Property: Issued by the U.S. Department of Justice and the Federal Trade Commission: Statement of the Antitrust Enforcement Policy of the Department and the Commission With Respect to the Licensing of Intellectual Property Protected by Patent, Copyright, and Trade Secret Law, and of Know-How

January 12, 2017

Text of the Antitrust Guidelines For the Licensing of Intellectual Property
Statement of Commissioner Maureen K. Ohlhausen

..... Press Release

Thanks!

..... Don [I have attached the Guidelines; I will forward the Statement of
Commissioner Ohlhausen shortly]

Statement of Commissioner Maureen K. Ohlhausen

U.S. Dep't of Justice & Fed. Trade Comm'n, Antitrust Guidelines for the
Licensing of Intellectual Property

January 13, 2017

Intellectual property is the foundation of a successful innovation policy. Its intersection with antitrust thus affects the new economy. Unfortunately, there has been a worrying trend as some overseas enforcers wield their antitrust laws in unprincipled fashion to dilute IP rights. That approach discounts the importance of dynamic efficiencies to long-term economic growth, exaggerates the short-term gains to technology users of reduced input prices, and inappropriately morphs antitrust into a tool of price regulation.

In response to skepticism in some quarters about the value of IP in spurring technological advance, I have made the case for robust patent and copyright protection. *See, e.g.*, Maureen K. Ohlhausen, *The Case for a Strong Patent System* (June 8, 2016), <https://www.ftc.gov/public-statements/2016/06/case-strong-patent-system>; Maureen K. Ohlhausen & Dan Schneider, *Intellectual Property and the National Security Issue*, WASH. TIMES, Dec. 1, 2015. My study of the relationship between patent strength, private-firm R&D investment, and innovation will soon be published. Maureen K. Ohlhausen, *Patents Rights in an Era of IPR Skepticism*, 30 HARV. J.L. & TECH. (2017) (forthcoming). Although abuses do occur in the IP space, I argue for an evidence-based solution. *See* Maureen K. Ohlhausen, *The FTC PAE Study in Context* (Oct. 20, 2016), <https://www.ftc.gov/public-statements/2016/10/prepared-remarks-commissioner-maureen-k-ohlhausen-ftc-pae-study-context>. An evidentiary approach should apply equally to antitrust intervention in the patent space. I have expressed concern that, on occasion, the Federal Trade Commission has deviated from these principles. *See, e.g.*, Maureen K. Ohlhausen, *What Are We Talking About When We Talk About Antitrust?*, pp. 9-13 (Sept. 22, 2016), <https://www.ftc.gov/public-statements/2016/09/what-are-we-talking-about-when-we-talk-about-antitrust>.

Against that backdrop, the Antitrust Guidelines for the Licensing of Intellectual Property are a welcome guidepost. Last year I observed that the 1995 Guidelines offered a “sensible and balanced approach[.]” recognizing that “IP issues are not a special case that requires a different competition jurisprudence.” ABA Section of Antitrust Law’s Intellectual Property Committee, *Interview of Commissioner Ohlhausen*, PUBLIC DOMAIN 11-12 (Feb. 2016). Today the Agencies modestly update the Guidelines, embracing principles of commendable flexibility. I applaud the following attributes of the revised Guidelines, in particular:

- IP laws that grant “enforceable property rights” have social value (§ 1.0);
- The Guidelines observe that the “antitrust laws generally do not impose liability upon a firm for a unilateral refusal to assist its competitors” (§ 2.1);
- IP licensing is generally procompetitive (§ 2.0);
- The Agencies do not presume that IP bestows market power (§ 2.0);
- There is no liability for excessive pricing without anticompetitive conduct—indeed, “[i]f an intellectual property right does confer market power, that market power does not by itself offend the antitrust laws” (§ 2.2); and

- The rule of reason governs vertical IP-licensing restraints, including minimum resale price maintenance (§§ 5.2, *passim*).

Those notable features are by no means exhaustive, but reflect key principles to which the Agencies commit to adhere. Read in conjunction with the Agencies' other joint reports in the antitrust-IP space—*see, e.g.*, U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N, ANTITRUST ENFORCEMENT AND INTELLECTUAL PROPERTY RIGHTS: PROMOTING INNOVATION AND COMPETITION 30 (2007) (“[L]iability for mere unconditional, unilateral refusals to license will not play a meaningful part in the interface between patent rights and antitrust protections.”), www.usdoj.gov/atr/public/hearings/ip/222655.pdf—it is clear that patentees and other IP owners properly enjoy strong rights under U.S. law.



ANTITRUST GUIDELINES FOR INTERNATIONAL ENFORCEMENT AND COOPERATION

Issued by the:

U.S. DEPARTMENT OF JUSTICE
and
FEDERAL TRADE COMMISSION

January 13, 2017

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1. Introduction

“The heart of our national economic policy long has been faith in the value of competition,”¹ and the U.S. antitrust laws have stood as the ultimate protector of competition in our free market economy. That policy and these laws rest “on the premise that the unrestrained interaction of competitive forces will yield the best allocation of our economic resources, the lowest prices, the highest quality and the greatest material progress.”² To protect U.S. consumers and businesses from anticompetitive conduct in foreign commerce, the federal antitrust laws have applied to “commerce with foreign nations” since their inception.³

Since the 1995 release of the Antitrust Enforcement Guidelines for International Operations, trade between the United States and other countries has expanded at a tremendous rate. With this expansion, the federal antitrust laws have played an increasingly important role in protecting consumers and businesses purchasing in U.S. import commerce and exporters selling in U.S. export commerce from anticompetitive conduct. In addition, anticompetitive conduct—from price-fixing cartels to competition-reducing mergers and monopolization—increasingly is subject to investigation and, in some cases, remedial action by foreign authorities.

The Department of Justice (the “Department”) and the Federal Trade Commission (the “Commission” or “FTC”) (collectively the “Agencies”) are charged with enforcement of the federal antitrust laws, an essential component of which is the application of these laws to foreign commerce. Moreover, the Agencies cooperate on their antitrust enforcement with foreign authorities wherever appropriate.

In furtherance of that enforcement and in recognition of the role of international cooperation, the Agencies issue these Antitrust Guidelines for International Enforcement and Cooperation (“International Guidelines”), which replace the 1995 Antitrust Enforcement Guidelines for International Operations. The International Guidelines provide updated guidance to businesses engaged in international activities on questions that concern the Agencies’ international enforcement policy as well as the Agencies’ related investigative tools and cooperation with foreign authorities.

¹ *Standard Oil Co. v. Fed. Trade Comm’n*, 340 U.S. 231, 248 (1951).

² *N. Pac. Ry. Co. v. United States*, 356 U.S. 1, 4 (1958).

³ See *infra* Sections 3.1 and 3.2 for a discussion of the meaning of “commerce with foreign nations.”

Many nations share our faith in the value of competition, and as of 2017, over 130 jurisdictions have enacted antitrust laws as a means to ensure open and free markets, promote consumer welfare, and prevent conduct that impedes competition. Accordingly, the Agencies have expanded their efforts and committed greater resources to building and maintaining strong relationships with foreign authorities to promote greater policy engagement. This engagement with foreign authorities has multiple goals, notably: increasing global understanding of different jurisdictions' respective antitrust laws, policies, and procedures; contributing to procedural and substantive convergence toward best practices; and facilitating enforcement cooperation internationally. The Agencies have championed and continue to promote this engagement, focusing on substantive enforcement standards that seek to advance consumer welfare based on sound economics, procedural fairness, transparency, and non-discriminatory treatment of parties.

In furtherance of these goals, the Agencies raise important policy and practical antitrust issues with foreign authorities bilaterally and through multilateral organizations such as the Competition Committee of the Organisation for Economic Co-operation and Development ("OECD"), the International Competition Network ("ICN"), the United Nations Conference on Trade and Development ("UNCTAD"), and the Asia-Pacific Economic Cooperation ("APEC") forum. These efforts have resulted in the development and implementation of standards of international best practice and consensus guidance on substantive antitrust and procedural fairness.⁴ Consistent approaches to competition law, policy, and procedures across jurisdictions facilitate cooperation among competition agencies, and increase the effectiveness and predictability of enforcement, which benefits the Agencies, consumers, and the business community.

In the United States, the Agencies are responsible for international antitrust policy engagement and cooperation. The Agencies also work within the U.S. government to

⁴ See, e.g., Int'l Competition Network, *Guidance on Investigative Process*, <http://www.internationalcompetitionnetwork.org/uploads/library/doc1028.pdf>; Org. for Econ. Co-Operation & Dev., *Recommendation Concerning International Co-operation on Competition Investigations and Proceedings* (2014), <http://www.oecd.org/daf/competition/2014-rec-internat-coop-competition.pdf>; Int'l Competition Network, *Recommended Practices on the Assessment of Dominance/Substantial Market Power*; <http://www.internationalcompetitionnetwork.org/uploads/library/doc317.pdf>; Int'l Competition Network, *Recommended Practices for Merger Notification and Review Procedures*, <http://www.internationalcompetitionnetwork.org/uploads/library/doc588.pdf>; Org. for Econ. Co-Operation & Dev., *Recommendation Concerning Effective Action Against Hard Core Cartels* (1998), <https://www.oecd.org/daf/competition/2350130.pdf>.

ensure that broader U.S. policy and engagement appropriately reflects an understanding of complex international antitrust issues and accepted principles of competition law, economics, and policy. Consumers and businesses are welcome to contact the Agencies concerning the application and enforcement of antitrust law and policy internationally.

In addition to this introductory chapter, the International Guidelines are divided into four other chapters. Chapter 2 provides a brief summary of the antitrust and related laws that are likely to have the greatest significance for businesses engaged in international activities. Chapter 3 describes what connections to the United States are sufficient for the Agencies to investigate or bring enforcement actions challenging conduct occurring abroad or involving or affecting foreign commerce. Chapter 4 describes the Agencies' consideration of international comity concerns and the role of foreign government involvement in determining whether to open an investigation or bring an enforcement action. Chapter 5 provides guidance on the Agencies' pertinent investigatory tools and their enforcement cooperation with foreign authorities. These International Guidelines also include a number of examples that are intended to illustrate how the principles and policies discussed may operate in certain contexts.⁵

As is the case with all guidelines issued by the Agencies, users should rely on qualified counsel to assist them in evaluating the antitrust risk associated with any contemplated transaction or activity.⁶ No set of guidelines could possibly indicate how the Agencies will assess the particular facts of every case. Persons seeking more specific advance statements of enforcement intentions with respect to the issues discussed in the International Guidelines should use other procedures, which may include the Department's Business Review procedure⁷ and the Commission's Advisory Opinion procedure.⁸ Other existing Department and Commission guidelines and statements are not qualified, modified, or otherwise amended by the

⁵ The ultimate outcome of the analysis in a particular case, *i.e.*, in determining whether or not a violation of the federal antitrust laws has occurred, or the manner in which the Agencies may cooperate with foreign authorities, depends on the specific facts and circumstances of the case.

⁶ Users also should evaluate separately the risk of private litigation by competitors, consumers, and suppliers, as well as the risk of enforcement by state prosecutors under state and federal antitrust laws.

⁷ 28 C.F.R. § 50.6.

⁸ 16 C.F.R. §§ 1.1-1.4.

issuance of these International Guidelines. The International Guidelines are not intended to, do not, and may not be relied upon to create any rights, substantive or procedural, enforceable at law by any party in any matter, civil or criminal. Nor are any limitations hereby placed on otherwise lawful litigative prerogatives of the Department or Commission.

2. Relevant Antitrust and Related Statutes

Cases involving foreign commerce or foreign conduct can involve almost any provision of the federal antitrust laws. The Agencies do not discriminate in the enforcement of the antitrust laws based on the nationality of the parties. Nor do the Agencies employ their statutory authority to further non-antitrust goals. When the Agencies determine that a sufficient nexus to the United States exists to apply the antitrust laws⁹ and that neither international comity nor the involvement of a foreign jurisdiction precludes investigation or enforcement,¹⁰ the Agencies apply the same substantive rules to all cases. The following is a brief summary of the antitrust and related statutes that are likely to have the greatest significance for businesses engaged in international activities.

2.1 Sherman Antitrust Act

The Sherman Antitrust Act (“Sherman Act”) sets forth general antitrust prohibitions.¹¹ Section 1 of the Sherman Act outlaws contracts, combinations, and conspiracies that unreasonably restrain “trade or commerce among the several States, or with foreign nations.”¹² Section 2 outlaws monopolization, attempts to monopolize, and conspiracies to monopolize “any part of the trade or commerce among the several States, or with foreign nations.”¹³ Section 6a, added by the Foreign Trade Antitrust Improvements Act of 1982 (“FTAIA”), clarifies the Sherman Act’s application to conduct involving only non-import foreign commerce.¹⁴

⁹ *See infra* Sections 3.1-3.3.

¹⁰ *See infra* Sections 4.1-4.2.

¹¹ 15 U.S.C. §§ 1-7.

¹² *Id.* § 1.

¹³ *Id.* § 2.

¹⁴ *Id.* § 6a; *see infra* Sections 2.9, 3.1, and 3.2.

Violations of the Sherman Act may be prosecuted as civil or criminal offenses. The Department has sole responsibility for the criminal enforcement of the Sherman Act and criminally prosecutes traditional per se offenses of the law, which typically involve price fixing, customer allocation, bid rigging, or other cartel activities that would also be violations of the law in many countries. Criminal violations of the Act are punishable by fines and imprisonment. The Sherman Act provides that corporate defendants may be fined up to \$100 million and individual defendants may be fined up to \$1 million and sentenced to up to 10 years imprisonment.¹⁵

In a civil proceeding, the Department may obtain equitable relief to prevent and restrain violations of the Sherman Act.¹⁶ It may also obtain treble damages if the U.S. government is injured in its business or property by a violation, for example as a purchaser of affected goods or services.¹⁷ Private plaintiffs may also obtain injunctive and treble damage relief for violations of the Sherman Act.¹⁸

2.2 Federal Trade Commission Act

Section 5 of the Federal Trade Commission Act (“FTC Act”) declares unlawful “unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce.”¹⁹ Pursuant to its authority to prevent unfair methods of competition, the Commission may take administrative action against conduct that violates the Sherman Act or the Clayton Antitrust Act (“Clayton Act”), as well as anticompetitive practices that do not fall within the scope

¹⁵ 15 U.S.C. §§ 1-3. Defendants may be fined up to twice the gross pecuniary gain or loss caused by their offense in lieu of the Sherman Act fines, pursuant to 18 U.S.C. § 3571(d). Defendants may also be placed on probation for up to five years. The U.S. Sentencing Commission Guidelines provide advisory sentences or sentencing ranges for antitrust offenses. *See* U.S.S.G. § 2R1.1 & ch. 8. In determining the appropriate sentence, the court must consider the Guidelines’ advisory sentence or sentencing range, as well as the other factors in 18 U.S.C. § 3553(a) and also, for fines, the factors in 18 U.S.C. § 3572(a). The Department generally seeks sentences consistent with the Guidelines.

¹⁶ 15 U.S.C. § 4.

¹⁷ *Id.* § 15a.

¹⁸ *See id.* §§ 15, 26.

¹⁹*Id.* § 45.

of the Sherman or Clayton Acts.²⁰ The Commission may also seek injunctive relief in federal court under Section 13(b) of the FTC Act.²¹ These International Guidelines pertain only to the Commission's antitrust enforcement authority under Section 5's prohibition of unfair methods of competition. Section 5(a)(3) of the FTC Act, added by the Foreign Trade Antitrust Improvements Act of 1982, clarifies the FTC Act's application to conduct involving only non-import foreign commerce.²²

2.3 Clayton Antitrust Act

The Clayton Act expands on the general prohibitions of the Sherman Act and addresses anticompetitive problems in their incipiency.²³ Section 7 of the Clayton Act prohibits any merger or acquisition of stock or assets "where in any line of commerce or in any activity affecting commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly."²⁴ The Agency reviewing a transaction that would violate Section 7 can seek a federal court order enjoining its consummation.²⁵ In addition,

²⁰ *Id.* § 45(b). See Fed. Trade Comm'n, *Statement of Enforcement Principles Regarding "Unfair methods of Competition" Under Section 5 of the FTC Act*, <https://www.ftc.gov/public-statements/2015/08/statement-enforcement-principles-regarding-unfair-methods-competition>.

²¹ 15 U.S.C. § 53(b).

²² *Id.* § 45(a)(3).

²³ *Id.* §§ 12-27. Under the Clayton Act, "commerce" includes "trade or commerce among the several States and with foreign nations," and "person" includes corporations or associations existing under or authorized either by the laws of the United States or any of its states or territories, or by the laws of any foreign country. *Id.* § 12.

²⁴ *Id.* § 18. The asset acquisition clause applies to "person[s] subject to the jurisdiction of the Federal Trade Commission" under the Clayton Act.

²⁵ *Id.* § 25 (Clayton Act); *id.* § 53(b) (FTC Act). On August 19, 2010, the Agencies issued revised Horizontal Merger Guidelines, which outline their principal analytical techniques, practices, and enforcement policy with respect to mergers and acquisitions involving actual or potential competitors under the federal antitrust laws. U.S. Dep't of Justice & Fed. Trade Comm'n, *Horizontal Merger Guidelines* (2010), <https://www.justice.gov/sites/default/files/atr/legacy/2010/08/19/hmg-2010.pdf>.

the Commission may seek a cease and desist order in an administrative proceeding against a merger under Section 11 of the Clayton Act, Section 5 of the FTC Act, or both.²⁶ Private parties and state Attorneys General may also seek injunctive relief under the Clayton Act.²⁷

Section 3 of the Clayton Act prohibits any person engaged in commerce from conditioning the lease or sale of goods or commodities upon the purchaser's agreement not to use the products of a competitor, if the effect may be "to substantially lessen competition or tend to create a monopoly in any line of commerce."²⁸ In evaluating transactions, courts use the same analysis employed in the evaluation of tying under Section 1 of the Sherman Act to assess a defendant's liability under Section 3 of the Clayton Act.²⁹

Section 2 of the Clayton Act, as amended by the Robinson-Patman Act,³⁰ prohibits price discrimination in certain circumstances. In practice, the Commission has exercised principal responsibility for enforcing this provision.

2.4 Hart-Scott-Rodino Antitrust Improvements Act of 1976

Title II of the Hart-Scott-Rodino Antitrust Improvements Act of 1976 ("HSR Act") facilitates the Agencies' enforcement of the antitrust laws with respect to anticompetitive mergers and acquisitions. It requires that persons provide notice to the Agencies of certain proposed mergers or acquisitions and imposes a waiting

²⁶ 15 U.S.C. § 21 (Clayton Act); *id.* § 45 (FTC Act).

²⁷ *Id.* §§ 15c, 26.

²⁸ *Id.* § 14.

²⁹ *See, e.g., Sheridan v. Marathon Petroleum Co.*, 530 F.3d 590, 592 (7th Cir. 2008) ("Though some old cases say otherwise, the standards for adjudicating tying under the two statutes are now recognized to be the same.").

³⁰ 15 U.S.C. §§ 13-13b, 21a. The Robinson-Patman Act applies only to purchases involving commodities "for use, consumption, or resale within the United States." *Id.* § 13(a). It has been construed not to apply to sales for export. *See, e.g., Gen. Chem., Inc. v. Exxon Chem. Co.*, 625 F.2d 1231, 1234 (5th Cir. 1980). Intervening domestic sales, however, would be subject to the Act. *See Raul Int'l Corp. v. Sealed Power Corp.*, 586 F. Supp. 349, 351-55 (D.N.J. 1984).

period on these mergers or acquisitions.³¹ Transactions are subject to these requirements only if they meet certain conditions, including minimum size thresholds.³² Some transactions are explicitly exempted from these requirements by the statute's text.³³ The HSR Act and the Hart-Scott-Rodino Premerger Notification Rules ("HSR Rules")³⁴ exempt from the notification requirements certain international transactions (typically those having little nexus to U.S. commerce) that otherwise meet the statutory thresholds.³⁵ Transactions not subject to the HSR Act's notification and waiting period requirements may still be subject to the Sherman Act, the FTC Act, or the Clayton Act, and the Agencies may seek to block or undo an anticompetitive merger or acquisition or seek other equitable relief when any of those statutes applies.

If a transaction is subject to the HSR Act's requirements, the parties must typically wait 30 days after providing notice to the Agencies before they may consummate it; the parties to cash tender offers must wait only 15 days.³⁶ The Agency reviewing the transaction may request additional documents or information concerning a transaction, known as a "Second Request," during this waiting period. Issuing a Second Request extends the waiting period until a certain number of days after the

³¹ 15 U.S.C. § 18a. The scope of the Agencies' jurisdiction under Section 7 of the Clayton Act, *id.* § 18, exceeds the scope of those transactions subject to the premerger notification requirements of the HSR Act. Enforcement responsibility in particular cases is allocated to either the Department or the Commission typically based on prior agency expertise in the relevant product market at issue.

³² *Id.* § 18a(a). As a result of a 2000 amendment to the HSR Act, all minimum thresholds in the Act are adjusted annually based on changes in the gross national product. *Id.* § 18a(a)(2). The adjusted annual thresholds are announced in January of each year in the Federal Register, and are effective 30 days after publication. The current adjusted annual thresholds are available on the Commission's website at <https://www.ftc.gov/enforcement/premerger-notification-program/current-thresholds>.

³³ 15 U.S.C. § 18a(c).

³⁴ 16 C.F.R. pt. 801-03.

³⁵ 16 C.F.R. §§ 801.1(e), (k) & 802.50-53.

³⁶ 15 U.S.C. § 18a(b); 16 C.F.R. § 803.1; *see also* 11 U.S.C. § 363 (b)(2) (regarding certain transactions involving parties in bankruptcy).

Agency has received the requested material and the party certifies substantial compliance; typically 30 days, but only 10 days for cash tender offers.³⁷

Failure to comply with the HSR Act is punishable by court-imposed and potentially substantial civil monetary penalties.³⁸ A court also may order injunctive relief to remedy a substantial failure to comply with the HSR Act.³⁹

The HSR Act and the HSR Rules are necessarily technical and should be consulted directly. Businesses may seek an interpretation of their obligations under the HSR Act and the HSR Rules from the Commission's Premerger Notification Office.⁴⁰

2.5 Antitrust Criminal Penalty Enhancement and Reform Act of 2004

The Antitrust Criminal Penalty Enhancement and Reform Act of 2004 ("ACPERA") limits the liability for civil damages claims in private state or federal antitrust actions of a qualifying person cooperating with a criminal antitrust investigation by the Department.⁴¹ Specifically, for claims against a corporation that enters into an antitrust leniency agreement with the Department pursuant to its Corporate Leniency Policy⁴² or a cooperating individual covered by such an agreement, a claimant cannot recover damages exceeding the "portion of the actual damages sustained by such claimant which is attributable to the commerce done by the applicant in the goods or services affected by the violation."⁴³ To qualify for this

³⁷ 15 U.S.C. § 18a(e).

³⁸ *Id.* § 18a(g)(1). In August 2016, the limit on these penalties was adjusted upward to \$40,000 for each day a violation continues. That limit adjusts periodically based on inflation. 28 U.S.C. § 2461 note; 16 C.F.R. § 1.98(a).

³⁹ 15 U.S.C. § 18a(g)(2).

⁴⁰ *See* 16 C.F.R. § 803.30.

⁴¹ Pub. L. 108-237, 118 Stat. 661 (codified as 15 U.S.C. § 1 note). Originally set to expire in 2009, the provision has been twice extended. Pub. L. 111-190, 124 Stat. 1275 (2010); Pub. L. 111-30, 123 Stat. 1775 (2009). It is currently set to expire, absent further extension by Congress, on June 22, 2020.

⁴² For information on the Department's Antitrust Corporate Leniency Policy, see <https://www.justice.gov/atr/leniency-program>.

⁴³ 15 U.S.C. § 1 note.

limitation, the corporation or cooperating individuals must meet the conditions of the Corporate Leniency Policy, including cooperating fully with the Department's investigation, and must meet certain requirements in connection with the claimant's civil action. These requirements include providing the claimant with a full account of all facts known to the corporation or cooperating individual that are potentially relevant to the civil action, furnishing the claimant with potentially relevant documents and other items wherever located, and, in the case of cooperating individuals, making himself or herself available for interviews, depositions, or testimony in connection with the civil action as the claimant may reasonably require.

2.6 International Antitrust Enforcement Assistance Act

The International Antitrust Enforcement Assistance Act ("IAEAA")⁴⁴ authorizes the Agencies to enter into antitrust-specific mutual assistance agreements with foreign authorities.⁴⁵ Under such agreements, U.S. and foreign authorities may share evidence relating to antitrust violations already in their possession and provide each other with investigatory assistance in obtaining evidence, including statutorily protected confidential information.⁴⁶ The IAEAA does not apply to materials submitted pursuant to the HSR Act.⁴⁷ The Agencies entered into an IAEAA agreement with Australia in 1999.⁴⁸

⁴⁴ 15 U.S.C. § 6201 *et seq.*

⁴⁵ Information relevant to antitrust enforcement may also be provided under generalized legal assistance treaties in force between the United States and a wide range of foreign partners. *See infra* Sections 5.1.3 and 5.2.

⁴⁶ 15 U.S.C. § 6201. Agreements entered into under the IAEAA's authority must include, among other requirements, assurances that the foreign authority will protect the confidentiality of the information exchanged, *id.* § 6211(2)(A)-(C), and provisions addressing the permitted use of the evidence exchanged, *id.* § 6211(2)(E)(i), (ii).

⁴⁷ *Id.* § 6204(1).

⁴⁸ Agreement Between the Government of the United States of America and The Government of Australia on Mutual Antitrust Enforcement Assistance, U.S.-Aus. (1999), *reprinted in* 4 Trade Rep. Reg. (CCH) ¶ 13,502A, *available at* <https://www.ftc.gov/policy/cooperation-agreements/usaustralia-mutual-antitrust-enforcement-assistance-agreement>.

2.7 National Cooperative Research and Production Act

The National Cooperative Research and Production Act (“NCRPA”), as amended by the Standards Development Organization Advancement Act of 2004,⁴⁹ clarifies the substantive application of the state and federal antitrust laws to joint ventures and standards development organizations (“SDOs”) while engaged in standards development activity. It requires U.S. courts to judge the competitive effects of a challenged joint venture or SDO covered by the Act under a rule-of-reason standard.⁵⁰ This approach is consistent with the Agencies’ general analysis of joint ventures.⁵¹ The Act further provides for the possible recovery of attorney’s fees by joint ventures and SDOs that are prevailing parties in damage actions brought against them under the antitrust laws.

The NCRPA also establishes a voluntary procedure pursuant to which parties to a joint venture or an SDO that meet certain criteria may notify the Agencies of their intention to engage in standards development activity. Under the statute, if participants provide notice to the Agencies, the amount of monetary relief obtainable in a private civil suit challenging the standards-development activity is limited to actual, rather than treble, damages so long as the challenged conduct is within the scope of the notification. This benefit is not available to joint production ventures, unless “(1) the principal facilities for such production are located in the

⁴⁹ 15 U.S.C. §§ 4301-06.

⁵⁰ *Id.* § 4302.

⁵¹ See, e.g., U.S. Dep’t of Justice & Fed. Trade Comm’n, *Antitrust Guidelines for the Licensing of Intellectual Property* 5 (2017), <https://www.justice.gov/atr/IPguidelines/download>; Fed. Trade Comm’n & U.S. Dep’t of Justice, *Antitrust Guidelines for Collaborations Among Competitors*, (2000), available at https://www.ftc.gov/sites/default/files/documents/public_events/joint-venture-hearings-antitrust-guidelines-collaboration-among-competitors/ftcdojguidelines-2.pdf; Fed. Trade Comm’n & U.S. Dep’t of Justice, *Statements of Antitrust Enforcement Policy in Health Care*, Stmt. 2 (1996), available at https://www.ftc.gov/sites/default/files/attachments/competition-policy-guidance/statements_of_antitrust_enforcement_policy_in_health_care_august_1996.pdf (outlining a four-step approach for joint venture analysis). See generally *Am. Needle, Inc. v. Nat’l Football League*, 560 U.S. 183 (2010); *Texaco, Inc. v. Dagher*, 547 U.S. 1 (2006); *Fed. Trade Comm’n v. Ind. Fed’n of Dentists*, 476 U.S. 447 (1986); *Nat’l Collegiate Athletic Ass’n v. Bd. of Regents of Univ. of Okla.*, 468 U.S. 85 (1984). See generally also *In re Mass. Board of Registration in Optometry*, 110 F.T.C. 549 (1988).

United States or its territories, and (2) each person who controls any party to such venture (including such party itself) is a United States person, or a foreign person from a country whose law accords antitrust treatment no less favorable to United States persons than to such country's domestic persons with respect to participation in joint ventures for production."⁵²

2.8 Webb-Pomerene Act

The Webb-Pomerene Act provides a limited antitrust exemption for the formation and operation of associations of otherwise competing businesses to engage collectively in export sales.⁵³ The exemption applies only to the export of "goods, wares, or merchandise."⁵⁴ It does not apply to conduct that has an anticompetitive effect in the United States or that injures domestic competitors of the members of an export association. Nor does it provide any immunity from prosecution under foreign antitrust laws.⁵⁵ Associations seeking an exemption under the Webb-Pomerene Act must file their articles of agreement and annual reports with the Commission, but pre-formation approval from the Commission is not required. Few associations file reports with the FTC; those reports are available on the Commission's website.⁵⁶

2.9 Export Trading Company Act of 1982

The Export Trading Company Act of 1982 ("ETC Act")⁵⁷ is designed to increase U.S. exports of goods and services in several ways.⁵⁸ In Title II, it encourages more

⁵² 15 U.S.C. § 4306(2).

⁵³ *Id.* §§ 61-65.

⁵⁴ *Id.* § 61.

⁵⁵ *See, e.g.*, Case C-89/85, *Ahlström v. Comm'n*, 1988 E.C.R. 5193 (finding Webb-Pomerene association was not exempt from violations of European antitrust law); Commission Decision of 19 December 1990 Relating to a Proceeding Under Article 85 of the EEC Treaty, 1991 O.J. (L 152) 16-20 (denying antitrust exemption to soda ash Webb-Pomerene association); *Competition Comm'n v. Am. Nat. Soda Ash Corp.*, 2008 ZACT 92 (South Africa) (settlement by Webb-Pomerene association with Competition Tribunal South Africa for violations of antitrust laws).

⁵⁶ Webb-Pomerene Act filings are available at <https://www.ftc.gov/policy/reports/webb-pomerene-act-filings>. Two associations filed reports with the FTC for 2015.

⁵⁷ Pub L. No. 97-290, 96 Stat. 1233 (codified in scattered sections of 15 U.S.C.).

efficient provision of export trade services to U.S. producers and suppliers by reducing restrictions on trade financing provided by financial institutions.⁵⁹ In Title III, it reduces uncertainty concerning the application of the U.S. antitrust laws to export trade through the creation of a procedure by which persons engaging in U.S. export trade may obtain an export trade certificate of review (“ETCR”).⁶⁰ In Title IV, also known as the Foreign Trade Antitrust Improvement Act of 1982 or FTAIA, it clarifies the application of the Sherman Act and the FTC Act to conduct involving only non-import foreign commerce.⁶¹ The Title III certificates are discussed briefly here; the application of the Sherman Act and FTC Act is treated below in Chapter 3.

Export trade certificates of review are issued by the Secretary of Commerce with the concurrence of the Department. Persons named in the ETCR obtain limited immunity from suit under both federal and state antitrust laws for activities that are specified in the certificate and that comply with the terms of the certificate.⁶² To obtain an ETCR, an applicant must show that proposed export conduct will:

1. result in neither a substantial lessening of competition or restraint of trade within the United States nor a substantial restraint of the export trade of any competitor of the applicant;
2. not unreasonably enhance, stabilize, or depress prices in the United States of the class of goods or services covered by the application;
3. not constitute unfair methods of competition against competitors engaged in the export of the class of goods or services exported by the applicant; and
4. not include any act that may reasonably be expected to result in the sale for consumption or resale in the United States of such goods or services.⁶³

Congress intended that these standards “encompass the full range of the antitrust laws,” as defined in the ETC Act.⁶⁴

⁵⁸ 15 U.S.C. § 4001(b).

⁵⁹ See 12 U.S.C. §§ 372, 635 a-4, 1841, 1843. Because Title II does not implicate the antitrust laws, it is not discussed further in these Guidelines.

⁶⁰ 15 U.S.C. §§ 4011-21.

⁶¹ *Id.* § 6a (Sherman Act); *id.* § 45(a)(3) (FTC Act); see *infra* Sections 3.1-3.3.

⁶² H.R. REP. NO. 97-924, at 26 (1982); see 15 U.S.C. § 4021(6).

⁶³ 15 U.S.C. § 4013(a).

The protections provided by an ETCR from the federal and state antitrust laws are not unlimited. First, conduct that falls outside the scope of a certificate remains fully subject to private and governmental enforcement actions. Second, an ETCR that is obtained by fraud is void from the outset and thus offers no protection under the antitrust laws. Third, any person that has been injured by certified conduct may recover actual (though not treble) damages if that conduct is found to violate any of the statutory criteria described above.⁶⁵ In any such action, certified conduct enjoys a presumption of legality, and the prevailing party is entitled to recover costs and attorneys' fees.⁶⁶ Fourth, an ETCR does not constitute, explicitly or implicitly, an endorsement or opinion by the Secretary of Commerce or by the Department concerning the legality of such business plans under the laws of any foreign country. Finally, an ETCR does not insulate conduct from investigation or enforcement by a foreign antitrust authority.

The Secretary of Commerce may revoke or modify an ETCR if the Secretary or the Department determines that the applicant's export activities have ceased to comply with the statutory criteria for obtaining a certificate.⁶⁷ The Department may also bring suit under Section 15 of the Clayton Act to enjoin conduct that threatens a "clear and irreparable harm to the national interest,"⁶⁸ even if the conduct has been pre-approved as part of an ETCR.

The Commerce Department, in consultation with the Department, has issued guidelines setting forth the standards used in reviewing ETCR applications.⁶⁹

⁶⁴ H.R. REP. NO. 97-924, at 26(1982); *see* 15 U.S.C. § 4021(6).

⁶⁵ 15 U.S.C. § 4016(b)(1).

⁶⁶ *See id.* § 4016(b)(3), (b)(4).

⁶⁷ *Id.* § 4014(b).

⁶⁸ *Id.* § 4016(b)(5); *see also id.* § 25.

⁶⁹ *See* Int'l Trade Admin. (U.S. Dep't of Commerce), *The Export Trade Certificate of Review Program - The Competitive Edge for U.S. Exporters: Guidelines* (2015), http://trade.gov/mas/ian/etca/tg_ian_002140.asp. The Commerce Department's Export Trading Company Guidebook provides information on establishing and using an export trading company, including factors to consider when applying for an ETCR. Int'l Trade Admin. (U.S. Dep't of Commerce), *The Export Trading Company Guidebook* (1987). As of the date of these Guidelines, there are approximately 80 active certificates.

2.10 Wilson Tariff Act

The Wilson Tariff Act⁷⁰ prohibits “every combination, conspiracy, trust, agreement, or contract” made by or between two or more persons or corporations, either of whom is engaged in importing any article from a foreign country into the United States, where the agreement is intended to restrain trade or increase the market price in any part of the United States of the imported articles, or of “any manufacture into which such imported article enters or is intended to enter.” Violation of the Wilson Tariff Act is a misdemeanor, punishable by a maximum fine of \$5,000 or one year in prison. This Act also provides for seizure of the imported articles.⁷¹

2.11 Trade Act of 1974, Section 301

Section 301 of the Trade Act of 1974 provides that the U.S. Trade Representative (“USTR”), subject to the specific direction, if any, of the President, may take action, including restricting imports, to enforce rights of the United States under any trade agreement, to address acts inconsistent with the international legal rights of the United States, or to respond to unjustifiable, unreasonable or discriminatory practices of foreign governments that burden or restrict U.S. commerce.⁷² Interested parties may initiate such actions through petitions to the USTR, or the USTR may itself initiate proceedings. Section 301(d)(3)(B)(i)(IV) includes the “toleration by a foreign government of systematic anticompetitive activities by enterprises or among enterprises in the foreign country that have the effect of restricting . . . access of United States goods or services to a foreign market” as one of the “unreasonable” practices that might justify such a proceeding.⁷³ The Department participates in the interagency committee that makes recommendations to the President on what actions, if any, should be taken.

2.12 Tariff Act of 1930

The Tariff Act of 1930⁷⁴ provides remedies for certain violations of the trade laws with antitrust implications, including violations of the laws regarding

⁷⁰ 15 U.S.C. §§ 8-11.

⁷¹ *Id.* § 11.

⁷² 19 U.S.C. § 2411.

⁷³ *Id.*

⁷⁴ *Id.* §§ 1202 *et seq.*

countervailing and anti-dumping duties.⁷⁵ Significant for purposes of the Agencies' enforcement of the federal antitrust laws, certain settlements of trade disputes entered under specific procedures set forth in the U.S. trade laws are granted implied immunity under this Act, even if the settlement involves price and quantity agreements or otherwise implicates the antitrust laws.⁷⁶ Agreements among competitors that do not comply with specific procedures in the U.S. trade laws or go beyond the measures authorized by such laws, however, are subject to the antitrust laws to the same extent as conduct unrelated to the settlement of a trade dispute. In the absence of legal authority, the fact, without more, that U.S. or foreign government officials were involved in or encouraged measures that would otherwise violate the antitrust laws does not immunize such arrangements.⁷⁷

3. Agencies' Application of U.S. Antitrust Law to Conduct Involving Foreign Commerce

In making investigative and enforcement decisions, the Agencies focus on whether there is a sufficient connection between the anticompetitive conduct and the United States such that the federal antitrust laws apply and the Agencies' enforcement would redress harm or threatened harm to U.S. commerce and consumers. This Chapter describes circumstances under which a sufficient connection exists. If the Agencies determine that a sufficient connection exists, the Agencies generally will

⁷⁵ *Id.* §§ 1671, 1673.

⁷⁶ *See, e.g.*, Letter from Charles F. Rule, Acting Assistant Attorney General, Antitrust Division, Department of Justice, to Mr. Makoto Kuroda, Vice-Minister for International Affairs, Japanese Ministry of International Trade and Industry, July 30, 1986 (concluding that a suspension agreement did not violate the antitrust laws on the basis of factual representations that the agreement applied only to products under investigation, that it did not require pricing above levels needed to eliminate sales below foreign market value, and that assigning weighted-average foreign market values to exporters who were not respondents in the investigation was necessary to achieve the purpose of the anti-dumping law).

⁷⁷ *Cf. United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 226 (1940) ("Though employees of the government may have known of those programs and winked at them or tacitly approved them, no immunity would have thereby been obtained. For Congress had specified the precise manner and method of securing immunity [in the National Industrial Recovery Act]. None other would suffice. . . ."); *see also Otter Tail Power Co. v. United States*, 410 U.S. 366, 378-79 (1973).

proceed in the normal course, subject to the considerations described in Chapter 4 and principles of prosecutorial discretion.

It is well established that the federal antitrust laws apply to foreign conduct that has a substantial and intended effect in the United States.⁷⁸ In 1982, Congress reaffirmed the applicability of the antitrust laws to conduct involving foreign commerce when it passed the FTAIA, which added Section 6a to the Sherman Act and Section 5(a)(3) to the FTC Act.⁷⁹ These provisions clarify whether the antitrust laws reach conduct—regardless of where it takes place—that involves trade or commerce with foreign nations.⁸⁰ Specifically, Section 6a provides:

Sections 1 to 7 of [the Sherman Act] shall not apply to conduct involving trade or commerce (other than import trade or import commerce) with foreign nations unless—

(1) such conduct has a direct, substantial, and reasonably foreseeable effect—

(A) on trade or commerce which is not trade or commerce with foreign nations, or on import trade or import commerce with foreign nations; or

⁷⁸ *Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 796 (1993); *United States v. Nippon Paper Indus. Co.*, 109 F.3d 1, 9 (1st Cir. 1997); *United States v. Aluminum Co. of Am.*, 148 F.2d 416, 444 (2d Cir. 1945).

⁷⁹ 15 U.S.C. § 6a (Sherman Act); *id.* § 45(a)(3) (FTC Act).

⁸⁰ The Supreme Court and other courts have declined to consider whether Section 6a amended existing law or merely codified it. *Hartford Fire*, 509 U.S. at 796 n.23; *Nippon Paper*, 109 F.3d at 4. Other courts have held that Section 6a supplanted the prior standard for the extraterritorial reach of the Sherman Act. *McGlinchy v. Shell Chem. Co.*, 845 F.2d 802, 813 n.8 (9th Cir. 1988); *The In Porters, S.A. v. Hanes Printables, Inc.*, 663 F. Supp. 494, 497 (M.D.N.C. 1987). If both the prior precedent and Section 6a apply in a single case, their requirements likely yield the same results. Conduct that either involves U.S. import commerce, *see infra* Section 3.1, or has a direct, substantial, and reasonably foreseeable effect on U.S. commerce, *see infra* Section 3.2, likely has a substantial and intended effect in the United States. In the Agencies' view, however, a separate showing of substantial and intended effects is unnecessary when some of the challenged conduct takes place in the United States because such a case would involve application, at least in part, of the U.S. antitrust law to territorial conduct.

(B) on export trade or export commerce with foreign nations, of a person engaged in such trade or commerce in the United States; and

(2) such effect gives rise to a claim under the provisions of sections 1 to 7 of this title, other than this section.

If sections 1 to 7 of this title apply to such conduct only because of the operation of paragraph (1)(B), then sections 1 to 7 of this title shall apply to such conduct only for injury to export business in the United States.⁸¹

Section 5(a)(3) of the FTC Act closely parallels this provision.⁸²

Although the FTAIA clarified the reach of the Sherman Act and the FTC Act, it did not address the reach of the Clayton Act. Nevertheless, the Agencies would apply the principles outlined below when making enforcement decisions regarding mergers and acquisitions involving trade or commerce with foreign nations.

⁸¹ 15 U.S.C. § 6a.

⁸² See 15 U.S.C § 45(a)(3). The federal courts of appeals have expressed differing views as to whether the FTAIA goes to a claim's merits or a court's subject-matter jurisdiction. Compare *In re Monosodium Glutamate Antitrust Litig.*, 477 F.3d 535, 537 (8th Cir. 2007) (treating FTAIA as a question of subject-matter jurisdiction), *Empagran S.A. v. F. Hoffmann-LaRoche, Ltd.*, 417 F.3d 1267, 1269 (D.C. Cir. 2005) (same), *United States v. Anderson*, 326 F.3d 1319, 1329-30 (11th Cir. 2003) (same), and *Den Norske Stats Oljeselskap As v. HeereMac Vof*, 241 F.3d 420, 424-25 (5th Cir. 2001) (same), with *Minn-Chem, Inc. v. Agrium, Inc.*, 683 F.3d 845, 852 (7th Cir. 2012) (en banc) (FTAIA relates to merits of a claim), *overruling United Phosphorus, Ltd. v. Angus Chem. Co.*, 322 F.3d 942, 951-52 (7th Cir. 2003) (en banc) (FTAIA relates to court's subject-matter jurisdiction), *United States v. Hsiung*, 778 F.3d 738 (9th Cir. 2015) (merits), *overruling United States v. LSL Biotechs.*, 379 F.3d 672, 677 (9th Cir. 2004) (subject-matter jurisdiction), *Lotes Co., Ltd. v. Hon Hai Precision Indus. Co.*, 753 F.3d 395, 405 (2d Cir. 2014) (merits), *overruling Filetech S.A. v. France Telecom S.A.*, 157 F.3d 922, 929-32 (2d Cir. 1998) (subject-matter jurisdiction), and *Animal Sci. Prods., Inc. v. China Minmetals Corp.*, 654 F.3d 462, 467-68 (3d Cir. 2011) (merits), *overruling Carpet Grp. Int'l v. Oriental Rug Importers Ass'n, Inc.*, 227 F.3d 62, 69-70 (3d Cir. 2000) (subject-matter jurisdiction). This difference will not affect the Agencies' decisions about whether to proceed with an investigation or an enforcement action because the Agencies will not proceed when the FTAIA precludes the claim on the merits or strips the court of jurisdiction.

3.1 Conduct Involving Import Commerce

In general, the proscriptions in the Sherman Act and the FTC Act apply to conduct subject to Congress' constitutional power "to regulate commerce with foreign nations," among other things.⁸³ The FTAIA places "conduct involving trade or commerce (other than import trade or import commerce) with foreign nations" beyond the reach of these statutes, unless the conduct satisfies the FTAIA's effects exception described below.⁸⁴ The parenthetical language, however, excludes from the FTAIA's operation conduct involving import trade and import commerce. This provision is commonly referred to as the "import commerce exclusion."⁸⁵ As a result of this exclusion, conduct involving U.S. import commerce, like conduct involving commerce within the United States, is "subject to the Sherman Act's [or FTC Act's] general requirements for effects on commerce, not to the special requirements spelled out in the FTAIA."⁸⁶

The import commerce exclusion does not apply to conduct merely because those participating in the conduct are also engaged in import commerce. Rather the conduct being challenged must itself involve import commerce.⁸⁷ Conversely, the import commerce exclusion may apply to conduct even if the participants themselves do not act as importers. For example, a firm cannot escape liability for unreasonably restraining or monopolizing import commerce by outsourcing the delivery of its product to the United States.

Conduct may "involve" import commerce even if it is not directed specifically or exclusively at import commerce and even if the import commerce involved

⁸³ U.S. Const. art. I, § 8, cl. 3; *see, e.g.*, 15 U.S.C. § 1 (outlawing conspiracies in unreasonably restraint of "trade or commerce . . . with foreign nations"); *id.* §§ 44, 45(a)(1) (outlawing "unfair methods of competition in or affecting" "commerce . . . with foreign nations"); *see generally* *United States v. Se. Underwriters Ass'n*, 322 U.S. 533, 588 (1944); *Fed. Trade Comm'n v. Klesner*, 274 U.S. 145, 151 (1927).

⁸⁴ *See infra* Section 3.2.

⁸⁵ *See, e.g.*, *Minn-Chem*, 683 F.3d at 855.

⁸⁶ *Id.* at 854; *see Hsiung*, 778 F.3d at 754; *cf.* H.R. REP. NO. 97-686, at 9 (1982) (explaining that "import restraints, which can be damaging to American consumers, remain covered by the law").

⁸⁷ *Carpet Grp.*, 227 F.3d at 71.

constitutes a relatively small portion of the worldwide commerce involved in the anticompetitive conduct.

Illustrative Example A

Situation: Corporation 1 and Corporation 2 have factories in Country Alpha where they manufacture Widget X. Corporation 1 and Corporation 2 agree to charge higher prices for Widget X. They sell Widget X to customers around the world, including in the United States.

Discussion: Corporation 1 and Corporation 2 manufacture Widget X outside the United States and sell Widget X in or for delivery to the United States. Thus their conspiracy to fix the price of Widget X is conduct involving U.S. import commerce. Accordingly, the conduct is prohibited by Section 1 of the Sherman Act as a conspiracy in restraint of “trade . . . with foreign nations,” and Section 6a would not exempt this conspiracy from the antitrust laws. The circumstance that the price-fixing agreement concerned worldwide sales and did not specifically identify sales into the United States would not change the analysis. Likewise, even if the sales of Widget X in import commerce were a relatively small proportion or dollar amount of the price-fixed goods sold worldwide, the analysis would remain unchanged.⁸⁸

Illustrative Example B

Situation: Shipping Corporation 1 and Shipping Corporation 2 are located in Country Alpha and provide international shipping services on various routes to the United States. Shipping Corporation 1 and Shipping Corporation 2 agree to charge higher prices for shipping services on select routes, including some routes to the United States.

Discussion: Shipping Corporation 1 and Shipping Corporation 2’s conspiracy to fix the price of shipping services, which are closely connected to the importation of goods into the United States, is conduct involving import commerce. Moreover, the conduct would also involve

⁸⁸ See generally *Hsiung*, 778 F.3d at 754-56 (affirming Sherman Act convictions on ground that evidence that conspirators sold price-fixed components in or for delivery to the United States satisfied Section 6a’s import commerce exclusion).

import commerce if Shipping Corporation 1 and Shipping Corporation 2 sold shipping services to customers in the United States for the transport of goods to the United States. In either case, the conduct is prohibited by Section 1 of the Sherman Act as a conspiracy in restraint of “trade . . . with foreign nations,” and Section 6a would not exempt this conspiracy from the antitrust laws. The conduct also likely has a direct, substantial, and reasonably foreseeable effect on import commerce by raising the price of importing goods into the United States or of the imported goods themselves, in which case it would also satisfy the FTAIA’s effects exception, described below.⁸⁹

3.2 Conduct Involving Non-Import Foreign Commerce

The FTAIA initially places conduct involving non-import foreign commerce, which means U.S. export commerce and wholly foreign commerce, outside the reach of the Sherman Act and FTC Act.⁹⁰ What is commonly referred to as the FTAIA’s “effects exception”⁹¹ brings such conduct back within the reach of the Acts if the conduct has a direct, substantial, and reasonably foreseeable effect on commerce within the United States, U.S. import commerce, or the export commerce of a U.S. exporter, and that effect gives rise to a claim.⁹²

Whether an alleged effect on such commerce is direct, substantial, and reasonably foreseeable is a question of fact. An effect on commerce is “direct” if there is a reasonably proximate causal nexus, that is, if the effect is proximately caused by the alleged anticompetitive conduct.⁹³ In other words, an effect is direct if, in the

⁸⁹ See *infra* Section 3.2.

⁹⁰ *F. Hoffmann-La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155, 162-63 (2004).

⁹¹ See, e.g., *Animal Sci. Prods., Inc. v. China Minmetals Corp.*, 654 F.3d 462, 471 (3d Cir. 2011).

⁹² *Empagran*, 542 U.S. at 162.

⁹³ See *Minn-Chem*, 683 F.3d at 857; *Lotes Co. v. Hon Hai Precision Indus. Co.*, 753 F.3d 395, 409-13 (2d Cir. 2014). Although one court of appeals has held that an effect on U.S. commerce is “direct” for purposes of Section 6a only if it follows “as an immediate consequence” of the defendant’s activity, *United States v. LSL Biotechs.*, 379 F.3d 672, 680 (9th Cir. 2004), the proximate cause standard is more consistent with the language of the statute. As the Seventh Circuit explained “[s]uperimposing

natural or ordinary course of events, the alleged anticompetitive conduct would produce an effect on commerce. The substantiality requirement does not provide a minimum pecuniary threshold, nor does it require that the effects be quantified.⁹⁴ Finally, the “reasonable foreseeability” requirement is an objective test, requiring that the effect be foreseeable to “a reasonable person making practical business judgments.”⁹⁵

Illustrative Example C

Situation: Corporation 1 and Corporation 2 have factories in Country Alpha where they manufacture Component X, a piece of high-tech hardware used in electronic products. Corporation 1 and Corporation 2 agree to raise prices for Component X sold to finished product integrators. These integrators have factories in Country Beta where they incorporate Component X into finished electronic products sold in the United States.

Discussion: Assuming Corporation 1 and Corporation 2 do not sell Component X in or for delivery to the United States, their conspiracy to fix the prices of Component X is conduct involving wholly foreign commerce, that is, commerce between Countries Alpha and Beta, and thus would not fall within the FTAIA’s import commerce exclusion. The conduct would still fall within the reach of the Sherman Act if it has a (1) direct, (2) substantial, and (3) reasonably foreseeable effect on

the idea of ‘immediate consequence’ on top of the full [integrated] phrase [‘direct, substantial, and reasonably foreseeable’] results in a stricter test than the complete text of the statute can bear” and “comes close to ignoring the fact that straightforward import commerce has already been excluded from the FTAIA’s coverage.” *Minn-Chem*, 683 F.3d at 857. Nevertheless, any difference between these two tests is unlikely to yield different results in the vast majority of cases.

⁹⁴ Cf. *McLain v. Real Estate Bd. of New Orleans, Inc.*, 444 U.S. 232, 243 (1980) (“Nor is jurisdiction defeated in a case relying on anticompetitive effects by plaintiff’s failure to quantify the adverse impact of defendant’s conduct.”); *Goldfarb v. Va. State Bar*, 421 U.S. 773, 785 (1975) (“[O]nce an effect is shown, no specific magnitude need be proved”).

⁹⁵ *Animal Sci.*, 654 F.3d at 471.

U.S. import commerce in finished electronic products that incorporate Component X.

Assessing the conduct's effects can be a fact-intensive inquiry. Here the Agencies would collect and analyze evidence to determine whether the price fixing of the component had an effect on U.S. import commerce. If it does, the Agencies would further analyze the evidence and collect additional evidence, as necessary, to determine: (1) whether the price fixing was the proximate cause of that effect, (2) whether the effect was substantial, and (3) whether that effect was a result of the price fixing that was foreseeable to a reasonable person making practical business judgments.

The fact that the price-fixed component was first sold to integrators in Country Beta, where it was incorporated into finished electronic products which were then sold in, or for delivery to, the United States would not render indirect an effect on import commerce in those products. Nor would the fact that the finished products were sold around the world or that Corporation 1 and Corporation 2 were unaware or indifferent to whether the finished products were sold in the United States render insubstantial or not reasonably foreseeable the effect on import commerce. In this context, substantiality is not a question of proportion. So long as the effect on import commerce is substantial, it does not matter if that effect is smaller than the conduct's effect outside the United States. Reasonable foreseeability is an objective standard, which asks not whether the conspirators actually foresaw the effect, but rather whether a reasonable person would foresee the effect on import commerce.

The relative size of Component X as a cost component of the finished electronic products may be relevant to determining whether the price-fixing conduct has the requisite effect, but it is not dispositive. For example, Component X may account for a large portion of the cost of the finished product, but competition from substitutes for the finished electronic products that do not incorporate Component X makes it unlikely that a price increase on Component X will affect import commerce in the finished products. Conversely, Component X may account for a small fraction of the cost of the finished product but the finished electronic product pricing is closely tied to input costs due to market conditions or contractual arrangements, or for other reasons. Thus, any price increase on Component X could, as a practical matter, have the requisite effect on import commerce in the finished electronic product.

Evidence that the conspirators actually expected their conduct to cause an effect on import commerce in the finished products would help to show that a direct, substantial, and reasonably foreseeable effect existed. Such evidence might include Corporation 1 and Corporation 2's contacts with purchasers in the United States, including negotiations regarding Component X pricing, as well as Corporation 1 and Corporation 2's discussing market conditions and tracking sales of the finished products in the United States. But the presence or absence of such evidence would not fundamentally alter the Agencies' analysis.⁹⁶

Illustrative Example D

Situation: Company 1 and Company 2 are located in Country Alpha, where they extract Mineral X. Company 3 is located in the United States, where it extracts Mineral X. Company 3 is able to meet the entire U.S. demand for Mineral X and does so. Company 1 and Company 2 supply the rest of the world with Mineral X, but not the United States. By mutual agreement, Company 1 and Company 2 reduce their sales of Mineral X, significantly driving up the price of Mineral X outside the United States. Because of the increased price for Mineral X outside the United States, Company 3 begins to export much of the U.S. supply of Mineral X. No other firms replace Company 3's diverted sales, and the price of Mineral X rises inside the United States.

Discussion: Company 1 and Company 2's conspiracy to reduce their sales of Mineral X outside the United States is conduct involving wholly foreign commerce. Such conduct would fall within the reach of the Sherman Act if it has a direct, substantial, and reasonably foreseeable effect on U.S. interstate commerce in Mineral X. Here, the conspiracy had the effect of raising prices on interstate sales of Mineral

⁹⁶ See generally *Hsiung*, 778 F.3d at 756-60 (affirming Sherman Act convictions on alternate ground that evidence that price fixing of components sold abroad had a direct effect on U.S. import commerce in finished products containing price-fixed components satisfied Section 6a's effects exception).

X. That effect appears to be direct, substantial, and reasonably foreseeable.⁹⁷

The FTAIA's effects exception also requires that the effect on commerce within the United States, U.S. import commerce, or the export commerce of a U.S. exporter "gives rise to" a claim under the antitrust laws. In a damages action brought under the antitrust laws, this provision requires that the effect on U.S. commerce be an adverse one and that the effect proximately cause the plaintiff's antitrust injury.⁹⁸ It is therefore appropriate for courts to distinguish among damages claims based upon the underlying transaction that forms the basis of the injury to ensure that each claim redresses injury consistent with the requirements of the antitrust laws, including the FTAIA. For example, when anticompetitive conduct affects commerce around the world, a plaintiff whose antitrust injury arises from that conduct's effect on U.S. import commerce may recover damages for that injury, but a plaintiff that suffers a foreign injury that is independent of, and not proximately caused by, the conduct's effect on U.S. commerce cannot recover damages under the U.S. antitrust laws.⁹⁹

Similarly, when the United States is a plaintiff seeking damages under Section 4A of the Clayton Act for injury to its business or property, the United States must establish that the alleged conduct's effect on U.S. commerce proximately caused the injury to the United States' business or property.

⁹⁷ Cf. H.R. REP. NO. 97-686, at 13 (1982) ("For example, if a domestic export cartel were so strong as to have a 'spillover' effect on commerce within this country—by creating a world-wide shortage or artificially inflated world-wide price that had the effect of raising domestic prices—the cartel's conduct would fall within the reach of our antitrust laws. Such an impact would, at least over time, meet the test of a direct, substantial and reasonably foreseeable effect on domestic commerce.")

⁹⁸ *F. Hoffmann-La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155, 173 (2004); *Lotes Co., Ltd. v. Hon Hai Precision Industry Co.*, 753 F.3d 395, 414 (2d Cir. 2014); *In re Dynamic Random Access Memory Antitrust Litig.*, 546 F.3d 981, 987 (9th Cir. 2008); *In re Monosodium Glutamate Antitrust Litig.*, 477 F.3d 535, 538 (8th Cir. 2007); *Empagran S.A. v. F. Hoffmann-La Roche Ltd.*, 417 F.3d 1267, 1271 (D.C. Cir. 2005).

⁹⁹ *Empagran*, 542 U.S. at 165, 169-73 (the federal antitrust laws "reflect a legislative effort to redress *domestic* antitrust injury that foreign anticompetitive conduct has caused") (emphasis added)); see also *Lotes*, 753 F.3d at 413-15.

Civil actions for equitable relief brought by the Agencies or criminal enforcement actions brought by the Department, on behalf of the United States, do not seek to redress a pecuniary injury to the government. Instead, such actions are brought by the sovereign to enjoin or prosecute a violation of its laws. In such cases, a direct, substantial, and reasonably foreseeable effect on U.S. commerce would give rise to the sovereign's claim.¹⁰⁰

Thus, as a result of the effects exception's "gives rise to" provision, the Sherman Act can apply and not apply to the same conduct, depending upon the circumstances, including the plaintiff bringing the claim, the nature of the claim, and the injury underlying the claim.¹⁰¹

3.3 Conduct Involving U.S. Government Financing or Purchasing

The Agencies may, in appropriate cases, take enforcement action when the U.S. government is a purchaser, or substantially funds the purchase, of goods or services for consumption or use abroad. Cases in which the effect of anticompetitive conduct with respect to the sale of these goods or services falls primarily on U.S. taxpayers may qualify for redress under the federal antitrust laws.¹⁰² The requisite U.S.

¹⁰⁰ The Department's Antitrust Corporate Leniency Policy requires applicants to make restitution to the victims of their offense. *See supra* n.42. Consistent with the Supreme Court's and courts of appeals' interpretation of the "gives rise to" provision that damages for violations of the Sherman Act are not available for foreign injuries independent of and not proximately caused by any adverse effect on U.S. commerce, *supra* n.98, the Department construes the leniency policy to not require restitution to victims whose antitrust injuries are independent of and not proximately caused by an adverse effect on (i) trade or commerce within the United States, (ii) import trade or commerce, or (iii) the export trade or commerce of a person engaged in such trade or commerce in the United States, which effect was proximately caused by the anticompetitive activity being reported.

¹⁰¹ *Empagran*, 542 U.S. at 174; *see also Motorola Mobility LLC v. AU Optronics Corp.*, 775 F.3d 816, 820, 825 (7th Cir. 2014) (noting that the FTAIA "would not block the Department of Justice from seeking criminal or injunctive remedies" for price fixing that had the requisite effect on U.S. commerce, while holding private plaintiff could not recover damages because the injury did not arise from that effect).

¹⁰² *See United States v. Anderson*, 326 F.3d 1319 (11th Cir. 2003) (applying Sherman Act to bid rigging on USAID-funded construction projects in Egypt). *Cf. United States v. Concentrated Phosphate Exp. Ass'n*, 393 U.S. 199, 208 (1968) ("[A]lthough the fertilizer shipments were consigned to Korea and although in most

government involvement could include an actual purchase of goods by the U.S. government for shipment abroad, a U.S. government grant to a foreign government that is specifically earmarked for the transaction, or a U.S. government loan specifically earmarked for the transaction that is made on such generous terms that it amounts to a grant. The Agencies consider U.S. government interests to be sufficiently affected when, as a result of its payment or financing, the U.S. government bears a substantial portion of the cost of the transaction. U.S. government interests would not be considered to be sufficiently implicated with respect to a transaction that is merely funded by an international agency, or a transaction in which the foreign government received non-earmarked funds from the United States as part of a general government-to-government aid program.

4. Agencies' Consideration of Foreign Jurisdictions

4.1 Comity

In enforcing the federal antitrust laws, the Agencies consider international comity. Comity itself reflects the broad concept of respect among co-equal sovereign nations and plays a role in determining “the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation.”¹⁰³ In determining whether to investigate or bring an action, or to seek particular remedies in a given case, the Agencies take into account whether significant interests of any foreign sovereign would be affected.¹⁰⁴

cases Korea formally let the contracts, American participation was the overwhelmingly dominant feature. The burden of noncompetitive pricing fell, not on any foreign purchaser, but on the American taxpayer. The United States was, in essence, furnishing fertilizer to Korea. . . . The foreign elements in the transaction were, by comparison, insignificant.”); *United States v. Standard Tallow Corp.*, No. 85-cv-2062, 1988 WL 72620 (S.D.N.Y. Jan. 28, 1988) (consent decree) (barring suppliers from fixing prices or rigging bids for the sale of tallow financed in whole or in part through grants or loans by the U.S. Government to the Government of Egypt); *United States v. Anthracite Exp. Ass'n*, No. 70-cv-9171, 1970 WL 540 (M.D. Pa. Nov. 12, 1970)(consent decree) (barring price-fixing, bid- rigging, and market allocation in Army foreign aid program).

¹⁰³ *Hilton v. Guyot*, 159 U.S. 113, 164 (1895).

¹⁰⁴ The Agencies, like other competition authorities around the world, consider the legitimate interests of foreign sovereigns in accordance with the recommendations

A decision to take an investigative step or to prosecute an antitrust action under the federal antitrust laws represents a determination that the importance of antitrust enforcement outweighs any relevant foreign policy concerns. That determination is entitled to deference.¹⁰⁵ Some courts have undertaken a comity analysis in disputes between private parties.¹⁰⁶

In performing this comity analysis, the Agencies consider a number of relevant factors. The relative weight given to each factor depends on the facts and circumstances of each case. Among other things, the Agencies weigh: the existence of a purpose to affect or an actual effect on U.S. commerce; the significance and foreseeability of the effects of the anticompetitive conduct on the United States; the degree of conflict with a foreign jurisdiction's law or articulated policy; the extent to which the enforcement activities of another jurisdiction, including remedies resulting from those enforcement activities, may be affected; and the effectiveness of foreign enforcement as compared to U.S. enforcement.

An investigation or enforcement action by a foreign authority will not preclude an investigation or enforcement action by either the Department or the Commission. Rather, the Agency will determine whether, in light of actions by the foreign authority, investigation or enforcement is warranted to address harm or threatened harm to U.S. commerce and consumers from anticompetitive conduct. In cases in which an Agency opens an investigation or brings an enforcement action concerning conduct under investigation by a foreign authority, it may coordinate with that authority.¹⁰⁷

Several of the comity factors considered by the Agencies warrant further discussion.

First, when considering the degree of conflict with foreign laws, the Agencies review the relevant laws of the interested foreign sovereigns. In the context of the Agencies' enforcement, conflicts of law are rare. As more jurisdictions have adopted and enforce antitrust laws that are compatible with those of the United States, it has

of the OECD and various bilateral agreements, and may, as appropriate, discuss these issues with foreign counterparts. *See infra* Chapter 5.

¹⁰⁵ *See, e.g., United States v. Baker Hughes, Inc.*, 731 F. Supp. 3, 6 n.5 (D.D.C.), *aff'd*, 908 F.2d 981 (D.C. Cir. 1990).

¹⁰⁶ *See, e.g., Timberlane Lumber Co. v. Bank of Am.*, 549 F.2d 597, 614-16 (9th Cir. 1976).

¹⁰⁷ *See infra* Chapter 5.

become increasingly common that no conflict exists between U.S. antitrust enforcement interests and the laws or policies of a foreign sovereign. Further, no conflict of law exists if a person subject to the laws of two sovereigns can comply with both.¹⁰⁸ Moreover, no conflict exists in cases where foreign law is neutral as to particular conduct, because it remains possible for the parties in question to comply with the U.S. antitrust laws without violating foreign law. In situations where a conflict of law exists, however, comity may counsel in favor of declining enforcement.

Second, the Agencies will assess the articulated interests and policies of a foreign sovereign beyond whether there is a conflict with foreign law. In determining whether to investigate or bring an enforcement action regarding an alleged antitrust violation, the Agencies consider the extent to which a foreign sovereign encourages or discourages certain courses of conduct or leaves parties free to choose among different courses of conduct.

Third, the Agencies consider whether the objectives sought to be obtained by U.S. enforcement could be achieved by foreign enforcement. The Agencies may consult with interested foreign authorities with the purpose of working to understand and address harm or threatened harm to U.S. commerce and consumers from anticompetitive conduct.

4.2 Consideration of Foreign Government Involvement

In some instances, a foreign government may be involved in anticompetitive conduct that involves or affects U.S. commerce. In determining whether to conduct an investigation or to file an enforcement action in cases in which foreign government involvement is known or suspected, the Agencies consider four legal doctrines that lie at the intersection of government action and the antitrust laws: (1) foreign sovereign immunity; (2) foreign sovereign compulsion; (3) act of state; and (4) petitioning of sovereigns.¹⁰⁹

¹⁰⁸ *Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 798-99 (1993).

¹⁰⁹ In some cases, investigation may be necessary to assess the nature of foreign government involvement and the applicability of the principles discussed below, even where an Agency ultimately refrains from enforcement.

4.2.1 Foreign Sovereign Immunity

In civil cases, the Foreign Sovereign Immunities Act of 1976 (“FSIA”)¹¹⁰ provides the “sole basis for obtaining jurisdiction over a foreign state in the courts of this country.”¹¹¹ The FSIA shields foreign states¹¹² from the civil jurisdiction of the courts of the United States, subject to certain enumerated exceptions and to treaties in place at the time of the FSIA’s enactment.¹¹³ Under the FSIA, federal courts have jurisdiction over foreign states in certain cases in which the foreign state has:

- a. waived immunity explicitly or by implication;
- b. engaged in commercial activity;
- c. expropriated property in violation of international law;
- d. acquired rights to property in the United States;
- e. committed certain torts within the United States; or
- f. agreed to arbitration of the dispute.¹¹⁴

The “commercial activity” exception is the most relevant exception for antitrust purposes.¹¹⁵ The FSIA provides that a foreign state is not immune from jurisdiction of U.S. courts when:

¹¹⁰ 28 U.S.C. § 1330 *et seq.*

¹¹¹ *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 443 (1989).

¹¹² The FSIA defines “foreign state” to include a “political subdivision of a foreign state or an agency or instrumentality of a foreign state.” 28 U.S.C. § 1603(a). It further defines an “agency or instrumentality of a foreign state” to mean any entity “(1) which is a separate legal person, corporate or otherwise; and (2) which is an organ of a foreign state or political subdivision thereof, or a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof; and (3) which is neither a citizen of a State of the United States [as defined elsewhere in Title 28 of the U.S. Code], nor created under the laws of any third country.” *Id.* § 1603(b). The majority-ownership prong of this definition encompasses state-owned corporations, so long as the “foreign state itself owns a majority of the corporation’s shares.” *Dole Food Co. v. Patrickson*, 538 U.S. 468, 477 (2003). The Act does not, however, apply to cases brought against individual foreign officials, whose immunity is governed instead by the common law. *Samantar v. Yousuf*, 560 U.S. 305, 319 (2010).

¹¹³ 28 U.S.C. § 1604.

¹¹⁴ *See generally id.* § 1605.

the action is based upon a commercial activity carried on in the United States by the foreign state; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States.¹¹⁶

“Commercial activity” is defined to include “either a regular course of commercial conduct or a particular commercial transaction or act,” and the FSIA provides that “the commercial character of an activity shall be determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose.”¹¹⁷ Commercial activity is distinct from sovereign activity inasmuch as the former is understood to include “those powers that can also be exercised by private citizens,” while the latter is understood to include “powers peculiar to sovereigns.”¹¹⁸ In other words, the principal question is whether the government is acting “not as a regulator of a market, but in the manner of a private player within it.”¹¹⁹

To determine whether an action is “based upon” a commercial activity, a court must focus on “the particular conduct on which the plaintiff’s action is based,” *i.e.*, “those

¹¹⁵ *Id.* § 1605(a)(2); *see also id.* § 1603(e) (defining “commercial activity carried on in the United States by a foreign state” as “commercial activity carried on by such state and having substantial contact with the United States”).

¹¹⁶ *Id.* § 1605(a)(2).

¹¹⁷ *Id.* § 1603(d).

¹¹⁸ *Alfred Dunhill of London, Inc. v. Republic of Cuba*, 425 U.S. 682, 704 (1976).

¹¹⁹ *Republic of Arg. v. Weltover, Inc.*, 504 U.S. 607, 614 (1992); *see also Saudi Arabia v. Nelson*, 507 U.S. 349, 360 (1993); *Universal Trading & Inv. Co. v. Bureau for Representing Ukrainian Interests in Int’l & Foreign Courts*, 727 F.3d 10, 19-20 (1st Cir. 2013); *Cnty. Fin. Grp., Inc. v. Republic of Kenya*, 663 F.3d 977, 980 (8th Cir. 2011); *Jurisdiction of U.S. Courts in Suits Against Foreign States: Hearings on H.R. 11315 Before Subcomm. on Admin. Law & Governmental Relations of the House Comm. on the Judiciary*, 94th Cong. 53 (1976) (statement of Monroe Leigh, Legal Advisor, U.S. Dep’t of State) (courts should “inquire whether the activity in question is one which private parties ordinarily perform or whether it is peculiarly within the realm of governments”).

elements that, if proven, would entitle a plaintiff to relief and the gravamen of the complaint.”¹²⁰

As a practical matter, most activities of foreign state-owned enterprises operating in the commercial marketplace are “commercial” and, therefore, such enterprises are not immune from the jurisdiction of the U.S. courts in actions to enforce the antitrust laws by virtue of the FSIA. The commercial activities of these enterprises are subject to the U.S. antitrust laws to the same extent as the activities of privately owned foreign firms.

4.2.2 Foreign Sovereign Compulsion

Because U.S. antitrust laws can extend to foreign persons and conduct with a sufficient connection to the United States, some persons may find themselves subject to foreign legal requirements that conflict with the laws of the United States. In these circumstances, courts have recognized a limited defense against application of the U.S. antitrust laws when a foreign sovereign compels the very conduct that the U.S. antitrust law would prohibit.¹²¹ If it is possible, however, for a party to comply with both the foreign law and the U.S. antitrust laws, the existence of the foreign law does not provide any legal excuse for actions that do not comply with U.S. law.¹²² Similarly, that conduct may be lawful, approved, or encouraged in a foreign jurisdiction does not, in and of itself, bar application of the U.S. antitrust

¹²⁰ *OBB Personenverkehr AG v. Sachs*, 136 S. Ct. 390, 395 (2015) (citing *Saudi Arabia v. Nelson*, 507 U.S. 349, 356-57 (1993)) (internal quotation marks and alterations omitted).

¹²¹ See, e.g., *Mannington Mills, Inc. v. Congoleum Corp.*, 595 F.2d 1287, 1293-94 (3d Cir. 1979); *Trugman-Nash, Inc. v. N.Z. Dairy Bd.*, 954 F. Supp. 733, 736 (S.D.N.Y. 1997); *Interamerican Refining Corp. v. Texaco Maracaibo, Inc.*, 307 F. Supp. 1291, 1304 (D. Del. 1970).

The defense of foreign sovereign compulsion is distinct from the state action doctrine articulated in *Parker v. Brown*, 317 U.S. 341 (1943). The state action doctrine applies to the actions of U.S. states and their subdivisions, and also to private anticompetitive conduct that is both: (1) undertaken pursuant to clearly articulated state policies and (2) actively supervised by the state. See *N.C. State Bd. of Dental Exam’rs v. Fed. Trade Comm’n*, 135 S. Ct. 1101 (2015).

¹²² *Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 798-99 (1993).

laws—even when the foreign jurisdiction has a strong policy in favor of the conduct in question.¹²³

Two rationales underlie the limited defense of foreign sovereign compulsion. First, Congress enacted the U.S. antitrust laws against the background of well-recognized principles of international law and comity, pursuant to which U.S. authorities give due deference to the official acts of foreign governments. A defense for actions compelled by foreign sovereigns under certain circumstances serves to accommodate equal sovereigns. Second, fairness considerations require a mechanism to provide a predictable rule of decision for those seeking to conform their behavior to all applicable laws.

The Agencies recognize and consider this foreign sovereign compulsion defense when determining whether to bring an enforcement action. Because of the limited scope of the defense, however, the Agencies will refrain from bringing an enforcement action based on considerations of foreign sovereign compulsion only when certain criteria are satisfied.

First, the foreign government must have compelled the anticompetitive conduct under circumstances in which a refusal to comply with the foreign government's command would give rise to the imposition of penal or other severe sanctions. As a general matter, the Agencies regard the foreign government's formal representation that refusal to comply with its command would have such a result as being sufficient to establish that the conduct in question has been compelled. To be sufficient, however, the representation must contain enough detail to enable the Agencies to see precisely how the compulsion would be accomplished under foreign law.¹²⁴ Foreign government measures short of compulsion do not suffice for this defense, although they may be a relevant comity consideration if, for example, the measures reflect an articulated policy of the foreign government.

Second, the defense generally applies only when the compelled conduct can be accomplished entirely within the foreign sovereign's own territory. If the compelled

¹²³ *Id.* Discretionary conduct is also outside the protections afforded by this defense. See *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 706-07 (1962).

¹²⁴ For example, the Agencies may not regard as dispositive a statement that is unsupported or ambiguous, or that, on its face, appears to be internally inconsistent. The Agencies may inquire into the circumstances underlying the statement and may request further information if the source of the power to compel is unclear.

conduct occurs in the United States, the Agencies will not recognize the defense.¹²⁵ For example, the defense would not apply if a foreign government required the U.S. subsidiaries of several firms to organize a cartel in the United States to fix the price at which products would be sold in the United States.

Third, the order must come from the foreign government acting in its governmental capacity.¹²⁶ The defense does not arise from conduct that would fall within the FSIA commercial activity exception.

Illustrative Example E

Situation: Increased quantities of Commodity X have flooded the world market over the last several years, including substantial amounts coming into the United States. The officials of Countries Alpha, Beta, and Gamma meet with their respective domestic firms and urge them to “rationalize” production of Commodity X by cooperatively cutting back. Going one step further, the government of Country Gamma orders cutbacks from its domestic firms, subject to substantial penalties for non-compliance. Producers from Countries Alpha and Beta agree among themselves to institute comparable cutbacks, but their governments do not require them to do so. The overseas production cutbacks have sufficient effects on U.S. commerce for the antitrust laws to apply.

Discussion: The Agencies would not find that foreign sovereign compulsion precludes prosecution of the agreement in restraint of trade entered into by the participants from Countries Alpha and Beta.¹²⁷ The Agencies would acknowledge a defense of sovereign compulsion, however, for the participants from Country Gamma.

¹²⁵ See *Linseman v. World Hockey Ass’n*, 439 F. Supp. 1315, 1324-25 (D. Conn. 1977).

¹²⁶ See *supra* Section 4.2.1.

¹²⁷ As in all such cases, the Agencies would also consider whether comity factors counsel against bringing an enforcement action for the conduct. See *supra* Section 4.1.

4.2.3 Act of State Doctrine

The act of state doctrine prevents courts from “declar[ing] invalid the official act of a foreign sovereign performed within its own territory.”¹²⁸ Applying this doctrine, courts decline to adjudicate claims or issues that would require the court to judge the validity of the sovereign act of a foreign state in its own territory.¹²⁹ This doctrine is rooted in considerations of international comity and the separation of powers.¹³⁰

The doctrine does not apply to every act taken by an individual or entity affiliated with a sovereign state. For instance, it does not apply to the acts of individual government officials acting outside their official capacity.¹³¹ Nor does it apply to private actors, even when those acts are approved or condoned by the foreign government in question.¹³²

Accordingly, when a restraint on competition arises directly from the act of a foreign sovereign, such as the grant of a license, award of a contract, or expropriation of property, the Agencies may refrain from bringing an enforcement action based on the principles animating the act of state doctrine. More specifically, the Agencies may exercise enforcement discretion and decline to challenge foreign acts of state if

¹²⁸ *W.S. Kirkpatrick & Co. v. Env’tl Tectonics Corp., Int’l*, 493 U.S. 400, 405 (1990); *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 401 (1964); *Underhill v. Hernandez*, 168 U.S. 250, 252 (1897) (“Every sovereign state is bound to respect the independence of every other sovereign state, and the courts of one country will not sit in judgment on the acts of the government of another, done within its own territory. Redress of grievances by reason of such acts must be obtained through the means open to be availed of by sovereign powers as between themselves.”).

¹²⁹ *See W.S. Kirkpatrick*, 493 U.S. at 406 (“Act of state issues only arise when a court *must decide*—that is, when the outcome of the case turns upon—the effect of official action by a foreign sovereign. When that question is not in the case, neither is the act of state doctrine.”).

¹³⁰ *Id.* at 404; *Sabbatino*, 376 U.S. at 423 (the doctrine “express[es] the strong sense of the Judicial Branch that its engagement in the task of passing on the validity of foreign acts of state may hinder rather than further this country’s pursuit of goals . . . in the international sphere”).

¹³¹ *Republic of Iraq v. ABB AG*, 768 F.3d 145, 165 (2d Cir. 2014).

¹³² *See, e.g., In re Potash Antitrust Litig.*, 686 F. Supp. 2d 816, 825 (N.D. Ill. 2010).

the facts and circumstances indicate that: (1) the specific conduct complained of is a public act of the sovereign, (2) the act was taken within the territorial jurisdiction of the sovereign, and (3) the conduct relates to a matter that is governmental, rather than commercial.¹³³

4.2.4 Petitioning of Sovereigns

Under the *Noerr-Pennington* doctrine, a genuine effort to obtain or influence action by governmental entities in the United States falls outside the scope of the Sherman Act, even if the intent or effect of that effort is to restrain or monopolize trade.¹³⁴ It is the view of the Agencies that the principles undergirding this doctrine apply to the petitioning of foreign governments. The Agencies, therefore, will not challenge under the antitrust laws genuine efforts to obtain or influence action by foreign government entities.¹³⁵ But as with *Noerr-Pennington*, the Agencies will not exercise this discretion when faced with “sham” activities, in which petitioning “ostensibly directed toward influencing governmental action, is a mere sham to cover . . . an attempt to interfere directly with the business relationships of a competitor,”¹³⁶ or when *Noerr-Pennington* would otherwise not apply.¹³⁷

Illustrative Example F

Situation: Corporation 1 and Corporation 2 have mines in Country Alpha where they extract Mineral X. Corporation 1 and Corporation 2 use different techniques to extract Mineral X. Corporation 1 launches a

¹³³ See *Alfred Dunhill of London, Inc. v. Republic of Cuba*, 425 U.S. 682, 704 (1976) (plurality op. of White, J.). Cf. *supra* Section 4.2.1.

¹³⁴ See *United Mine Workers of Am. v. Pennington*, 381 U.S. 657 (1965); *E.R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961); see also *Cal. Motor Transp. Co. v. Trucking Unlimited*, 404 U.S. 508 (1972) (extending protection to petitioning before “all departments of Government,” including the courts).

¹³⁵ Cf. *Amarel v. Connell*, 102 F.3d 1494, 1520 (9th Cir. 1996).

¹³⁶ *Profl Real Estate Investors, Inc. v. Columbia Pictures Indus.*, 508 U.S. 49, 56 (1993) (internal quotations omitted).

¹³⁷ See, e.g., *Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492 (1988); *Walker Process Equip., Inc. v. Food Mach. & Chem. Corp.*, 382 U.S. 172 (1965).

campaign designed to foster the adoption and retention of regulations that would effectively outlaw Corporation 2's mining technique. As part of this broader campaign, Corporation 1 files a complaint with Country Alpha's Ministry of Mines alleging severe health and safety concerns stemming from Corporation 2's mining technique and demanding the permanent closure of Corporation 2's mine. If successful, Corporation 1 would have an effective monopoly on the U.S. market for Mineral X. The Country Alpha Ministry of Mines decides to investigate the complaint, leading to the temporary shutdown of Corporation 2's operations.

Discussion: Had Corporation 1's activities been directed at a U.S. government entity and the *Noerr-Pennington* doctrine applied, the Agencies would not take action against Corporation 1. Applying like principles here, the Agencies would not institute enforcement action against Corporation 1 for lodging a complaint with the Country Alpha Ministry of Mines.

5. International Cooperation

Effective enforcement of the U.S. antitrust laws in a global economy benefits from cooperation with foreign authorities. The Agencies are committed to cooperating with foreign authorities on both policy and investigative matters. This cooperation contributes to convergence on substantive enforcement standards that seek to advance consumer welfare, based on sound economics, procedural fairness, transparency, and non-discriminatory treatment of parties. The Agencies' international policy work and case cooperation are closely connected. As noted above, consistent approaches to competition law, policy, and procedures across jurisdictions facilitate case cooperation among competition authorities. Moreover, through case cooperation, the Agencies and cooperating authorities often raise important substantive and procedural issues as they arise in practice, which can lead to greater convergence in substantive analysis and procedures. In keeping with these Guidelines' focus on international enforcement and practice, this Chapter focuses on investigations and case cooperation.

International case cooperation helps agencies investigating a particular matter to identify issues of common interest, gain a better understanding of relevant facts, and achieve consistent outcomes. Cooperation can yield better results for competition and promote efficiency for both cooperating agencies and subjects of an investigation. It can improve substantive analyses and procedures, and ensure that investigations and remedies are as consistent and predictable as possible, which improves outcomes, and reduces uncertainty and expense to firms doing business

across borders. When either Agency reviews a case that raises possible competitive concerns in jurisdictions outside of the United States, it may consult with the relevant foreign authorities about the matter and coordinate and cooperate with those authorities conducting parallel investigations.¹³⁸ As described in greater detail throughout this chapter, cooperation can include a broad range of practices, from initiating informal discussions and informing cooperating authorities of the different stages of their investigations, to engaging in detailed discussions of substantive issues, exchanging information, conducting interviews at which two or more agencies may be present, and coordinating remedy design and implementation, as relevant and appropriate.¹³⁹

5.1 Investigations and Cooperation

Increasingly, the Agencies' investigations involve conduct, entities, individuals, and information located outside the United States. The Agencies employ a combination of their own investigative tools and cooperation with foreign authorities in investigating and seeking appropriate remedies in certain international matters.

5.1.1 Investigative Tools

When practical and consistent with enforcement objectives, the Agencies may request that parties and third parties voluntarily: provide documents; submit to interviews; or provide other information related to an investigation. These requests may seek documents or information located outside the United States.

The Agencies also may use compulsory measures to obtain documents and information. Specifically, the Agencies may compel production of documents or

¹³⁸ An Agency may continue that cooperation when either it or the foreign authority has closed its investigation. The Agencies may also engage in general discussions with foreign authorities on matters in which only one authority has an open investigation.

¹³⁹ The Agencies do not conduct "joint investigations" with foreign authorities; neither Agency exercises control over foreign authorities regarding their investigations, nor accepts direction from foreign authorities regarding its own investigations. The Agencies, however, do cooperate with foreign authorities conducting parallel investigations. "[R]obust information-sharing and cooperation across parallel investigations" do not transform multiple parallel investigations into a joint investigation. *United States v. Getto*, 729 F.3d 221, 231 (2d Cir. 2013).

information via civil investigative demand (“CID”) or subpoena.¹⁴⁰ U.S. law provides authority for such compulsory measures directed to persons over whom the courts have personal jurisdiction.¹⁴¹ The Agencies may compel the production of documents or information, including documents or information located outside the United States, when the documents or information sought are within the “possession, custody, or control” of an individual or entity subject to the jurisdiction of the United States and are not protected by the attorney-client privilege or the work-product doctrine.¹⁴²

When one of the Agencies investigates a transaction notified under the HSR Act, it may issue a request for additional documents or information, typically called a “Second Request.”¹⁴³ Compliance with a Second Request requires production of all responsive documents and information, no matter where located.

Conflicts can arise where foreign statutes purport to prevent individuals or entities from disclosing documents or information for use in U.S. proceedings. The mere existence of such statutes, however, does not excuse noncompliance with a request for documents or information from one of the Agencies.¹⁴⁴

¹⁴⁰ The Department may issue CIDs pursuant to the Antitrust Civil Process Act, 15 U.S.C. § 1312, and the FTC may issue CIDs and subpoenas pursuant to the FTC Act. *Id.* §§ 49, 57b-1(c). In merger investigations, the Agencies utilize the mechanisms of the HSR Act to gather information from parties. *Id.* § 18(a). *See also* U.S. Dep’t of Justice, *Crim. Resource Manual* § 279 (discussing availability of subpoenas reaching individuals and evidence located abroad), <https://www.justice.gov/usam/criminal-resource-manual-279-subpoenas>.

¹⁴¹ *In re Grand Jury Proceedings (Bank of Nova Scotia)*, 740 F.2d 817, 828-29 (11th Cir. 1984); *United States v. First Nat’l City Bank*, 396 F.2d 897, 900-901 (2d Cir. 1968); *see also, e.g.*, 28 U.S.C. § 1783(a) (authorizing a U.S. court to order the issuance of a subpoena “requiring the appearance as a witness before it, or before a person or body designated by it, of a national or resident of the United States who is in a foreign country, or requiring the production of a specified document or other thing by him,” under circumstances identified in the statute).

¹⁴² 15 U.S.C. § 57b-1(c)(1) (FTC Act); *id.* § 1312(a) (Antitrust Civil Process Act).

¹⁴³ *See* Section 2.2.4, *supra*, regarding the HSR Act.

¹⁴⁴ The Agencies do not view the mere existence of blocking statutes as creating a conflict of law for purposes of the comity analysis. *Cf. Société Nationale Industrielle*

Because unilaterally collecting documents or information from individuals or entities located abroad can adversely affect law enforcement relationships with foreign countries, the Agencies use compulsory measures after carefully considering the importance of the documents or information to the investigation or prosecution and the availability of other means to obtain them.¹⁴⁵ When such compulsory measures are warranted, the Agencies may seek to work with the foreign authority involved as appropriate.

5.1.2 Confidentiality

The Agencies' enforcement activities benefit greatly from access to sensitive, nonpublic information from businesses and consumers. The Agencies recognize the importance of protecting the confidentiality of sensitive, nonpublic information received from parties and foreign authorities. The Agencies protect the confidentiality of all such information received, be it from businesses or consumers located domestically or abroad, or from foreign authorities, under applicable provisions of U.S. law.

Several statutes require the Agencies to treat as confidential certain information obtained in the course of an investigation. The HSR Act prohibits the Agencies from disclosing information obtained pursuant to the act, including the fact that the parties filed notice of a proposed transaction and confidential business information provided in a filing or in response to a document or information request.¹⁴⁶ The FTC Act restricts disclosure of information that the Commission receives pursuant to compulsory process, or produced voluntarily in lieu of process, in a law enforcement investigation.¹⁴⁷ The FTC Act also prohibits the Commission from making public any trade secret or any commercial or financial information it obtains that is

Aérospatiale v. U.S. Dist. Court, 482 U.S. 522, 542-44 & n. 29 (1987). Comity is addressed in Section 4.1.

¹⁴⁵ U.S. Dep't of Justice, *Crim. Resource Manual* § 279, <https://www.justice.gov/usam/criminal-resource-manual-279-subpoenas>.

¹⁴⁶ See 15 U.S.C. § 18a(h).

¹⁴⁷ 15 U.S.C. §§ 57b-2(b), 57b-2(f). Section 21(f) of the FTC Act also explicitly protects from disclosure any materials received from a non-U.S. competition authority when "the foreign law enforcement agency or other foreign government agency has requested confidential treatment, or has precluded such disclosure under other use limitations, as a condition of providing the material." *Id.* § 57b-2(f).

privileged or confidential, except in limited circumstances.¹⁴⁸ The Antitrust Civil Process Act prohibits the Department from disclosing documents or testimony obtained pursuant to a CID without the consent of the person that produced the materials, except in limited circumstances.¹⁴⁹ Other federal laws also require the Agencies to treat specific types of information as confidential, without regard to the manner in which the information is obtained. For example, laws governing privacy, national security information, and trade secrets require that the Agencies treat certain information as confidential.¹⁵⁰

There are certain, discrete circumstances in which the Agencies may disclose a person's confidential information for a specific use. The HSR Act, the FTC Act, and the Antitrust Civil Process Act do not bar the Agencies' use of a person's confidential information in judicial and administrative proceedings.¹⁵¹ However, the Federal Rules of Civil Procedure and FTC Rules of Practice include procedures to protect confidential information used in judicial proceedings or FTC administrative proceedings.¹⁵²

The Agencies also are subject to the Freedom of Information Act ("FOIA"), which provides the public with a right of access to certain agency records.¹⁵³ This statute, however, contains several exemptions that protect information provided to the Agencies. It permits the Agencies to withhold certain categories of documents from

¹⁴⁸ *Id.* § 46(f).

¹⁴⁹ *See* 15 U.S.C. § 1313(c)(2), (d).

¹⁵⁰ For example, U.S. law imposes confidentiality obligations regarding certain classes of information, including personally identifiable information. *See, e.g.* 5 U.S.C. § 552a (Privacy Act of 1974).

¹⁵¹ In addition, the FTC Act, with regard to the Commission, and HSR Act do not prevent the Agencies from complying with information requests from Congress. In the event of such a request, however, the Agency receiving the request must notify the submitter of the information, and the Agency can request confidential treatment of any information that may be shared.

¹⁵² For instance, the person providing information may seek a protective order to prevent confidential information from being made public or from being used outside the court proceeding. *See* Fed. R. Civ. P. 26(c); 16 C.F.R. § 3.31(d) (requiring Administrative Law Judge in FTC proceeding to issue a specific protective order).

¹⁵³ 5 U.S.C. § 552.

requesters, including information protected by statute (such as the HSR Act or FTC Act), “commercial or financial information obtained from a person [that is] privileged or confidential,” inter- or intra-agency memoranda or letters that would be routinely privileged in civil discovery, and “files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.”¹⁵⁴ In addition, an exemption from FOIA’s disclosure regime applies to certain information compiled for law enforcement purposes, including when disclosure could interfere with enforcement proceedings or disclose the identity of a confidential source.¹⁵⁵

5.1.3 Legal Bases for Cooperation

The Agencies’ authority to cooperate with foreign authorities is inherent in their ability to act in furtherance of their mandates. The Department and FTC, therefore, each has the discretion to cooperate, including when it furthers its enforcement interests. Cooperation can be facilitated by bilateral and multilateral arrangements.¹⁵⁶ The Agencies have also developed best practices and guidance documents on cooperation for specific types of investigations.¹⁵⁷ These

¹⁵⁴ *Id.* § 552(b)(3)-(6).

¹⁵⁵ *Id.* § 552(b)(7).

¹⁵⁶ For example, the United States or the Agencies have bilateral cooperation agreements with eleven jurisdictions or competition agencies: Germany (1976); Australia (1982); the European Union (1991); Canada (1995); Brazil, Israel, and Japan (1999); Mexico (2000); Chile (2011); Colombia (2014); and Peru (2016). The Agencies also have entered into memoranda of understanding with the Russian Federal Antimonopoly Service (2009), the three Chinese antimonopoly enforcement agencies (2011), the Indian competition authorities (2012), and the Korea Fair Trade Commission (2015). These arrangements are available at <https://www.justice.gov/atr/antitrust-cooperation-agreements> and <https://www.ftc.gov/policy/international/international-cooperation-agreements>. Multilateral arrangements include the Recommendation of the OECD Council Concerning Co-Operation on Competition Investigations and Proceedings, and the ICN Framework for Merger Cooperation. Org. for Econ. Co-Operation & Dev., Recommendation of the OECD Council Concerning Co-Operation on Competition Investigations and Proceedings (2014), <http://www.oecd.org/competition/international-coop-competition-2014-recommendation.htm>; Int’l Competition Network, Framework for Merger Cooperation (2012), <http://www.internationalcompetitionnetwork.org/uploads/library/doc803.pdf>.

¹⁵⁷ See, e.g., US-EU Merger Working Grp., *Best Practices on Cooperation in Merger Investigations* (2011), <https://www.justice.gov/atr/best-practices-cooperation-merger->

arrangements and guidance documents can serve as a catalyst for cooperation and provide useful guidance to coordinate and facilitate enforcement activities. They are not necessary for cooperation to take place, and the Agencies may cooperate with relevant foreign authorities in the absence of any formal arrangement. These bilateral and multilateral arrangements do not change the signatories' laws, including laws concerning the treatment of confidential information.

The IAEAA authorizes the Agencies to enter into antitrust-specific mutual assistance agreements with foreign authorities that allow the Agencies to share evidence relating to antitrust violations already in their possession and provide each other with investigatory assistance in obtaining evidence, subject to certain limitations.¹⁵⁸ As noted in Section 2.6, the IAEAA does not apply to materials submitted pursuant to the HSR Act.¹⁵⁹

[investigations](#); China Ministry of Comm., Fed. Trade Comm'n, U.S. Dep't of Justice, *Guidance for Case Cooperation between the Ministry of Commerce and the Department of Justice and Federal Trade Commission on Concentration of Undertakings (Merger) Cases* (2011), <https://www.ftc.gov/system/files/attachments/press-releases/federal-trade-commission-department-justice-meet-chinese-ministry-commerce-merger-enforcement/111129mofcom.pdf>; U.S.- Can. Working Grp., *Best Practices on Cooperation in Merger Investigations* (2014), <https://www.justice.gov/sites/default/files/atr/legacy/2014/03/25/304654.pdf>; Int'l Competition Network, *Anti-Cartel Enforcement Manual*, <http://www.internationalcompetitionnetwork.org/working-groups/current/cartel/manual.aspx>; Int'l Competition Network, *Recommended Practices for Merger Notification and Review Procedures*, <http://www.internationalcompetitionnetwork.org/uploads/library/doc588.pdf>; Int'l Competition Network, *Recommended Practices for Merger Analysis*, <http://www.internationalcompetitionnetwork.org/uploads/library/doc316.pdf>; Int'l Competition Network, *Practical Guide to Enforcement Cooperation in Mergers*, <http://www.internationalcompetitionnetwork.org/uploads/library/doc1031.pdf>; Org. for Econ. Co-Operation & Development, *Best Practices for Formal Exchange of Information Between Competition Authorities in Hard Core Cartel Investigations* (2005), <http://www.oecd.org/competition/cartels/35590548.pdf>.

¹⁵⁸ 15 U.S.C. § 6201 *et seq.*, discussed *supra* Section 2.6. Mutual Legal Assistance Treaties may be used in the criminal context, discussed *infra* Section 5.2.

¹⁵⁹ *Id.* § 6204(1).

5.1.4 Types of Information Exchanged and Waivers of Confidentiality

If a transaction or conduct under antitrust investigation in the United States is also being investigated by a foreign authority, the Department or the Commission may contact the authority. The Agencies may share with these foreign authorities relevant publicly available information.¹⁶⁰ Similarly, it remains in the Agencies' discretion whether to share with cooperating foreign authorities agency non-public information, which is information that the Agencies are not statutorily prohibited from disclosing, but that the Agencies normally treat as non-public and withhold from public disclosure.¹⁶¹ Examples of agency non-public information include the existence of an open investigation and the Agencies' staff views as to the merits of a case, market definition, competitive effects, substantive theories of harm, and remedies. Before exchanging agency non-public information, the Agencies will have reached an understanding that the foreign authority will maintain the information in confidence and in accordance with that authority's laws and rules. This may be through bilateral or multilateral cooperation agreements or arrangements, or other means.

While confidentiality obligations generally prohibit the Agencies from disclosing to foreign authorities confidential information submitted by a person,¹⁶² that person can enable the Agencies to engage in more meaningful cooperation with foreign authorities by granting the Agencies a waiver of confidentiality as to information that may be otherwise protected from disclosure. The Agencies issued a joint model waiver of confidentiality for use in civil matters, which serves to streamline the waiver process¹⁶³ and published explanatory materials that provide further details on waivers of confidentiality, applicable confidentiality rules, and the process for providing a waiver of confidentiality.¹⁶⁴

¹⁶⁰ The types of relevant publicly available information that the Agencies may share with foreign authorities include background information regarding a particular industry or company and public records, such as court or securities filings.

¹⁶¹ See, e.g., 5 U.S.C. § 552(b)(5).

¹⁶² See *supra* Section 5.1.2.

¹⁶³ Fed. Trade Comm'n & Dep't of Justice, *Model Waiver of Confidentiality* (2013), https://www.ftc.gov/sites/default/files/attachments/international-waivers-confidentiality-ftc-antitrust-investigations/model_waiver.pdf.

¹⁶⁴ U.S. Dep't of Justice & Fed. Trade Comm'n, *Model Waiver of Confidentiality for Use in Civil Matters Involving Non-U.S. Competition Auths. Frequently Asked*

A waiver identifies the terms under which a person agrees to waive statutory confidentiality protections vis-à-vis the agency that originally received the person's confidential information. A waiver also describes an agency's policy regarding how it will treat the information it receives from another agency pursuant to a waiver, although it is not an agreement signed by the agency. Waivers are limited in scope to a specific, named matter and designate the agencies that may share the waiving person's confidential information. Waivers generally allow the cooperating authorities to share documents, statements, data, and other information.

Waivers enable deeper communication, cooperation, and coordination among competition authorities concurrently reviewing a matter. They can lead to more effective, efficient investigations and better-informed, more consistent enforcement decisions based on the Agencies' increased ability to share information.

The Agencies will protect information received from a foreign authority pursuant to a waiver under applicable provisions of U.S. law. The Agencies will not seek information that is privileged under U.S. law from foreign authorities through waivers or other cooperative activities.¹⁶⁵

Similarly, the Agencies will provide information to foreign authorities pursuant to a waiver when they have reached an understanding with the recipient agency that it will maintain the confidentiality of such information consistent with its laws and rules. Generally, a person that has waived the confidentiality of its information as to one of the Agencies also will provide a separate waiver of confidentiality to the relevant foreign authority, based on the waiving person's understanding of the foreign authority's confidentiality protections.

The Agencies may request a waiver of confidentiality, but the decision whether to provide one rests solely with the producing person. Refusal to provide a waiver will not prejudice the outcome of an investigation, though, in some cases, the absence of a waiver may have practical effects such as increasing the risk of inconsistent outcomes between jurisdictions. Further, declining to grant a waiver will not preclude the Agencies from sharing publicly available or agency non-public information with foreign authorities.

Questions (2015), www.justice.gov/sites/default/files/atr/legacy/2015/05/11/300916.pdf.

¹⁶⁵ *Id.*

Illustrative Example G

Situation: Corporation 1 and Corporation 2 each manufacture Product X and Product Y. Corporation 1 and Corporation 2 enter into an agreement to merge. The proposed merger meets the threshold for premerger notification in the United States under the HSR Act and the thresholds for premerger notification in several other jurisdictions. Corporation 1 and Corporation 2 inform the U.S. Agency reviewing the merger as well as reviewing foreign authorities that the merger will be notified or reviewed in multiple jurisdictions. Pre-notification consultations and pre-merger filings are timed to facilitate communication and cooperation among reviewing authorities at key decision-making stages of their respective investigations.

Discussion: After learning that the merger will be notified or reviewed in more than one jurisdiction, the U.S. Agency contacts the foreign reviewing authorities to discuss review timetables and assess the potential for cooperation. The extent of cooperation with each foreign authority reviewing the matter will vary depending on factors including the depth of that authority's investigation, the competitive conditions in that authority's jurisdiction, and the scope of potential remedies likely to be considered. The U.S. Agency requests a waiver of confidentiality from Corporation 1 and Corporation 2 to allow for the exchange of confidential information with the reviewing authorities in Countries Alpha, Beta, and Gamma, given the nature of the competitive concerns raised by the merger in these jurisdictions. Corporation 1 and Corporation 2 voluntarily grant these waivers, as well as the waivers of confidentiality requested by each of these reviewing authorities. The U.S. Agency cooperates with the reviewing authorities in Countries Delta and Epsilon on the basis of publicly available and agency non-public information, without exchanging confidential business information.

As reviews of the merger proceed, the U.S. Agency and the other reviewing authorities arrange communications between and among themselves as appropriate to their investigations. The U.S. Agency and authorities of Alpha, Beta, and Gamma each arrange regular, bilateral calls and, in some instances, certain of these agencies conduct interviews together, facilitated by waivers. These reviewing agencies, as well as the reviewing authorities of Delta and Epsilon, also conduct status calls, based on publicly available and agency non-public information to update each other on the timing of reviews and theories of harm. The reviewing authorities of Delta and Epsilon identify that

the merger's effects in their jurisdictions are likely to be insignificant, and that they will close their investigations accordingly.

5.1.5 Remedies

The Agencies seek remedies that effectively address harm or threatened harm to U.S. commerce and consumers, while attempting to avoid conflicts with remedies contemplated by their foreign counterparts.¹⁶⁶ An Agency will seek a remedy that includes conduct or assets outside the United States only to the extent that including them is needed to effectively redress harm or threatened harm to U.S. commerce and consumers¹⁶⁷ and is consistent with the Agency's international comity analysis.¹⁶⁸

When multiple authorities are investigating the same transaction or same conduct, the Agencies may cooperate with other authorities, to the extent permitted under U.S. law, to facilitate obtaining effective and non-conflicting remedies.¹⁶⁹

¹⁶⁶ *United States v. General Elec. Co. et al.*, No. 15-cv-1460 (D.D.C. 2015); *In re Panasonic Corp. et al*, Dkt. No. C-4274 (FTC Jan. 8, 2010) (allowed for extension of divestiture deadline if necessary to obtain approval for divestiture from the European Commission).

¹⁶⁷ *Polypore Int'l, Inc. v. Fed. Trade Comm'n*, 686 F.3d 1208, 1219 (11th Cir. 2012) (affirming Commission decision in a merger matter with remedy including assets located outside the United States); *United States v. Cont'l AG & Veyance Technologies*, No. 14-cv-2087 (D.D.C. 2014) (facilities in Mexico divested); *U.S. v. Anheuser-Busch InBev SA/NV & Grupo Modelo S.A.B. DE C.V.*, No. 13-cv-127 (D.D.C. 2013) (brewery in Mexico divested); *In re Victrex, plc*, Dkt. No. C-4586 (FTC July 14, 2016) (remedy prohibiting contract provisions that could result in exclusivity, including when products are manufactured or sold abroad for use in products sold or cleared for use in the United States); *In re Intel Corp.*, Dkt. No. 9341 (FTC Nov. 2, 2010) (remedy including requirements regarding licensing with foreign CPU maker that potentially competed with Intel in order to restore competition in United States). These remedies are often entered into voluntarily pursuant to consent decrees.

¹⁶⁸ *See supra* Section 4.1.

¹⁶⁹ As with other aspects of cooperation, a person's grant of waivers can enhance the efficacy of such discussions between the Agencies and foreign authorities.

Cooperation also may facilitate the development of a proposed remedies package that comprehensively addresses the concerns of multiple authorities.¹⁷⁰ In some circumstances, cooperation may result in one authority closing an investigation without remedies after taking another authority's remedies into account.¹⁷¹

Illustrative Example H

Situation: After investigating the merger as outlined in Illustrative Example G, the U.S. Agency finds that the merger is likely to substantially lessen competition in the U.S. market for Product X, and therefore that the merger would violate Section 7 of the Clayton Act. The U.S. Agency determines that these competitive concerns likely can be addressed through a divestiture of Corporation 1's assets related to Product X. Countries Alpha, Beta, and Gamma also find that the merger will harm competition in their markets for Product X, and Country Gamma has additional concerns about a reduction of competition in Gamma's market for Product Y.

Discussion: The U.S. Agency and the authorities in Alpha, Beta, and Gamma discuss, among themselves and with Corporation 1 and Corporation 2, a proposed remedy for the competitive concerns regarding Product X, in an effort to identify a package of assets for divestiture that addresses the reviewing agencies' competitive concerns. In this instance, the U.S. Agency and the foreign reviewing authorities agree that the same divestiture remedy for Product X will effectively address the competitive concerns in their respective jurisdictions. Corporation 1 and Corporation 2 enter into a consent decree in the

¹⁷⁰ See U.S.- Can. Working Grp., *Best Practices on Cooperation in Merger Investigations* (2014), https://www.ftc.gov/system/files/attachments/international-competition-consumer-protection-cooperation-agreements/canada-us_merger_cooperation_best_practices.pdf; US-EU Merger Working Grp., *Best Practices on Cooperation in Merger Investigations* (2011), <https://www.justice.gov/sites/default/files/atr/legacy/2011/10/27/276276.pdf>.

¹⁷¹ See United States Submission to OECD Competition Committee regarding Remedies in Cross-Border Merger Cases, DAF/COMP/WP3/WD(2013) (discussing cooperation and remedies in: *In the Matter of Agilent Technologies*; *In the Matter of Panasonic Corporation/Sanyo Electric Co., Ltd.*; *UTC/Goodrich*; *Cisco/Tandberg*; and other matters).

United States that includes divestiture of specified assets of Corporation 1's related to Product X, and the authority in Alpha seeks the same divestiture remedy to ensure enforceability of the remedy in its jurisdiction. Country Beta concludes that the remedies secured in the United States and in Country Alpha are sufficient to address its competitive concerns and closes its investigation. Country Gamma seeks a remedy identical to that entered into in the United States and Country Alpha regarding Product X, coupled with an additional remedy to address the competitive harm in its jurisdiction regarding Product Y.

5.2 Special Considerations in Criminal Investigations

Among the Department's top priorities is the criminal investigation and prosecution of international price-fixing cartels. Because these cartels often involve foreign-located defendants, witnesses, and evidence, antitrust enforcement in this context can present not only an investigatory challenge but also a special need for international cooperation and coordination. Mutual Legal Assistance Treaties ("MLATs") are an important basis for international cooperation in the Department's criminal antitrust enforcement. MLATs are used often in criminal investigations to gather evidence located outside the United States. Parties to these agreements have agreed to assist one another in criminal law enforcement matters.¹⁷² The specific provisions of MLATs vary, but they generally provide for assistance in obtaining evidence and in serving documents in one jurisdiction at the request of the other.

The Department also coordinates with foreign authorities when they are conducting cartel investigations parallel with the Department's own. The Department sometimes shares information to coordinate investigative steps. For example, to minimize the risk of document destruction, the Department and foreign authorities can time dawn raids and searches to coincide in multiple jurisdictions. And the Department and foreign authorities may also coordinate on logistical aspects of their parallel investigations to help minimize overlapping and inconsistent demands placed on cooperating individuals and firms. The Department recognizes that such coordination has the benefit of decreasing the costs to cooperators and

¹⁷² The United States' MLAT with Germany is unique in that it also provides for U.S. assistance to Germany in administrative cartel matters. *See* Mutual Legal Assistance Treaty, U.S.-Ger., S. Treaty Doc. 108-27 (2003), *available at* <https://www.congress.gov/108/cdoc/tdoc27/CDOC-108tdoc27.pdf>.

increasing the pace of the investigations and is committed to engaging in such coordination where practicable.

The Department's ability to share information with foreign authorities is not unlimited, however. An essential component in the investigation and enforcement of the criminal antitrust laws is the grand jury, which is subject to the grand jury secrecy rule. Through its subpoenas, a grand jury can "compel the production of evidence or the testimony of witnesses as it considers appropriate, and its operation generally is unrestrained by the technical procedural and evidentiary rules governing the conduct of criminal trials."¹⁷³ The Department is prohibited, however, from disclosing matters occurring before the grand jury absent an applicable exception.¹⁷⁴ This prohibition cannot be waived by a subject of the investigation, a grand jury witness, or a recipient of a grand jury subpoena. The prohibition, however, does not apply to these persons and therefore does not generally prohibit disclosures by them.

In addition, a criminal investigation can gather information through the assistance of an applicant under the Department's Corporate and Individual Leniency Policies for antitrust crimes.¹⁷⁵ To qualify for leniency under those policies, the applicant is required, among other things, to report the wrongdoing with candor and completeness and provide full, continuing, and complete cooperation. That required cooperation includes the production of all documents, information, or other materials in the applicant's possession, custody, or control, wherever located, that are requested by the Department in connection with the criminal antitrust investigation and are not protected by the attorney-client privilege or the work-product doctrine.

The Department holds the identity of leniency applicants and the information they provide in strict confidence. The Department does not publicly disclose the identity of an applicant or information provided by the applicant, absent prior disclosure by the applicant, unless required to do so by a court order in connection with litigation.

¹⁷³ *United States v. Calandra*, 414 U.S. 338, 343 (1974); see also *Branzburg v. Hayes*, 408 U.S. 665, 688 (1972). The "powers of the grand jury are not unlimited," *id.*; for example, a grand jury subpoena does not override a valid privilege and may be quashed or modified by a court if compliance would be "unreasonable or oppressive." Fed. R. Crim. P. 17(c)(2).

¹⁷⁴ Fed. R. Crim. P. 6(e).

¹⁷⁵ For information on these policies, see <https://www.justice.gov/atr/leniency-program>.

A leniency applicant can agree to waive this confidentiality assurance and allow the Department to share the applicant's identity and information with a foreign authority. Such waivers of confidentiality for information sharing with a foreign authority are common when the applicant has also applied for leniency under the foreign authority's leniency policy.

Lastly, the Department sometimes seeks the cooperation of foreign jurisdictions to obtain indicted fugitives. It can seek the issuance of an INTERPOL "Red Notice," which operates as an international "wanted" notice that, in some INTERPOL member countries, serves as a request, should the fugitive enter their jurisdiction, to arrest the subject, with a view toward extradition. And the Department can request that a foreign jurisdiction extradite a fugitive defendant located in that jurisdiction to the United States.¹⁷⁶

¹⁷⁶ Extradition ordinarily depends on the presence and terms of an extradition treaty with the foreign jurisdiction.

Annex 1. Defined Terms

ACPERA.....	Antitrust Criminal Penalty Enhancement and Reform Act of 2004
Agencies.....	The Department of Justice and Federal Trade Commission
APEC.....	Asia-Pacific Economic Cooperation
CID.....	Civil Investigative Demand
Clayton Act.....	Clayton Antitrust Act
Commission.....	Federal Trade Commission
Department.....	The Department of Justice
ETC Act.....	Export Trading Company Act of 1982
ETCR.....	Export Trade Certificate of Review
FTC.....	Federal Trade Commission
FTC Act.....	Federal Trade Commission Act
FSIA.....	Foreign Sovereign Immunities Act of 1976
FTAIA.....	Foreign Trade Antitrust Improvements Act of 1982
FOIA.....	Freedom of Information Act
HSR Act.....	Hart-Scott-Rodino Antitrust Improvements Act of 1976
HSR Rules.....	Hart-Scott-Rodino Premerger Notification Rules
IAEAA.....	International Antitrust Enforcement Assistance Act
ICN.....	International Competition Network
International Guidelines.....	Antitrust Guidelines for International Enforcement and Cooperation
MLATs.....	Mutual Legal Assistance Treaties
NCRPA.....	National Cooperative Research and Production Act
OECD.....	Organisation for Economic Co-operation and Development
Sherman Act.....	Sherman Antitrust Act
SDOs.....	Standards Development Organizations
UNCTAD.....	United Nations Conference on Trade and Development
USTR.....	U.S. Trade Representative

The “Sharing” Economy

Issues Facing Platforms, Participants & Regulators

A Federal Trade Commission Staff Report

November 2016

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This staff report represents the views of the FTC staff and does not necessarily represent the views of the Commission or any individual Commissioner. The Commission, however, has voted to authorize the staff to issue this staff report.

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Executive Summary

Introduction

In our competitive economy, innovation is a major driver of long-term consumer welfare gains. Disruptive innovation in particular offers great potential benefits to consumers. Markets can be transformed by new technology; novel products, services, or business models; or new sources of supply. This innovation, economist Joseph Schumpeter argued, is a “perennial gale of creative destruction” that propels market economies to meet consumer demands.¹ The opportunity to compete in the marketplace affords potential innovators the incentives to undertake the expensive, difficult, and risky process of creating and introducing innovative products and services. Preserving such opportunities has long been a core part of the Federal Trade Commission’s competition mission.

Over the past few years, disruptive innovation by peer-to-peer platforms, such as Uber, Lyft, and Airbnb, has been altering the landscape of sectors such as for-hire transportation and short-term lodging. These platforms, collectively dubbed the “sharing economy” by many observers,² establish marketplaces that enable transactions between numerous suppliers (who frequently are individuals or small entities) and consumers. These platforms, and the parties transacting on them, are capitalizing on the widespread adoption of internet and smartphone technology and significantly reshaping how products and services are provided. They have brought substantial benefits to consumers and suppliers alike, while challenging incumbents who have traditionally served those sectors.

Sharing economy platforms have experienced a meteoric rise in recent years, and are projected to grow rapidly in the near future. For example, PricewaterhouseCoopers has estimated that five key sharing economy sectors generated \$15 billion in revenues worldwide in 2013, and that they will generate \$335 billion by 2025.³ Two travel-related sectors have been at the center of this phenomenon: for-hire transportation service (similar to service provided by traditional taxis and limousines) and short-term lodging service (broadly similar to service provided by hotels and bed-and-breakfasts). The two leading firms, Uber and Airbnb, are each less than a decade old and have been valued at \$62.5 billion and \$25.5 billion, respectively.⁴

The rapid growth of some of these platforms has stirred considerable debate over the application of state and local regulation to these platforms and the suppliers who use them. On the one hand, regulatory measures may be needed to protect consumers, promote public safety, and meet other

¹ JOSEPH SCHUMPETER, CAPITALISM, SOCIALISM, AND DEMOCRACY 84 (3d ed. 1950).

² While there is a debate over the accuracy of the term “sharing economy,” this report uses it simply to refer to peer-to-peer platforms and the commercial activity that takes place on those platforms. The debate is addressed below. *See infra* pp. 10-11.

³ Press Release, PricewaterhouseCoopers, Five Key Sharing Economy Sectors Could Generate £9 Billion of UK Revenues by 2025 (Aug. 15, 2014), http://pwc.blogs.com/press_room/2014/08/five-key-sharing-economy-sectors-could-generate-9-billion-of-uk-revenues-by-2025.html. Others also project rapid growth for various sectors. *See, e.g.*, Sam Smith, *Uber, Lyft & Other Ride Sharing Services to See Revenues Double by 2020, Reaching \$6.5 Billion*, INVESTORIDEAS.COM (Apr. 6, 2016), <http://www.investorideas.com/news/2016/main/04061.asp> (reporting research by Juniper.com).

⁴ *See infra* notes 24, 25.

legitimate governmental goals. On the other hand, regulation can chill incentives for innovation by increasing costs and decreasing potential returns, thereby impeding or preventing new entry and depriving consumers of the benefits of new product and service offerings. Lawmakers and regulators face a challenging task in balancing these concerns. The novel products or services at issue, or the manner in which they are supplied, may be quite different from those of incumbent firms with which they have ample regulatory experience. Moreover, disruptive innovation tends to produce dynamic, evolving markets, complicating the task of adjusting regulations.

To better understand the economic activity generated and issues raised by emerging internet peer-to-peer platforms, the Federal Trade Commission held a workshop in June 2015 entitled *The "Sharing" Economy: Issues Facing Platforms, Participants, and Regulators*.⁵ The Workshop brought together legal, economic, and business experts as well as stakeholders to examine competition, consumer protection, and economic issues arising from sharing economy activity. The Commission also issued a request for comments and received over 2,000 public comments in response.⁶

This report describes and summarizes the ideas and issues discussed at the Workshop and in the comments received from the public. In particular, the report discusses the economics underlying how these marketplaces operate, and the platforms' approaches to addressing consumer protection and other regulatory concerns through trust mechanisms. It examines the costs and benefits resulting from the entry of these disruptive competitors, and regulatory approaches to protect consumers and the public while preserving the benefits of competition offered by these new sources of supply. It focuses on questions directly relevant to the Commission's responsibilities to protect consumers and promote competition, and does not address topics outside its areas of expertise and authority.⁷

Chapter 1 focuses on the economics of sharing economy marketplaces, particularly how these platforms use technology to facilitate low-cost transacting among many small suppliers and buyers, as well as certain competition issues that may arise as sharing economy marketplaces mature. Chapter 2 addresses technology-enabled trust mechanisms that platforms have implemented to give participants

⁵ Fed. Trade Comm'n, Workshop Announcement, The "Sharing" Economy: Issues Facing Platforms, Participants, and Regulators (Apr. 17, 2015), <https://www.ftc.gov/system/files/attachments/press-releases/ftc-examine-competition-consumer-protection-economic-issues-raised-sharing-economy-june-workshop/150416economyworkshop.pdf>. Appendix C contains the Workshop agenda. All of the materials from the Workshop, including a video of the proceedings, are available on the Workshop webpage: *The "Sharing" Economy: Issues Facing Platforms, Participants, and Regulators*, FED. TRADE COMM'N (June 9, 2015), <https://www.ftc.gov/news-events/events-calendar/2015/06/sharing-economy-issues-facing-platforms-participants-regulators>. A transcript of the proceedings is also available. Transcript of Sharing Economy Workshop, Fed. Trade Comm'n (June 9, 2015), https://www.ftc.gov/system/files/documents/public_events/636241/sharing_economy_workshop_transcript.pdf [hereinafter Workshop Tr.].

⁶ See Fed. Trade Comm'n, Workshop Announcement, *supra* note 5; List of Public Comments regarding Sharing Economy Workshop, FED. TRADE COMM'N, <https://www.ftc.gov/policy/public-comments/initiative-607>. Appendix A lists all of the public comments cited in this report, together with links to the documents. Appendix B provides a brief overview of the public comments.

⁷ For example, the report does not examine important questions such as whether platform suppliers are independent contractors or employees, what safeguards may be needed to help deter racial or other forms of discrimination, or what measures are appropriate to effectively and efficiently increase access for those with disabilities. Although the Commission recognizes the importance of these issues, it did not address these topics at the Workshop because they lie outside its areas of expertise and authority. Rather, the Workshop focused on questions more directly relevant to the Commission's responsibilities to protect consumers and promote competition.

confidence that transactions with strangers will go smoothly. Chapter 3 examines the debate surrounding the approaches governments should adopt in regulating sharing economy platforms and suppliers. Chapter 4 discusses the rise of the sharing economy in two key sectors, short-term lodging and for-hire transportation service, the competition between platform-based suppliers and traditional incumbents, and the resulting debate over how regulators should respond.

Chapter 1

A sharing economy marketplace involves three important sets of players – *the platform*, which provides the marketplace, *the buyers* (also referred to in varying contexts as consumers, riders, or renters), and *the sellers* (also referred to in varying contexts as suppliers, providers, or hosts). The buyers and sellers are typically individuals or small entities who transact over the platform. A platform provides a discrete set of services to the parties using it, facilitating their efforts to transact effectively and efficiently, including searching for potential transacting partners, agreeing to terms with them, and performing the contract. To facilitate transactions, a platform typically designs and provides an online marketplace that buyers and sellers can access by employing various internet-connected digital communications devices. These devices – often mobile, geolocation-enabled smartphones and tablets – are typically owned by the participants themselves rather than supplied by the platform. They generally run mobile software applications (“apps”) that simplify the process for accessing and using the platform, its search engine, and platform software designed to match buyers and sellers.

A sharing economy platform may compete with other platforms within its sector to attract buyers and sellers as participants, as well as with traditional suppliers of goods and services similar to those sold over the platform. For example, Uber and Lyft compete with existing taxicab companies for riders, as well as with each other for drivers and riders. The platform’s commercial success depends on the extent to which it is able to attract users and earn revenues, for example by charging fees for the transactions.

Workshop participants identified three characteristics of a successful platform marketplace.

First, it must attract a large number of participants to both sides of the market, so that each participant has a substantial number of potential matches on the other side of the market (resulting in a “thick” market). The value of the platform to a participant depends on the number of participants on the other side of the market, resulting in two-sided network effects. Workshop panelists explored the importance of market “thickness” and the potential impact of network effects on market concentration and platform entry.

Second, a platform must enable potential transaction partners to search for one another, find a match, and complete a transaction. To be successful, a platform must reduce friction that otherwise would make transactions costly or more cumbersome. For example, a platform may define the product or service when customers have diverse preferences across a heterogeneous spectrum of goods or services, and suppliers offer a correspondingly diverse set of offerings. A narrow product definition will exclude some similar products offered by sellers from the buyer’s consideration, potentially making the market too thin, whereas a broad definition may include so many diverse products offered by sellers that comparisons could be difficult for many buyers. For example, Workshop participants contrasted Uber, which quickly makes a match between riders and drivers based on geographical proximity, with Airbnb,

which enables prospective renters to search many listings, consider a broad array of attributes, and choose which hosts to contact.

Third, platforms must make transacting between strangers safe and reliable enough that buyers and sellers feel confident that their transaction will proceed as agreed. Chapter 2 describes how platforms seek to address this need by implementing reputation systems and other trust mechanisms.

The Workshop also addressed some of the factors underlying the growth of the sharing economy. Participants discussed how platforms can facilitate entry by small suppliers, for example, by providing them with the means to efficiently reach customers on a large scale. They also explored how, in many cases, small suppliers can offer goods and services at attractive prices because they can employ underutilized assets. For example, hosts who wish to use their residences more fully may list them as short-term rentals on Airbnb. Because these sellers already have a key asset, in this case their residence, the capital investments required to enter the market may be small, lowering barriers to entry and the overall cost of service. Platforms generally also provide suppliers with flexibility to choose when to provide service, for example, by focusing on periods when they have underutilized time or when demand is highest.

Finally, the Chapter turns to several policy issues that may arise as the sharing economy matures, although Workshop participants found it difficult to make predictions in these areas. Panelists discussed whether professional (as opposed to part-time) sellers may account for an increasing proportion of supply over sharing economy platforms. eBay, several participants observed, has seen a pronounced shift from individual to small business sellers. Panelists differed regarding the extent to which such a switch is likely to occur on other platforms.

Panelists also considered whether and to what extent two-sided network effects might enable a platform to amass a large portion of participants in a market, thereby achieving a dominant position and potentially precluding effective competition from other platforms. Workshop participants generally expressed some skepticism regarding such concerns. Several identified countervailing market forces that could constrain a large platform, such as the ability of participants to join multiple platforms simultaneously (*i.e.*, "multi-homing"). Moreover, they recognized that a high concentration of participants on a single marketplace, even if it leads to dominance, could be highly valuable to both buyers and sellers, potentially making the impact of network effects on balance positive.

Panelists addressed the potential for platforms to integrate vertically, for example by employing people to supply service over the platform rather than simply providing a marketplace. Panelists generally were skeptical regarding the likelihood of such vertical integration, but recognized it could raise competition policy concerns. They also stated that vertical integration could be beneficial, by improving efficiency in the sharing economy. Indeed, panelists discussed the possibility that vertical integration may give some platforms the ability to address negative externalities, for example, how a vertically integrated Uber might be better able to deal with the problem of traffic congestion.

Chapter 2

Chapter 2 provides an overview of why trust mechanisms are important in the sharing economy, how particular platforms employ trust mechanisms, and how these mechanisms work to promote buyer and seller satisfaction. To some, the fact that individuals are willing to purchase goods and services from non-professionals or even strangers through sharing economy platforms represents something of a puzzle. A seller operating in the sharing economy can be anonymous, having made little or no investment in establishing a physical commercial space or even a business reputation, and thus does not typically offer buyers the opportunity to inspect goods or services in-person prior to purchase. For these and other reasons, there has been some concern that low-quality sellers would be attracted to these marketplaces, potentially driving out high-quality sellers and causing marketplaces either to dissolve or to deal primarily in low-quality goods and services.

Panelists observed, however, that these problems do “not stop the sharing economy from prospering . . . because the internet also provides a number of new tools to address the problem[s].”⁸ Platforms use reputation ratings systems and other trust mechanisms, employing internet and software technologies, to encourage good behavior by participants on the platforms. Perhaps the most familiar example is the seller rating system developed by eBay through which buyers can rate their experience with a particular seller, generating an aggregate “Feedback score” that incorporates the ratings from many individual buyers. Sharing economy platforms have developed their own reputation ratings systems, adapted to the particular good or service sold over the platform. Common features include the opportunity for both buyers and sellers to rate one another, the opportunity to rate along different dimensions of the product (*e.g.*, the quality of communication or the quality of the good itself), and safeguards against user manipulation via fake reviews.

The panelists participating in the Workshop generally agreed that, although reputation ratings systems do not eliminate buyer or seller dissatisfaction, they work well enough to have facilitated the enormous growth of the sharing economy. Panelists highlighted research showing that a seller’s reputation rating influences buying decisions on a platform: a higher-rated seller is likely to earn a premium compared to a lower-rated seller offering the same good. In addition to earning a premium, a higher rating also increases the probability that an individual seller will make a sale. Panelists also opined that reputation mechanisms work well to deter fraudulent behavior from occurring on the platform.

Although panelists generally agreed that reputation ratings systems are working well in the sharing economy, many expressed the view that these systems do not function perfectly. In particular, panelists expressed views or outlined evidence showing that reputation ratings may be biased upward because platform users tend to leave positive feedback or no feedback at all rather than leave negative feedback. Reputation ratings may also be biased toward extreme experiences because users may be more likely to take the time to leave feedback if they have a particularly positive or negative experience with a transaction partner. In addition, panelists opined that a reputation rating in the sharing economy may be misleading, because users may act strategically by leaving fake reviews, or be reluctant to criticize a person they have dealt with directly, such as a host on Airbnb. Further, panelists explained that

⁸ Workshop Tr. at 55 (Chrysanthos Dellarocas). *See generally infra* Chapter 2, Section III.

reputation ratings may not accurately reflect a user's quality if the user is just starting out on the platform or planning to exit the platform soon. In the former case – the so-called “cold start” – if the number of transactions an individual user has engaged in is low or zero, even a well-functioning reputation system would have difficulty assessing that individual's quality. The latter case involves “reputation milking,” whereby a user trades on a well-established reputation for high-quality but provides low-quality prior to leaving the platform.

Workshop participants addressed a number of ways platforms could adjust their reputation systems to account for some of these problems. Potential adjustments by a platform include: reporting a user's percentile ranking alongside his or her aggregate score; reporting on the number of unrated or “silent” transactions for a given user; and/or weighing recent transactions more heavily than older ones in calculating an individual user's reputation score. In addition to adjusting the reputation rating system, panelists pointed to efforts by platforms to promote trust among users by incorporating so-called “platform interventions.” Platform interventions include curating entry onto the platform, such as by performing background checks of users (particularly service providers), or providing certain “guarantees” by the platform, such as by refunding money to dissatisfied customers or supplying insurance in the event one user causes damage to another. Platform interventions can help solve problems associated with cold start and reputation milking in particular.

Panelists also discussed the benefits and costs of having the platform rather than a third party supply the reputation rating system. Panelists generally agreed that combining market-making and reputation-rating within a single platform generates economies of scope, and that for the most part platforms have the appropriate incentives to provide sufficient information to allow platform users to choose the proper transaction partner. That said, some panelists also recognized that because platforms often earn fees based upon the number of transactions that they enable, they could have an incentive to inflate the quality of users' reputations if doing so would increase the number of transactions.

Chapter 3

Chapter 3 addresses the debate surrounding regulation of the sharing economy. Regulating sharing economy transactions raises several concerns. On the one hand, appropriate regulatory measures can protect consumers, promote public safety, and meet other legitimate government goals. On the other hand, unnecessary or excessive regulation can chill the disruptive innovation associated with sharing economy platforms – for example, by raising barriers to entry or increasing costs of operation – and thereby delay or reduce the substantial consumer benefits that often accrue when new competitors enter the marketplace. Lawmakers and regulators must balance these competing considerations in determining how to regulate economic activity on sharing economy platforms.

As the FTC explained in a submission to the Organisation for Economic Co-operation and Development (OECD):

Competition authorities can play an important role shaping the inevitable transitions caused by disruptive innovation, by advocating for regulatory responses that do not unduly restrain competition, enforcing competition rules to ensure that incumbents do not foreclose new rivals

from the market, and using studies and other research methods to foster greater understanding of new technologies and business models.⁹

The FTC plays just such a role through its competition advocacy program, which provides advice and input on competition policy issues raised by, for example, state and local regulation of sharing economy business models.

The Commission, through advocacy and comment letters addressing state and local regulation affecting platform-based local transport services, has articulated broadly applicable principles for balancing competition policy and regulatory goals. Specifically, regulators should impose requirements only when there is evidence that regulation is needed to protect consumers and the public or to serve some other legitimate public goal. Moreover, regulatory actions should be tailored so that they are no more restrictive than necessary to serve those goals.

Chapter 3 describes the views expressed by Workshop participants on these issues. According to some participants, sharing economy suppliers frequently compete with traditional suppliers of similar products or services, and should be subject to the same regulatory requirements to ensure a level playing field. Other participants, however, suggested that requirements imposed on new platform suppliers be tailored to the particular circumstances they present, and account for the existence of any platform-supplied features and mechanisms that address regulatory needs. Indeed, some participants expressed skepticism regarding existing regulatory provisions, suggesting that they may be outmoded, may reflect erroneous assessments of regulatory needs, or may be designed to protect incumbents. They suggested that regulators reform such provisions to lift unnecessary burdens from both platform and traditional suppliers.

Evaluating these competing claims is complicated by the differing interests of the players. Entrants may have incentives to understate the extent to which regulation of their activities is needed to protect consumers and third parties; conversely incumbents may have incentives to respond to new entry by using the regulatory process to impede competition. For example, they may demand that regulators force such entrants to follow the same regulations applied to them, regardless of relevant differences in business models.

Panelists generally recognized that regulatory issues involving sharing economy platforms may differ substantially from those posed by traditional suppliers. As discussed in Chapter 2, reputation systems and other trust mechanisms (*e.g.*, insurance, guarantees, vetting of participants) provided by platforms may significantly lessen consumer protection concerns arising from inadequate knowledge, and therefore reduce the need for regulation to address these problems. Panelists also described how new technology has improved communications between suppliers and customers and thus could reduce the need for certain regulatory provisions. Panelists generally recognized that traditional suppliers may adopt similar technology and business models, and that should they do so, regulators should adjust their regulatory treatment accordingly.

⁹ Comment from Fed. Trade Comm'n to Competition Committee, OECD Directorate for Financial and Enterprise Affairs, OECD 2 (June 19, 2015), https://www.ftc.gov/system/files/attachments/us-submissions-oecd-other-international-competition-fora/1507disruptive_innovation_us.pdf.

In examining potential approaches to regulating the sharing economy, a number of Workshop participants emphasized that the growth of the sharing economy is the result of new and innovative business models, activity that is inherently risky and unpredictable in nature. The sheer pace of change is staggering. In the space of a few years, several platforms have transformed whole sectors of their respective markets. Several panelists argued that the speed and unpredictability of this innovation will likely make it necessary to adjust regulation substantially as sharing economy markets develop, and therefore called for flexibility in regulatory approaches and avoidance of preemptive regulation.

Finally, Chapter 3 briefly addresses privacy concerns that could arise due to the large amounts of data platforms assemble, particularly about participants and their transactions. Although some panelists suggested the sharing economy raises substantial privacy concerns, there was limited opportunity to analyze the problems and discuss possible policy measures. Several participants noted a tension or need for balancing between privacy concerns and the flow of transaction-specific and customer-specific information that is central to the success of the sharing economy. Commission work on data security and privacy issues can provide useful guidance in this area.

Chapter 4

Chapter 4 focuses attention on the vigorous debates over how to regulate the platforms and platform-based suppliers who have made substantial inroads in the for-hire transport and short-term lodging sectors. Participants identified protecting the health and safety of consumers of these services and the public as core regulatory concerns, and addressed several other regulatory areas as well.

Workshop participants generally recognized that the services provided by new suppliers in the for-hire transport sector (*e.g.*, Uber drivers) were similar in important respects to those provided by taxi drivers. In contrast, participants disagreed on the extent of differences between platform lodging suppliers (*e.g.*, Airbnb hosts) and traditional hotels and bed-and-breakfasts. Airbnb claimed that hosts generally are individual residents who allow guests to stay in their homes once in a while, and should not be subject to regulations applied to hotels and bed-and-breakfasts. Hotels disagreed, claiming in part that many Airbnb hosts are in fact operating commercially and thus should be similarly regulated.

The platforms emphasized that their ratings mechanisms and other policies help address the need to protect consumers and the public. Uber, for example, vets its own drivers, and its rating system is intended to promote safe and effective service. Airbnb has a rating system and handles guests' payments, transmitting them to the hosts only after the guests have checked in. Airbnb and Uber also take other significant steps to provide guarantees and insurance products to suppliers. However, disputes remain as to the adequacy of some of these measures, for example, whether background checks for platform-based drivers should include fingerprinting.

In part due to the similarities of service provided by platform-based drivers and taxi drivers, Workshop panelists agreed that some taxi regulations regarding safety (*e.g.*, vetting drivers, inspecting cars, and requiring insurance) should apply in some form to both. At the same time, they generally suggested that regulators should tailor regulation to reflect key features of sharing economy supply. Indeed, a significant number of jurisdictions have imposed regulations protecting consumers by requiring platform-based drivers to pass background checks, obtain insurance, and meet other

requirements, but have tailored the requirements to the particular circumstances of providing rides over platforms. Such common ground was not evident among panelists in the short-term lodging sector.

The Chapter also briefly reviews the debate over three other areas of regulatory concern in these sectors: collection of applicable taxes, preservation of residential neighborhoods, and service to the disabled or disadvantaged. The Workshop discussion touched on the difficulties some of these issues pose and the need for reliable data to understand them clearly.

The tax issue involves claims by hotels and others that Airbnb hosts generally fail to pay applicable local or state taxes. Representatives of Airbnb and a hotel association who spoke at the Workshop disagreed on the degree of Airbnb's responsibility and willingness to collect applicable fees and taxes from hosts and transmit them to state or local governments.

The neighborhood preservation issue arises from concerns that short-term renters will undermine the quiet, clean, and safe character of residential neighborhoods, through disruptive or undesirable behavior. Also of concern is the potential for conversion of residential units into full-time Airbnb rentals, which some argued could reduce the supply of affordable housing. Panelists also debated whether hosts are renting in violation of certain local ordinances that restrict short-term rentals (*e.g.*, rentals for less than 30 days) in residential areas. A report prepared by the New York State Attorney General's office using Airbnb data suggested that many Airbnb rentals in New York City were in violation of the city's short-term rental restrictions. In addition to disputing the report's findings, Airbnb argued that the restrictions are antiquated and should be reformed, a position with which hotels and others disagreed.

Workshop participants also briefly discussed the ability of platform drivers to meet obligations to provide service to traditionally underserved customers and disabled riders. Both taxi and Uber representatives acknowledged that service to disabled riders is a challenge for both business models, but noted that they are making efforts to address it.

Introduction¹⁰

Innovation is a major driver of long-term consumer welfare gains in our competitive economy. Disruptive innovation in particular offers great potential benefits to consumers. Markets can be transformed by new technology; novel products, services, or business models; or new sources of supply. This innovation, economist Joseph Schumpeter argued, is a “perennial gale of creative destruction” that propels market economies to meet consumer demands.¹¹ The opportunity to compete in the marketplace affords potential innovators the incentives to undertake the expensive, difficult, and risky process of creating and introducing innovative new products and services. Preserving such opportunities has long been a core part of the Federal Trade Commission’s competition mission.

A variety of new business models, collectively referred to as the “sharing economy,” have emerged in the past few years and are dramatically reshaping how services and products are provided in an expanding number of sectors. Fundamentally, sharing economy platforms use internet, smartphone, and software technologies to create marketplaces that facilitate transactions between numerous peers – decentralized buyers and sellers who are frequently individuals or small entities. Sharing economy platforms enable “the emergence of marketplaces, . . . meeting point[s] for supply and demand, making it easier for almost anyone to become a supplier of goods and services in exchange for money.”¹² They provide transactional services in order to facilitate commercial activity between these participating buyers and sellers,¹³ in contrast with internet retailers that themselves sell goods and services directly to buyers (e.g., Apple’s or Best Buy’s or Drugstore.com’s websites).

The term “sharing economy” itself generates criticism. Some commentators argue that the word “sharing” is a “misnomer” employed to mask the essentially commercial nature of the activity on these platforms.¹⁴ They have argued that the term misleadingly “frames technology-enabled transactions as if they were altruistic or community endeavors”¹⁵ and “create[s] a halo of positive branding to avoid the

¹⁰ This report represents the views of the staff of the Federal Trade Commission. It does not necessarily represent the views of the Commission or of any individual Commissioner. This report describes the views expressed by panelists, commenters, and other speakers and writers in connection with the Workshop. Neither the Commission nor any individual Commissioner necessarily endorses or subscribes to any of those views, which should be understood by the reader as belonging or attributed only to the speaker or writer who expressed them.

¹¹ SCHUMPETER, *supra* note 1, at 84.

¹² CATALAN COMPETITION AUTH., PEER-TO-PEER (P2P) TRANSACTIONS AND COMPETITION 2 (2014), *attached to* Catalan Competition Auth. Comment. *See also* ARUN SUNDARARAJAN, THE SHARING ECONOMY: THE END OF EMPLOYMENT AND THE RISE OF CROWD-BASED CAPITALISM 69 (2016) (sharing economy platforms “may represent a new structure for organizing economic activity, one that is an interesting hybrid of a market and a hierarchy”).

¹³ *See, e.g.*, Rudy Telles Jr., Office of Chief Economist, U.S. Dept. of Commerce, *Issue Brief #01-16, Digital Matching Firms: A New Definition in the “Sharing Economy”* Space 3 (June 3, 2016), <http://www.esa.gov/sites/default/files/digital-matching-firms-new-definition-sharing-economy-space.pdf> [hereinafter U.S. Dept. of Commerce Issue Brief] (“Digital matching firms use information technology (IT systems), typically available via web-based platforms such as mobile ‘apps’ on Internet-enabled devices, to facilitate peer-to-peer transactions.”).

¹⁴ *See, e.g., id.*; Sarah O’Connor, *The Gig Economy is Neither ‘Sharing’ nor ‘Collaborative’*, FIN. TIMES (June 14, 2016), <https://www.ft.com/content/8273edfe-2c9f-11e6-a18d-a96ab29e3c95>.

¹⁵ Natasha Singer, *Twisting Words to Make ‘Sharing’ Apps Seem Selfless*, N.Y. TIMES (Aug. 8, 2015), <http://www.nytimes.com/2015/08/09/technology/twisting-words-to-make-sharing-apps-seem-selfless.html>. On the other hand, some argue that the sharing economy label has been applied to platforms that do promote activities that resemble

discussion of what regulatory structures need to be modernized to deal with these platforms.”¹⁶ For example, a June 2016 report by the U.S. Department of Commerce noted that “terms such as ‘sharing’ and ‘collaborative’” incorrectly “impl[y] services being provided for free” although “[s]ervice providers are simply using their assets to earn money.”¹⁷

Others consider the term “sharing economy” vague, with “a range of meanings.”¹⁸ We have seen various other phrases used to refer to these platform-enabled activities, including “collaborative consumption,” “gig economy,” “on-demand economy,” and the “peer economy.”¹⁹ Given the prevalent use of the term “sharing economy” throughout the Workshop, this report continues to use the term to refer to activity on peer-to-peer platforms that are primarily commercial in nature.

A sharing economy platform must enable participants to transact effectively and inexpensively, which generally includes searching for potential transacting partners, agreeing to terms, and performing the contract. To facilitate transactions, successful platforms typically design and provide a marketplace in which buyers and sellers employ various internet-connected devices to access the platform. These devices, which are frequently mobile, geolocation (“GPS”)-enabled smartphones and tablets, run mobile applications that simplify the process of using the platform. The platform provides a search engine and software designed to match buyers and sellers effectively and efficiently, and “at a scale never seen before.”²⁰ The use of mechanisms to promote confidence in transacting also has greatly contributed to the success of certain sharing economy platforms.

Small-scale, peer-to-peer transactions now occurring over sharing economy platforms are not new at all.²¹ Long before the internet, young people needing a ride or a spare room for a weekend, or a parent needing a household service, might consult a bulletin board or the classified ads, or make some phone calls. Now they can go to sharing economy platforms to obtain rides through the Uber and Lyft platforms, find a room to rent through Airbnb or other similar platforms, or locate a handyman or

conventional sharing, while recognizing that the term is now applied mainly to platforms facilitating commercial activity. See, e.g., Sarah Kessler, *The “Sharing Economy” Is Dead, And We Killed It*, FAST COMPANY (Sept. 14, 2015, 6:06 AM), <https://www.fastcompany.com/3050775/the-sharing-economy-is-dead-and-we-killed-it>.

¹⁶ Adam Chandler, *What Should the ‘Sharing Economy’ Really Be Called?*, THE ATLANTIC (May 26, 2016), <http://www.theatlantic.com/business/archive/2016/05/sharing-economy-airbnb-uber-yada/484505/>.

¹⁷ U.S. Dept. of Commerce Issue Brief, *supra* note 13, at 4.

¹⁸ *Sharing Economy*, WIKIPEDIA, https://en.wikipedia.org/wiki/Sharing_economy (last updated Sept. 29, 2016, 8:57 AM) (“Sharing economy is an umbrella term with a range of meanings, often used to describe economic and social activity involving online transactions.”); see also Rachel Botsman, *The Sharing Economy Lacks A Shared Definition*, FAST COMPANY (Nov. 22, 2013, 7:30 AM), <http://www.collaborativeconsumption.com/2013/11/22/the-sharing-economy-lacks-a-shared-definition/>.

¹⁹ See, e.g., Rachel Botsman, *supra* note 18; Gideon Lichfield, *All the Names for the New Digital Economy, and Why None of Them Fits*, QUARTZ (Nov. 12, 2015), <http://qz.com/548137/all-the-names-for-the-new-digital-economy-and-why-none-of-them-fits/>. See also U.S. Dept. of Commerce Issue Brief, *supra* note 13 (adopting the term “digital matching firms”); SUNDARARAJAN, *supra* note 12, at 27 (proposing the term “crowd-based capitalism”).

²⁰ Application Developers All. Comment at 1.

²¹ Workshop Tr. at 85-86 (Arun Sundararajan).

cleaning person on TaskRabbit or Handy. These platforms use the internet to facilitate exchanges at a much larger scale, and to reduce the cost associated with matching transaction partners.²²

PricewaterhouseCoopers estimates that sharing economy marketplaces in five sectors – peer-to-peer finance, online staffing, peer-to-peer accommodation, car sharing, and music/video streaming – generated \$15 billion in revenues worldwide in 2013, and projects that these revenues will rise more than twentyfold to \$335 billion by 2025.²³ The magnitude of the sharing economy's impact has registered in the financial world as well. Some of the largest companies in this space have gone through multiple rounds of funding, in some cases reflecting valuations in the tens of billions of dollars. Based on a round of funding in December 2015, Uber was valued at \$62.5 billion,²⁴ while a November 2015 financing placed Airbnb's valuation at \$25.5 billion.²⁵ Etsy, the peer-to-peer marketplace for handmade or vintage items, went public in April 2015 and opened with a value of nearly \$4 billion.²⁶ Incumbent businesses are also providing financing to sharing economy marketplaces – partnering with, investing in, or acquiring sharing economy platforms. Since the beginning of 2015, General Motors made a \$500 million investment in Lyft, valuing Lyft's equity interest at \$5.5 billion,²⁷ and Apple invested \$1 billion in Didi Chuxing, China's biggest for-hire transportation platform.²⁸ Hotelier Hyatt has purchased a stake in British accommodations platform OneFineStay,²⁹ while Expedia paid \$3.9 billion to acquire the lodging site HomeAway.³⁰

Two sectors of the travel industry have been at the epicenter of the explosion of sharing economy activity:³¹ short-term lodging (specifically, rental stays like those provided by hotels and bed-and-breakfasts) and for-hire transportation service (specifically, services akin to those provided by traditional taxis and limousines). Airbnb has become a leading platform for facilitating short-term rental transactions. Started in 2008 by roommates who rented out space in their apartment during a local convention, Airbnb reported over two million listings in over 34,000 cities, and a cumulative total of 60

²² Comput. & Commc'ns Indus. Ass'n Comment at 2.

²³ Press Release, PricewaterhouseCoopers, *supra* note 3; *see also* Smith, *supra* note 3.

²⁴ Mike Isacc & Leslie Picker, *Uber Valuation Put at \$62.5 Billion After a New Investment Round*, N.Y. TIMES (Dec. 4, 2015), <http://www.nytimes.com/2015/12/04/business/dealbook/uber-nears-investment-at-a-62-5-billion-valuation.html>.

²⁵ Jessica Guynn, *Airbnb Raises \$100M at \$25.5B Valuation*, USA TODAY (Nov. 20, 2015, 7:49 PM), <http://www.usatoday.com/story/tech/2015/11/20/airbnb-100-million-new-round-funding/76128194/>.

²⁶ Neha Dimri, *Crafts Website Company Etsy Valued at \$4 billion in Market Debut*, REUTERS (Apr. 16, 2015, 12:13 PM), <http://www.reuters.com/article/us-etsyinc-ipo-idUSKBN0N71T420150416>. However, a year later its value had fallen to about \$1 billion. Amy Larocca, *Etsy Wants to Crochet Its Cake, and Eat It Too*, N.Y. MAG. (Apr. 4, 2016), <http://nymag.com/thecut/2016/04/etsy-capitalism-c-v-r.html>.

²⁷ Alex Fitzpatrick, *Why General Motors Is Investing \$500 Million in Lyft*, TIME (Jan. 4, 2016), <http://time.com/4166130/general-motors-lyft/>.

²⁸ Mike Isaac & Vindu Goelmay, *Apple Puts \$1 Billion in Didi, a Rival to Uber in China*, N.Y. TIMES (May, 12, 2016), <http://www.nytimes.com/2016/05/13/technology/apple-puts-1-billion-in-didi-a-rival-to-uber-in-china.html>.

²⁹ Craig Karmin, *Hyatt Invests in Home-Rentals Firm*, WALL ST. J. (May 21, 2015, 2:27 PM), <http://www.wsj.com/articles/hyatt-invests-in-home-rentals-firm-1432232861>.

³⁰ Leslie Picker, *Expedia to Acquire HomeAway for \$3.9 Billion*, N.Y. TIMES (Nov. 4, 2015), <http://www.nytimes.com/2015/11/05/business/dealbook/expedia-to-acquire-homeaway-for-3-9-billion.html>.

³¹ Irene S. Levine, *From Homes to Meals to Cars, 'Sharing' Has Changed the Face of Travel*, CHI. TRIB. (Dec. 16, 2015, 5:49 PM), <http://www.chicagotribune.com/lifestyles/travel/sc-trav-1229-sharing-economy-20151216-story.html>.

million guests by the end of 2015.³² Platforms facilitating the provision of for-hire transportation service are often referred to as transportation network companies (or "TNCs"). The leading TNC, Uber, began operations in 2009 in San Francisco, and as of 2014 reported providing 140 million rides (including one million rides per day by year-end) and a driver base of over 162,000.³³ Pew Research Center found that by 2015, 11 percent of American adults had used an "on-line home-sharing service" and 15 percent had used "ride-hailing apps."³⁴

The growth of the sharing economy and the accompanying regulatory concerns are of great interest to the Federal Trade Commission. The Commission held a Workshop in June 2015 entitled *The "Sharing" Economy: Issues Facing Platforms, Participants, and Regulators*, which is the subject of this report.³⁵ The Workshop brought together legal, economic, and business experts to examine competition, consumer protection, regulatory, and economic issues relating to emerging internet peer-to-peer platforms, and the Commission received over 2,000 public comments on these topics.³⁶

The Commission's purpose in convening the Workshop and issuing this report is to focus on the important economic and regulatory issues that these peer-to-peer platforms present, not to support or oppose any particular business model. This report describes and summarizes the ideas and issues discussed at the Workshop and in the comments received from the public. In particular, the report discusses the economics underlying how these marketplaces operate, and the platforms' approaches to addressing consumer protection and other regulatory concerns through trust mechanisms. It examines the costs and benefits resulting from the entry of these disruptive competitors, and regulatory approaches to protect consumers and the public while preserving the benefits of competition offered by these new sources of supply.

As several Workshop panelists discussed, the sharing economy has expanded well beyond the accommodation and transportation sectors.³⁷ A panelist observed that a start-up tracking site lists "about

³² *About Us*, AIRBNB, <https://www.airbnb.com/about/about-us>. Piper Jaffray estimates that Airbnb hosts' share of the accommodations market could increase from two percent currently to as much as ten percent by 2025. Michael J. Olson & Samuel J. Kemp, Piper Jaffray, *Sharing Economy: An In-Depth Look At Its Evolution and Trajectory Across Industries* 15 (Mar. 2015), <http://collaborativeeconomy.com/wp/wp-content/uploads/2015/04/Sharing-Economy-An-In-Depth-Look-At-Its-Evolution-and-Trajectory-Across-Industries-.pdf>.

³³ Ellen Huet, *Uber Says It's Doing 1 Million Rides Per Day, 140 Million in Last Year*, FORBES (Dec. 17, 2014, 4:08 PM), <http://www.forbes.com/sites/ellenhuet/2014/12/17/uber-says-its-doing-1-million-rides-per-day-140-million-in-last-year/>; Ellen Huet, *Uber's Ever-Renewing Workforce: One-Fourth of Its Current U.S. Drivers Joined Last Month*, FORBES (Jan. 22, 2015, 4:14 PM), <http://www.forbes.com/sites/ellenhuet/2015/01/22/uber-study-workforce/>. Piper Jaffray estimates that peer-to-peer "ridesharing" platforms account for \$5.2 billion in global revenues, compared to a global \$90 billion taxi market. Olson & Kemp, *supra* note 32, at 26.

³⁴ Aaron Smith, Pew Research Ctr., *Shared, Collaborative and On Demand: The New Digital Economy* 3 (May 19, 2016), http://www.pewinternet.org/files/2016/05/PI_2016.05.19_Sharing-Economy_FINAL.pdf.

³⁵ Fed. Trade Comm'n, Workshop Announcement, *supra* note 5.

³⁶ *Id.* All of the materials from the Workshop, including a video of the proceedings, a written transcript, and the over 2000 public comments received are available on the Workshop webpage. See *The "Sharing" Economy: Issues Facing Platforms, Participants, and Regulators*, *supra* note 5.

³⁷ Workshop Tr. at 83 (Arun Sundararajan); See also Liran Einav, Chiara Farronato & Jonathan Levin, *Peer-to-Peer Markets* 1 (Nat'l Bureau of Econ. Research, Working Paper No. 21496, 2015), <http://www.nber.org/papers/w21496.pdf>.

600 peer-to-peer startups.”³⁸ One expert has developed an infographic “honeycomb” describing 16 broad sectors and approximately 40 subsectors in which sharing economy platforms operate, and specifying the location of 280 platforms within these categories.³⁹ His research reveals that the sharing economy model now extends to small businesses or individuals providing a wide range of goods and services, including, but by no means limited to: preparing meals, shipping or storing goods, renting tools or clothing, performing household tasks, providing health services, ordering custom-made goods, and obtaining funding for projects. And the expansion continues, as new platforms arise, each vowing to become the “Uber” or “Airbnb” of some other market sector.⁴⁰

Many Workshop participants described how entrepreneurial activity in the sharing economy generally enhances competition and consumer welfare by enabling the entry of new sources of supply. Some of these new suppliers have provided distinctive products and services, greater convenience, or lower prices that consumers value. However, their entry has also raised concerns regarding their potential impact on consumer protection, safety, and other public goals.⁴¹ State and local lawmakers and regulators face challenges as they seek to balance these competing considerations and also assess the ability of platforms to provide mechanisms for addressing many of the regulatory concerns. They often must resolve competing claims from incumbents arguing that they should apply existing regulations to new entrants, and from entrants arguing that features of their innovative business models lessen the need for traditional regulations.

The Commission is uniquely qualified to study the inherent tension between the potential competitive benefits that sharing economy business models may provide and the potential consumer harms they may pose. As Chairwoman Edith Ramirez said, “The Federal Trade Commission’s dual mission to promote competition and protect consumers makes the agency particularly well suited to consider the various issues raised by the sharing economy.”⁴² As part of its advocacy on competition matters, the Commission has sent advocacy letters to four jurisdictions considering regulatory measures affecting platform-based local transport services,⁴³ counseling regulators to avoid actions that “are likely

³⁸ Workshop Tr. at 23 (Chiara Farronato).

³⁹ Jeremiah Owyang, *Honeycomb 3.0: The Collaborative Economy Market Expansion*, JEREMIAH OWYANG BLOG (Mar. 10, 2016), <http://www.web-strategist.com/blog/2016/03/10/honeycomb-3-0-the-collaborative-economy-market-expansion-sxsw/>. A previous version of Owyang’s Honeycomb with 12 sectors was posted in December 2014 and referenced at the Workshop. See Jeremiah Owyang, *Collaborative Economy Honeycomb 2 – Watch it Grow*, JEREMIAH OWYANG BLOG (Dec. 7, 2014), <http://www.web-strategist.com/blog/2014/12/07/collaborative-economy-honeycomb-2-watch-it-grow/>.

⁴⁰ Workshop Tr. at 169 (Adam Thierer) (“look at a service like Shuttle, which is trying to be Uber for kids”); Geoffrey A. Fowler, *There’s an Uber for Everything Now*, WALL ST. J. (May 5, 2015, 1:09 PM), <http://www.wsj.com/articles/theres-an-uber-for-everything-now-1430845789> (“There’s an Uber for Everything Now: Apps do your chores: shopping, parking, cooking, cleaning, packing, shipping and more.”); Laura Entis, *‘We’re the Uber of X!’*, ENTREPRENEUR (Aug. 12, 2014), <http://www.entrepreneur.com/article/236456>.

⁴¹ See generally *infra* Chapter 3.

⁴² Edith Ramirez, Chairwoman, Fed. Trade Comm’n, Keynote Remarks at Fordham Law School 42nd Annual Conference on International Antitrust Law and Policy 2 (Oct. 2, 2015), https://www.ftc.gov/system/files/documents/public_statements/810851/151002fordhamremarks.pdf. See also Terrell McSweeney, Commissioner, Fed. Trade Comm’n, *Disruptors, Data & Robots: Competition Enforcement in the Digital Economy* 2-3, Chatham House Conference (Jun. 23, 2016), https://www.ftc.gov/system/files/documents/public_statements/966493/mcsweeney_-_chatham_house_keynote_6-23-16.pdf.

⁴³ See *infra* Chapter 3, Section I.

to hinder competition and are either not necessary or broader than necessary to achieve legitimate consumer protection and other public policy goals.”⁴⁴

This Introduction highlights the Commission’s interest in the sharing economy, but it should also clarify what is not driving the Commission’s interest. As Commissioner Maureen Ohlhausen emphasized in her introductory remarks, the Workshop was not intended as a precursor to law enforcement actions, but rather as an opportunity to learn more about this evolving set of business models and the issues they present.⁴⁵ Thus, this report aims to synthesize and present the information provided by the panelists at the Workshop and in the public comments submitted, not to identify areas for Commission investigation and enforcement. It seeks to aid the Commission, as well as regulators, consumer groups, platforms, participants using the platforms, incumbent firms, and others, as they address the complex issues raised by commercial activity conducted over sharing economy platforms.

In addition, this report focuses on questions directly relevant to the Commission’s responsibilities to protect consumers and promote competition, and does not address some of the policy issues raised by the sharing economy that are not within the Commission’s areas of expertise and authority. Two issues not covered in the report are worth noting. First, one of the most contentious legal and policy debates in the sharing economy concerns whether workers supplying services over platforms should be viewed as employees or as independent contractors, and the differences in legal protections and benefits associated with those classifications.⁴⁶ Government officials and experts discussed whether sharing economy workers fit well within the existing employee/independent contractor dichotomy, and whether to consider reforms to labor laws.⁴⁷ Second, concerns have been raised that some participants on Airbnb discriminate against African Americans,⁴⁸ spurring Airbnb to address the issue.⁴⁹

⁴⁴ Ramirez, *supra* note 42, at 6. *See infra* Chapter 3, Section I (describing these letters in more detail).

⁴⁵ Workshop Tr. at 6 (Ohlhausen).

⁴⁶ *See, e.g.*, O’Connor v. Uber Techs., 82 F. Supp. 3d 1133 (N.D. Cal. 2015) (denying Uber’s summary judgment motion on this issue); Cotter v. Lyft, Inc., 60 F. Supp. 3d 1067 (N.D. Cal. 2015) (denying parties’ cross-motions for summary judgment on this issue); Mike Isaac & Noam Scheiber, *Uber Settles Cases With Concessions, but Drivers Stay Freelancers*, N.Y. TIMES, (Apr. 21, 2016), <http://www.nytimes.com/2016/04/22/technology/uber-settles-cases-with-concessions-but-drivers-stay-freelancers.html>; Justin Fox, *Uber and the Not-Quite-Independent Contractor*, BLOOMBERG (June 23, 2015), <https://www.bloomberg.com/view/articles/2015-06-23/uber-drivers-are-neither-employees-nor-contractors>. These concerns were discussed in several of the comments received by the Commission. *See, e.g.*, Nat’l Employment Law Project Comment; Jobs With Justice Comment; P’ship for Working Families Comment.

⁴⁷ *See, e.g.*, Rachel Weiner & Lydia DePillis, *How Congress Can Make Life Better for Uber Drivers and Bike Messengers*, WASH. POST (June 3, 2016), https://www.washingtonpost.com/local/virginia-politics/how-congress-can-make-life-better-for-uber-drivers/2015/06/03/621d89f4-09f8-11e5-9e39-0db921c47b93_story.html; Joseph V. Kennedy, Info. Tech. & Innovation Found., *Three Paths to Update Labor Law for the Gig Economy* (Apr. 2016), <http://www2.itif.org/2016-labor-law-gig-economy.pdf>.

⁴⁸ *See, e.g.*, Selden v. Airbnb, Inc., No. 16-cv-00933, 2016 U.S. Dist. LEXIS 150863 (D.D.C. Nov. 1, 2016) (granting Airbnb’s motion to compel arbitration of plaintiff’s race discrimination claims); Benjamin G. Edelman, Michael Luca & Dan Svirsky, *Racial Discrimination in the Sharing Economy: Evidence from a Field Experiment 1* (Harvard Bus. Sch., Working Paper No. 16-069, 2016), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2701902 (finding that “applications from guests with distinctively African-American names are roughly 16% less likely to be accepted than identical guests with distinctively White names”); Benjamin G. Edelman & Michael Luca, *Digital Discrimination: The Case of Airbnb.com* (Harvard Bus. Sch., Working Paper No. 14-054, 2014), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2377353 (finding that non-black hosts using Airbnb in New York City charge about 12% more than black hosts for the equivalent rental).

Moreover, while sharing economy platforms are active in a wide range of sectors, a one-day Workshop can cover only certain parts of the sharing economy. This report focuses primarily on the short-term lodging and for-hire transportation service sectors. It is in these sectors that the sharing economy's disruptive innovation has arguably had the greatest economic impact to date, and in which the debate has been most robust on how to balance the potential benefits of disruptive innovation and the potential need for regulatory action to promote consumer protection and other public goals. The report occasionally refers to platforms in other sectors, *e.g.*, eBay and TaskRabbit, but those were not examined extensively. Platforms in other sectors may operate differently, as some of the comparisons between Uber and Airbnb in the report illustrate, and thus separate study of platforms in other sectors would further increase knowledge and understanding of the sharing economy. Due to differences in commercial activity across sectors, and the near-certainty that sharing economy platforms will continue to evolve over time, care should be taken when extrapolating lessons from the study of platforms in one sector to platforms in other sectors.⁵⁰

We hope that this report can serve as part of an ongoing conversation about the sharing economy.

⁴⁹ See *Fighting Discrimination and Creating a World Where Anyone Can Belong Anywhere*, AIRBNB ACTION, <https://www.airbnbaction.com/fighting-discrimination-and-creating-a-world-where-anyone-can-belong-anywhere/>; Katie Benner, *Airbnb Adopts Rules to Fight Discrimination by Its Hosts*, N.Y. TIMES (Sept. 8, 2016), <http://www.nytimes.com/2016/09/09/technology/airbnb-anti-discrimination-rules.html>;

⁵⁰ See generally Farhad Manjoo, *The Uber Model, It Turns Out, Doesn't Translate*, N.Y. TIMES (Mar. 23, 2016), <http://www.nytimes.com/2016/03/24/technology/the-uber-model-it-turns-out-doesnt-translate.html> (opining that the Uber model may be difficult to apply to other sectors).

Chapter One: Economics of Sharing Economy Marketplaces

I. Introduction

Over the last decade, sharing economy platforms such as Uber and Airbnb have made a dramatic entrance into everyday economic activity.⁵¹ Entrepreneurs have established a large number of platforms in a wide range of sectors during that span,⁵² and many more are on the way.⁵³

Although economists have been studying multi-sided platforms since the early 2000s,⁵⁴ economic literature is only beginning to examine the rise of the sharing economy.⁵⁵ The Workshop provided an opportunity for leading economists to shed some light on the complex economics of the sharing economy, furthering understanding and likely spurring additional research. Sections II and III of this Chapter look at the key characteristics of sharing economy platforms and the major market design issues they face. Section IV discusses various ways in which sharing economy platforms can improve welfare by enabling entry by suppliers, who potentially have lower costs or superior service compared to market incumbents, and by facilitating their transactions with consumers. Section V explores some of the competition issues that may arise as the sharing economy matures.

II. Key Characteristics of Sharing Economy Marketplaces

Sharing economy sites enable “the emergence of marketplaces, . . . meeting point[s] for supply and demand, making it easier for almost anyone to become a supplier of goods and services in exchange for money.”⁵⁶ Broadly speaking, “the role of peer-to-peer platforms [is] to connect individuals who want to trade assets or services.”⁵⁷ These platforms enable large decentralized groups of participants to transact with each other effectively and efficiently. They are reshaping the provision of some services and products, bringing disruptive innovation to a variety of sectors.⁵⁸

⁵¹ See *supra* Introduction, at text accompanying notes 23-25.

⁵² See Owyang, *Honeycomb 3.0*, *supra* note 39.

⁵³ See Workshop Tr. at 23 (Chiara Farronato).

⁵⁴ See, e.g., DAVID S. EVANS & RICHARD SCHMALENSEE, *MATCHMAKERS: THE NEW ECONOMICS OF MULTISIDED PLATFORMS* 14-15(2016).

⁵⁵ See, e.g., *id.*; Einav, Farronato & Levin, *supra* note 37; John J. Horton & Richard J. Zeckhauser, *Owning, Using and Renting: Some Simple Economics of the “Sharing Economy”* (Nat’l Bureau of Econ. Research, Working Paper No. 22029, 2016), <http://www.nber.org/papers/w22029.pdf>. Scholars have studied a few such platforms, particularly eBay, for some time. The Department of Commerce recently published a study of this space, referring to platforms as “digital matching firms.” U.S. Dept. of Commerce Issue Brief, *supra* note 13.

⁵⁶ CATALAN COMPETITION AUTH., *supra* note 12, at 2.

⁵⁷ See Workshop Tr. at 23 (Chiara Farronato). See also SUNDARARAJAN, *supra* note 12, at 26-27 (describing economic characteristics of the sharing economy).

⁵⁸ For a discussion of some of the benefits of sharing economy platforms, see U.S. Dept. of Commerce Issue Brief, *supra* note 13, at 11-14.

Platforms attract buyers and sellers by providing beneficial opportunities for transactions. To be attractive, potential trades between parties must offer gains, net of the costs of making a match and completing a transaction, that are superior to available alternatives.⁵⁹ Effective sharing economy platforms leverage technology to reduce transaction costs associated with matching dispersed buyers and sellers.

A sharing economy marketplace centers around three principal players – the platform, which provides the marketplace, and the buyers and sellers who transact on it.⁶⁰ Suppliers participating on the platform own the good to be sold (or rented) or control the assets needed to provide the service.⁶¹ They are typically individuals or small entities, and so transactions are characteristically peer-to-peer, *i.e.*, “the supplier may be someone similar to the consumer.”⁶² A sharing economy platform operates a marketplace, “match[ing] the[] individuals who own things with consumers who want to access them.”⁶³ It performs transactional services for the consumers and suppliers who transact in the marketplace,⁶⁴ for which it may receive a fee or otherwise obtain compensation. All platform participants – both consumers and suppliers – are therefore consumers of services supplied by the platform.

Sharing economy platforms thus contrast with more common, single-sided retail platforms.⁶⁵ For example, Airbnb provides a market in which hosts generally offer a single residence, or a part of it, to individuals needing short-term accommodations. In contrast, hotel websites such as Marriott.com or Hilton.com directly and simultaneously offer numerous rooms to travelers. Similarly, eBay provides a marketplace platform over which participating businesses or individuals conduct auctions or other sales transactions with each other, while internet retailer platforms (such as Apple’s or Best Buy’s internet platforms) generally act as retailers, making direct sales to customers.⁶⁶ Sharing economy platforms also contrast with multi-sided platforms that support transactions in the traditional economy.⁶⁷

⁵⁹ See Workshop Tr. at 23 (Chiara Farronato).

⁶⁰ See Einav, Farronato & Levin, *supra* note 37, at 2; CATALAN COMPETITION AUTH., *supra* note 12, at 2-3. There may be a number of different players whose activities relate to the sharing economy marketplace in important ways, such as companies that provide services to sharing economy suppliers that help them market their goods and services, fulfill their contracts, or otherwise run their businesses. See, e.g., Owyang, *Honeycomb 3.0*, *supra* note 39 (listing approximately 280 platforms serving segments in 40 sectors). See also Intuit Comment; Matt Villano, *What’s Next for the Sharing Economy?*, Entrepreneur (Nov. 21, 2014), <https://www.entrepreneur.com/article/239233> (“The next wave of opportunities in businesses will be companies that look at how we support development of the sharing economy”) (quoting Professor Arun Sundararajan).

⁶¹ See Workshop Tr. at 24 (Joshua Gans).

⁶² CATALAN COMPETITION AUTH., *supra* note 12, at 2.

⁶³ Workshop Tr. at 24 (Joshua Gans).

⁶⁴ See generally *infra* Section III (describing some of the services platforms provide to participants).

⁶⁵ For a discussion of the choice between operating a marketplace and being a reseller, see Andrei Hagiu & Julian Wright, *Do You Really Want to Be an eBay?*, 91 HARV. BUS. REV. 102 (2013), <https://hbr.org/2013/03/do-you-really-want-to-be-an-ebay>.

⁶⁶ Amazon is a very large online retailer selling directly to customers but, through its “Amazon Marketplace” service, also is a platform over which third parties sell products.

⁶⁷ Credit card companies like Visa or American Express, or mobile payment providers like Square, are multi-sided platforms that facilitate payments for transactions between buyers and sellers.

The individual suppliers using sharing economy platforms frequently employ their existing personal assets, in some cases dramatically reducing their need to incur fixed costs.⁶⁸ Sharing economy platforms can enable individuals and small entities to enter a market and supply customers they would otherwise not be able to reach in a cost-effective way. In some cases, they may bring about a “gale of creative destruction” envisioned by Schumpeter, transforming markets.⁶⁹ In other cases, they may simply offer a viable competitive alternative to existing suppliers. Platforms may enable transactions for which there previously was no market,⁷⁰ or may serve existing markets in novel ways, meeting unmet demand or displacing sales previously made by existing suppliers.⁷¹

III. Designing Sharing Economy Marketplaces

Successful platforms must design and maintain efficient markets that enable both buyers and sellers to capture gains from trade.⁷² Parties will not participate in a platform unless they expect the benefits to outweigh the costs of finding a transaction partner and completing the transaction. Thus, platforms must efficiently match suppliers and buyers for whom there are substantial gains from trade, without imposing transactions costs that undermine these gains.

One panelist laid out “three principles of market design,” which he attributed to Al Roth, Nobel Laureate in Economics: markets will generally be “successful if they are liquid”; if they enable matchmaking between buyers and sellers in real time; and “if the transactions in them are safe.”⁷³ Liquidity requires that markets be thick, *i.e.*, that there be substantial numbers of potential transaction partners on both sides of the market, and likely leads to two-sided network effects on these platforms. Matchmaking requires that participants be able to search among potential transaction partners, find suitable transaction partners, and enter into transactions. Safety, as a general matter, implies a degree of confidence that the transaction will be completed as expected, minimizing potential harms.⁷⁴ The design challenges facing sharing economy platforms vary with conditions in the particular sector in which they operate. For example, as the number of product attributes a buyer considers increases, the effort a buyer may expend for searching and matching may also increase. One panelist explained that matching poses a particular challenge “when people have very heterogeneous preferences and the set of products is really large, diverse, and . . . unstructured.”⁷⁵ When consumer preferences are relatively uniform, matching may be simpler.

⁶⁸ See *infra* Section IV.

⁶⁹ SCHUMPETER, *supra* note 1, at 84. See also EVANS & SCHMALENSEE, *supra* note 54, at 49 (peer-to-peer matchmaking platforms are “the forces behind a gale of ‘creative destruction’ that is revolutionizing economies worldwide”) (quoting Schumpeter).

⁷⁰ Workshop Tr. at 11 (Liran Einav).

⁷¹ Sundararajan, *supra* note 12, 121-23.

⁷² See Einav, Farronato & Levin, *supra* note 37, at 4-11.

⁷³ Workshop Tr. at 24-25 (Joshua Gans); see also Alvin E. Roth, *What Have We Learned from Market Design?*,

9 INNOVATION POL’Y & ECON. 79 (2009), <http://www.journals.uchicago.edu/doi/pdfplus/10.1086/592422>.

⁷⁴ Chapter 2 discusses various trust mechanisms that platforms may use to address safety concerns.

⁷⁵ Workshop Tr. at 14 (Liran Einav).

Successful sharing economy platforms generally enable access by modern digital communications technology, running mobile apps to connect buyers and sellers to platforms where they can find matches effectively and cheaply.⁷⁶ Panelists credited widespread connectivity and the spread of mobile internet and GPS-enabled devices for participants' ability to transact efficiently and "in real time."⁷⁷ The growth in computational power and machine learning may also be key in the sharing economy's success.⁷⁸ As one commenter noted, sharing economy software apps play an essential role in enabling "the exchange of goods and services at a scale never seen before" by "solving complex matching problems."⁷⁹

A. Thick Markets

A successful sharing economy platform requires that both sides of the market be "thick,"⁸⁰ *i.e.*, that there are substantial numbers of buyers and sellers, so that each participant has a significant number of potential matches. Adding buyers gives sellers greater incentive to participate in a platform; conversely, adding sellers gives buyers greater incentive to participate.⁸¹ This results in two-sided network effects, which are often found in two-sided platform marketplaces outside the sharing economy.⁸²

Therefore, a platform seeking to launch a successful marketplace faces a "chicken-and-egg" problem. It needs a substantial number of buyers to attract sellers and, at the same time, a substantial number of sellers to attract buyers.⁸³ To promote participation by all sides, platforms must be cognizant of the prices paid by participants on each side of the market, often subsidizing the participation by one group.⁸⁴ For example, to attract more drivers, Uber might increase its compensation per ride. This would, however, put upward pressure on prices paid by passengers, dampening their demand. According to one panelist, Uber has at times addressed this dilemma when beginning to offer service in a city by charging riders very low prices (to attract buyers) while allowing drivers to collect the entire fare (to attract sellers), effectively forgoing a profit for itself. Once numerous users have joined both sides of the

⁷⁶ *Id.* at 11 ("the idea of using technology to facilitate better matching of sellers and buyers" underlies the success of the sharing economy). For more extensive discussions of the technological forces fueling the growth of the sharing economy, see EVANS & SCHMALENSEE, *supra* note 54, at 39-45 and SUNDARARAJAN, *supra* note 12, at 52-65.

⁷⁷ Workshop Tr. at 12, 30 (Liran Einav). See also *id.* at 84 (Arun Sundararajan) (the "wave of peer-to-peer markets was really enabled" by the spread of mobile computing capacity with internet access and geolocation).

⁷⁸ *Id.* at 29 (Glen Weyl).

⁷⁹ Application Developers All. Comment at 1.

⁸⁰ Workshop Tr. at 21 (Glen Weyl) (emphasizing "the benefits that come to consumers from having a thick market").

⁸¹ See *id.* at 14 (Liran Einav).

⁸² For discussions of such effects, see, *e.g.*, David S. Evans & Richard Schmalensee, *Industrial Organization of Markets with Two-Sided Platforms*, 3 COMPETITION POL'Y INT'L 151, 153 (2007); Jean-Charles Rochet & Jean Tirole, *Two-Sided Markets: A Progress Report*, 37 RAND J. ECON. 645 (2006). See also Arun Sundararajan, *Network Effects*, @DIGITALARUN, <http://oz.stern.nyu.edu/io/network.html>.

⁸³ Workshop Tr. at 20 (Glen Weyl); EVANS & SCHMALENSEE, *supra* note 54, at 29-30.

⁸⁴ EVANS & SCHMALENSEE, *supra* note 54, at 85-100.

platform, Uber can raise the fares and revert to receiving its fee.⁸⁵ Alternatively, for-hire transportation service platforms may cut fares to compete with each other or to respond to demand conditions.⁸⁶

“The heterogeneity of the goods” that buyers may desire and suppliers may offer can also complicate efforts to achieve thick markets.⁸⁷ Heterogeneity reflects consumers’ differing preferences for varying characteristics of the goods and services, and the corresponding variety of goods and services offered by suppliers. Platforms help consumers locate suppliers with offerings that meet their preferences, for example, by providing search engines consumers can use to select from an array of diverse suppliers.⁸⁸

However, when products exhibit a high degree of heterogeneity, a platform may have difficulty providing buyers and sellers with a sufficiently thick market for the full range of products and services when and where desired.⁸⁹ For example, each Uber rider would like drivers available when and where he or she starts the app,⁹⁰ but some may prefer SUV service while others may want the cheapest vehicle available. On Airbnb, renters are usually interested in a variety of options for lodgings – different cities, different price points, different amenities.

B. Efficient Search and Matching

Simply having large numbers of potential buyers and sellers is not enough. Rather, parties must be able to search among potential transaction partners, find a match, and complete a transaction,⁹¹ encountering “search and matching frictions” that make transactions costly.⁹² Indeed, in some contexts,

⁸⁵ Workshop Tr. at 20-21. (Glen Weyl).

⁸⁶ Brian Solomon, *Is Uber Trying to Kill Lyft with a Price War?*, FORBES (Jan. 25, 2016), <http://www.forbes.com/sites/briansolomon/2016/01/25/is-uber-trying-to-kill-lyft-with-a-price-war/> (discussing Uber’s decision to cut prices in over 100 U.S. and Canadian cities, and Lyft’s decision to “follow suit”); James Covert, *Lyft’s Insane Fare Cuts Will Make You Think Twice About Uber*, N.Y. POST (May 23, 2016), <http://nypost.com/2016/05/23/lyfts-insane-fare-cuts-will-make-you-think-twice-about-uber/> (describing Lyft’s decision to decrease prices in New York City to increase ridership). Some drivers have protested the fare decreases, see, e.g., Billy Utt, *Austin Uber Drivers Are Planning a Valentine’s Day Slowdown*, AUSTIN INNO (Feb. 10, 2016, 8:41 AM), <http://austininno.streetwise.co/2016/02/10/uber-rates-in-austin-drivers-plan-valentines-day-protest/>, but the companies have implemented measures such as reducing their charges.

⁸⁷ Workshop Tr. at 37-38. (Glen Weyl); *id.* at 22 (Chiara Farronato) (focusing on “differences and heterogeneity driving the success of platforms”).

⁸⁸ On the other hand, a specialized platform that focuses on serving a particular segment of the market may be most effective in serving that group. For example, lodging or local transport platforms can be designed to serve a segment of demand with specific preferences rather than to serve broad heterogeneous preferences.

⁸⁹ EVANS & SCHMALENSEE, *supra* note 54, at 29-30 (making a market “thick” requires not just “numbers,” but also “getting more participants on each side with whom participants on the other side want to interact”).

⁹⁰ Workshop Tr. at 14 (Liran Einav).

⁹¹ See, e.g., Joseph V. Kennedy, The Info. Tech. & Innovation Found., *Why Internet Platforms Don’t Need Special Regulation* 3 (Oct. 2015), <http://www2.itif.org/2015-internet-platforms.pdf> (“common types of transaction costs facing a seller of wheat include searching for someone willing to buy wheat, negotiating a fair price and terms of delivery, and enforcing the agreement in case of any dispute”).

⁹² Workshop Tr. at 23-24 (Chiara Farronato); *id.* at 15 (Liran Einav).

a buyer will need to use a platform to discover the type of product or service he or she wants.⁹³

The willingness of parties to incur search costs will “depend on the value generated once the transaction takes place.”⁹⁴ Search and matching processes seek to balance the benefits of more extensive search with the costs it imposes on the platform and participants. One panelist described the market design problem facing platforms as involving “tradeoff[s]” between facilitating more precise results at higher cost versus facilitating less precise results at lower cost.⁹⁵ Platforms can make search less costly and more effective by, among other things, helping sellers highlight product attributes important to buyers, developing effective search tools for sifting through listings, and easing the completion of a transaction.⁹⁶

Efficient search and matching requires an appropriate definition of the product or service to be bought and sold over the platform. Heterogeneity of the service or product presents a challenge to the platform in categorizing the types of products or services offered.⁹⁷ A narrow definition of the product may result in searches that exclude similar products of interest to the consumer, while a broad definition may include so many different types of products that comparison and selection become difficult.⁹⁸

A platform’s approach to product definition, search, pricing, and matching will be contingent on the nature of the market and participants’ differing needs. For example, for-hire transport platforms, such as Uber and Lyft, generally define the service as a ride from one point to another accomplished as quickly as possible.⁹⁹ These platforms take a request for a ride, make a match with a nearby driver, and put the parties in contact with each other. There is limited opportunity for customer choice among drivers and an algorithm generally sets the ride price, without input by the parties.

In contrast, Airbnb allows for considerable differentiation among the properties offered by hosts over the platform.¹⁰⁰ Accommodations and the tastes of prospective renters can vary by location, type (house or apartment), size, cost, and many other criteria. Hosts provide information on various aspects of the unit they offer for rent through descriptions and pictures accompanying the listing, and Airbnb provides prospective renters with a database of listings and tools for conducting searches. Guests can browse through the listings, contact potential matches, and engage with hosts in further exploration and negotiation.¹⁰¹ The search and selection process for Airbnb rentals is generally considerably more

⁹³ *Id.* at 15 (Liran Einav) (in some cases “people actually don’t know what they want” and so the “platform is in the business of guiding people”).

⁹⁴ *Id.* at 23 (Chiara Farronato).

⁹⁵ *Id.* at 15-16 (Liran Einav).

⁹⁶ *See also* Einav, Farronato & Levin, *supra* note 37, at 4-6.

⁹⁷ Workshop Tr. at 23-24 (Chiara Farronato).

⁹⁸ *Id.* at 16 (Liran Einav) (“If you define the product too narrowly, then ... [participants can’t] search for things that are similar. If you define too coarse, then ... [products] vary in so many dimensions that it’s hard to compare and contrast.”).

⁹⁹ Other aspects – driver qualifications, insurance, ride quality – may be addressed by the platform by provisions applying to all participating drivers, ensuring some reasonable quality threshold for all participants.

¹⁰⁰ For a detailed discussion of Airbnb’s approach to tackling this problem, *see* Andrey Fradkin, *Search Frictions and the Design of Online Marketplaces* (Sept. 30, 2015) (unpublished manuscript), <http://andreyfradkin.com/assets/SearchFrictions.pdf>. In addition, speed of matching may be less critical for certain services.

¹⁰¹ *See* Workshop Tr. at 23 (Chiara Farronato).

involved than the process for arranging Uber rides, but the parties are usually willing to expend the extra effort because of the potentially higher value generated by finding better transaction options for a rental as opposed to a ride.

TaskRabbit provides an example of a platform that adjusted its approach to matching buyers and sellers based on experience. The platform enables people to hire short-term or temporary workers for specific tasks, such as assembling furniture or cleaning homes. TaskRabbit initially defined product categories narrowly based on the individual tasks, with the price and the match determined by an auction that some participants viewed as complicated and time-consuming.¹⁰² Because this proved costly and inefficient, TaskRabbit changed its platform design so that users can post a particular task, see information on workers ("Taskers") that TaskRabbit identifies as good matches, choose a worker, and schedule the job.¹⁰³ Similarly, transactions on eBay have increasingly shifted from peer-to-peer auctions to fixed price sales.¹⁰⁴ One explanation for this change is that its buyers found the auction process created friction, and professional sellers who made up an increasing portion of the sales on the platform could determine the value of their merchandise without auctions.

C. Confidence in Transacting

Absent efforts by the platform to promote trust, participants on both sides of sharing economy transactions would have little information about each other and therefore might lack confidence that the other party would perform the transaction properly. Users might be concerned that they would lose their investment in the transaction (the buyers' payments or the sellers' cost of supply) or suffer collateral harm or even damage to person or property. Such concerns can inhibit participation on a platform. As discussed extensively in Chapter 2, to encourage transactions, platforms take measures to promote users' trust and confidence that transactions will be completed successfully and that harms will be prevented or covered. These measures often include the adoption of reputation systems based on ratings of participants' previous transactions on the platform, the provision of guarantees or insurance to cover bad outcomes, or the screening of participants before permitting them to participate.

IV. Potential Gains from Trade from Platform-Based Supply

Platforms offer significant gains from trade. They can greatly reduce transaction costs faced by small, decentralized parties – individuals or small entities – making it possible for them to enter a market and provide a service.¹⁰⁵ Platforms can also facilitate entry by assembling and providing information

¹⁰² See *id.* at 16 (Liran Einav).

¹⁰³ See, e.g., Casey Newton, *TaskRabbit is Blowing Up Its Business Model and Becoming the Uber for Everything*, THE VERGE (June 17, 2014, 10:01 AM), <http://www.theverge.com/2014/6/17/5816254/taskrabbit-blows-up-its-auction-house-to-offer-services-on-demand>; *How TaskRabbit Works*, TASKRABBIT, <https://www.taskrabbit.com/how-it-works>.

¹⁰⁴ Workshop Tr. at 31 (Liran Einav); *id.* at 34 (Chiara Farronato). See also *Economists May Idolise Auctions, but Most People Do Not*, ECONOMIST (Aug. 29, 2015), <http://www.economist.com/news/finance-and-economics/21662595-economists-may-idolise-auctions-most-people-do-not-block>.

¹⁰⁵ SARAH A. DONOVAN ET AL., CONG. RESEARCH SERV., R44365, WHAT DOES THE GIG ECONOMY MEAN FOR WORKERS?, at summary (2016), <https://www.fas.org/sgp/crs/misc/R44365.pdf> ("coordination of jobs through an on-demand company reduces entry and operating costs for providers and allows workers' participation to be more transitory").

needed to begin service, supplying necessary inputs (e.g., insurance), and taking steps to reduce other challenges facing small entities.

Moreover, small producers operating on sharing economy platforms may have cost advantages. Several panelists pointed out that, in some cases, sharing economy suppliers have very low fixed costs.¹⁰⁶ Indeed, the sharing economy has seen its most pronounced growth in sectors in which suppliers make significant use of an otherwise underutilized personal asset – either renting the asset or providing a service using the asset. Because they do not have to purchase this asset specifically for commercial purposes, such suppliers can dramatically reduce their capital costs and entry risk.¹⁰⁷ Furthermore, sharing economy platforms generally do not incur such fixed costs, since the supplier and not the platform is responsible for supplying the good or service.

For example, a driver on Lyft or Uber can use his personal car during his free time to provide for-hire transport on the platform. He or she need not acquire a separate vehicle for commercial activity. Similarly, a host on Airbnb can rent her personal residence or part of it as short-term lodging. In these cases, suppliers are avoiding substantial capital investments because they can employ underutilized personal assets they already possess.¹⁰⁸ As a result, many sharing economy suppliers may have lower fixed costs than the traditional incumbents with whom they compete, which can make entry easier.¹⁰⁹ Sharing economy suppliers do, of course, incur variable costs, including expenses from adapting their personal assets to commercial use. For example, Airbnb hosts may need to prepare the unit each time it is rented, exchange keys and information, and engage in other miscellaneous tasks.

Another reason new platform suppliers' costs of entry and operation are often lower is that operating on platforms may allow these suppliers to bypass or navigate regulatory requirements. Reduction of entry costs through regulatory avoidance could be beneficial if the regulations needlessly impose significant barriers to entry and costs,¹¹⁰ but could be harmful if the regulations are necessary to serve an important public goal such as protecting consumers from harm.¹¹¹ To the extent that platforms can address the goals of regulations through trust mechanisms, discussed in Chapter 2, they may reduce

¹⁰⁶ See, e.g., Workshop Tr. at 13 (Liran Einav) (fixed costs in the sharing economy are "actually almost nothing").

¹⁰⁷ Tim Worstall, *Uber Reduces Capital Concentration and Increases the Number of Capitalists*, FORBES (Aug. 2, 2015, 6:09 AM), www.forbes.com/sites/timworstall/2015/08/02/uber-reduces-capital-concentration-and-increases-the-number-of-capitalists/ ("the sharing economy is allowing people to turn consumption goods into capital goods"). See also SUNDARARAJAN, *supra* note 12, at 127 ("peer-to-peer rental markets introduce new levels of adaptability and flexibility that enable people to take new economic risks").

¹⁰⁸ Workshop Tr. at 30 (Chiara Farronato) (suppliers on peer-to-peer platforms "are kind of leveraging underused assets or time").

¹⁰⁹ Of course, they may experience some increased costs associated with utilizing the asset more intensely, but these expenses may be low relative to the cost of purchasing the asset and do not require up-front payments. In addition, those who purchase assets, such as high-end cars, in order to provide services on platforms, do incur upfront capital costs and face risks of loss.

¹¹⁰ Workshop Tr. at 12 (Liran Einav); TechNet Comment at 3 (describing burdensome and unnecessary administrative regulations and restrictions blocking provision of service at airports).

¹¹¹ See, e.g., Benjamin G. Edelman & Damien Geradin, *Efficiencies and Regulatory Shortcuts: How Should We Regulate Companies Like Airbnb And Uber?*, 19 STAN. TECH. L. REV. 293, 309-22 (2016), <https://journals.law.stanford.edu/sites/default/files/stanford-technology-law-review/print/2016/04/19-2-4-edelman-geradin-final.pdf> (outlining reasons why regulation may be necessary). See generally *infra* Chapter 4, Section IV.

the need for regulatory action. Chapters 3 and 4 address the debate over regulating sharing economy transactions generally and in the lodging and for-hire transportation service sectors specifically.

Platforms may also provide valuable flexibility to suppliers in choosing when to supply services, reducing the opportunity cost of working and increasing efficiency.¹¹² For example, many Uber and Lyft drivers work part-time to augment their income from other work; flexibility can help them juggle driving with their competing commitments, thereby lowering the opportunity cost of driving.¹¹³ Similarly, Airbnb hosts can choose to rent when they have spare space or can easily find alternate accommodations. One panelist pointed out that this cost structure and flexibility may be used to advantage in industries where there can be sudden changes in demand.¹¹⁴ For example, Airbnb hosts can rent their residences on dates when demand is high.¹¹⁵ Similarly, Uber and Lyft drivers can schedule work when the demand for rides is high.

V. Competition Issues in the Sharing Economy

The Workshop panel discussed several ways in which the sharing economy may evolve and the policy issues these developments might raise, while recognizing that predictive power is limited in light of the dynamic and innovative nature of these business models. This section first examines the potential for traditional and professional suppliers to expand their use of platforms, in competition with sharing economy suppliers. It then assesses the extent to which network effects may lead to platform dominance and the potential welfare consequences. Finally, it considers the complications that may arise if a platform vertically integrates, for example, by becoming a supplier as well, in competition with other suppliers using the platform.

A. Peer-to-Peer vs. Traditional Suppliers

Peer-to-peer suppliers may initially be the primary suppliers participating in sharing economy platforms but, over time, more professional suppliers may enter the market.¹¹⁶ Panelists cited eBay as an example. Suppliers on eBay were initially mostly individuals selling their own goods, but now small businesses are increasingly using eBay as a retail outlet.¹¹⁷ Another panelist similarly observed that while suppliers on platforms such as Uber and Airbnb are individuals “leveraging underutilized assets,” specialized professionals who view the activity as a primary source of income may enter over time.¹¹⁸

¹¹² See also U.S. Dept. of Commerce Issue Brief, *supra* note 13, at 3 (platform participants “have flexibility in deciding their typical working hours”).

¹¹³ Jonathan Hall & Alan Krueger, *An Analysis of the Labor Market for Uber's Driver-Partners in the United States* 17-19 (Princeton Univ. Indus. Relations Section Working Paper No. 587, 2015), <http://dataspace.princeton.edu/jspui/bitstream/88435/dsp010z708z67d/5/587.pdf>.

¹¹⁴ Workshop Tr. at 13 (Liran Einav).

¹¹⁵ See Einav, Farronato & Levin, *supra* note 37.

¹¹⁶ Workshop Tr. at 14 (Liran Einav). See also U.S. Dept. of Commerce Issue Brief, *supra* note 13, at 5. (observing that digital matching firm service providers are not always amateurs, and some digital matching apps connect consumers with professionals).

¹¹⁷ Workshop Tr. at 31 (Liran Einav). See also *supra* p. 23.

¹¹⁸ Workshop Tr. at 30 (Chiara Farronato).

Indeed, some platforms may seek to include professional suppliers to expand their sales transaction volume. For example, professional drivers could make a platform more attractive to some passengers. In certain cities some taxi drivers have switched to Uber, and in others taxis can use the Uber app to find fares.¹¹⁹ In the short-term lodging rental market, a few hotels are beginning to list rooms on sharing economy platforms,¹²⁰ while some hosts reportedly are already using Airbnb to run commercial "rogue hotels" rather than to occasionally rent their own residence.¹²¹

B. Network Effects and Platform Dominance

As discussed in Section III.A above, sharing economy platforms are likely to exhibit two-sided network effects because increasing the number of buyers benefits (and attracts) sellers, while increasing the number of sellers benefits (and attracts) buyers. Two-sided network effects may enable a large platform to become dominant and insulated from competition from smaller platforms with fewer participants. Because they afford buyers and sellers fewer transacting options, smaller platforms may be far less attractive than a larger platform, limiting the extent to which they serve as viable competitive alternatives. Two-sided network effects could also create a barrier to entry, thereby protecting a dominant incumbent from new entry. A new platform would be unappealing to buyers unless it has attracted numerous participating sellers, and unappealing to sellers unless it has attracted numerous participating buyers. In other words, it must solve the chicken-and-egg problem noted earlier.¹²² One panelist expressed strong concerns that some existing platforms might achieve dominance, noting that some of their large market valuations might reflect expectations that they will achieve dominance.¹²³

Panelists, however, pointed to certain countervailing market forces that may reduce the ability of even a very large platform to exercise monopoly power and harm consumers. For one thing, participation on one platform need not preclude use of another. Buyers and sellers may find it easy to "multi-home" (*i.e.*, to participate on several platforms simultaneously).¹²⁴ As one panelist observed, such "platform-shopping disciplines the power of [] platforms."¹²⁵ Moreover, suppliers may benefit from

¹¹⁹ Nick Summers, *Uber Waives Fees to get London Taxi Drivers Using Its App*, ENGADGET (Feb. 9, 2016), <http://www.engadget.com/2016/02/09/uber-commission-fee-london-cabbies/>.

¹²⁰ See *infra* note 415 and accompanying text.

¹²¹ See *infra* text accompanying notes 460-464. For a formal model of some of the tensions that might pull peer-to-peer markets back towards more traditional models, see Andrei Hagiu & Julian Wright, *Multi-Sided Platforms* (Harv. Bus. School Working Paper No. 15-037, 2015), http://www.hbs.edu/faculty/Publication%20Files/15-037_cb5afe51-6150-4be9-ace2-39c6a8ace6d4.pdf.

¹²² Workshop Tr. at 20 (Glen Weyl) ("firms in these markets have traditionally been thought to have a hard time entering, as a result of these network effects"). See generally *United States v. Microsoft Corp.*, 253 F.3d 34, 55 (D.C. Cir. 2001) (en banc) (per curiam) (describing the "chicken-and-egg" problem in the context of computer operating systems platforms – software applications developers want to write programs that run on a platform with many users, while software applications users want to use a platform on which many programs already run).

¹²³ Workshop Tr. at 26-27, 32 (Joshua Gans).

¹²⁴ EVANS & SCHMALENSEE, *supra* note 54, at 28.

¹²⁵ Workshop Tr. at 26 (Joshua Gans); Kennedy, *supra* note 91, at 9 (explaining that buyers may have many options that effectively constrain the exercise of power). There are reports, however, of contractual arrangements that could inhibit the ability of TNC drivers to switch platforms. See, e.g., Ellen Huet, *Uber's Clever, Hidden Move: How Its Latest Fare Cuts Can Actually Lock In Its Drivers*, FORBES (Jan. 9, 2016), <http://www.forbes.com/sites/ellenhuet/2015/01/09/ubers-clever-hidden->

shifting to a different platform with relatively few suppliers: "To a driver, fewer competitors on the same platform means more profit."¹²⁶ Other factors are the ability of platforms to facilitate entry through dynamic pricing strategies, *e.g.*, low initial prices followed by higher prices when the market matures,¹²⁷ and potential entry by competing platforms.¹²⁸

In addition, network effects may operate differently within a geographic market versus across geographic markets.¹²⁹ In particular, network effects may be strong within a geographic market where a platform is dominant, but have little impact in other geographic markets. For example, for basic labor services of the sort found on a platform such as TaskRabbit, prospective buyers may care only about the extent of participation by suppliers in their city. Such a platform may have a dominant share of suppliers and buyers in one city, but this may not exert any influence on participants' choices of platforms in other geographic areas. In contrast, people seeking short-term lodging for vacations often will seek suppliers in various potential destinations.¹³⁰ Given such preferences, they would value a network that includes participating suppliers across geographic areas and network effects could extend beyond a single geographic area.

Moreover, as in other markets in which network effects are present, it is far from clear that a single, large platform harms consumers. Prices for the services of a dominant platform may be higher because of the lack of competition, but the thickness provided by a dominant marketplace may offer consumers and suppliers correspondingly greater value. As Chairwoman Ramirez observed regarding the sharing economy, "increased concentration does not always harm consumers; sometimes it benefits them, particularly where network externalities are substantial."¹³¹ A panelist argued that platforms are not themselves participating as buyers or sellers in the marketplace, and therefore generally will have incentives, even if they are dominant, to maintain an efficient marketplace to maximize platform value in the long run.¹³²

Workshop participants also discussed how network effects influence views on consolidation of platforms and entry of new platforms. One panelist took the position that fragmentation of the market caused by too many entrants could harm consumers, by interfering with the development of thick

[move-how-fare-cuts-actually-lock-in-its-drivers/](#) (describing special benefits with requirements that would "make[] it difficult if not impossible to work for more than one platform at once, something many drivers do to stay busy").

¹²⁶ Joshua Gans, *Is Uber Really in a Fight to the Death?*, DIGITOPOLY (Nov. 25, 2014), <http://www.digitopoly.org/2014/11/25/is-uber-really-in-a-fight-to-the-death/>. See also EVANS & SCHMALENSEE, *supra* note 54, at 29.

¹²⁷ Workshop Tr. at 20-21 (Joshua Gans).

¹²⁸ *Id.* at 34 (Chiara Farronato); see also *id.* at 33 (Glen Weyl).

¹²⁹ *Id.* at 20 (Glen Weyl).

¹³⁰ EVANS & SCHMALENSEE, *supra* note 54, at 11 (describing how Open Table, a restaurant reservation platform, found that network effects were strong within cities rather than across cities); SUNDARARAJAN, *supra* note 12, 119-20 (contrasting the network effects across cities for Uber and Airbnb).

¹³¹ Ramirez, *supra* note 42, at 5.

¹³² Workshop Tr. at 27-28 (Liran Einav). Another panelist suggested that large scale can enable a platform to better utilize trust mechanisms. See *id.* at 77 (Andrey Fradkin).

markets.¹³³ He argued that entry that “fragments the market” is bad, while “entry that really will displace” the incumbent should be encouraged.¹³⁴ Another panelist, however, identified “the continuous existence of potential [platform] entrants” as a particularly important source of competitive discipline.¹³⁵

C. Vertical Integration

As indicated above, most of the discussion at the Workshop viewed platforms as providing only transactional services, and not supplying products or services over the platform. However, the Workshop did examine the potential scenario in which, in addition to providing a marketplace, a platform also hired suppliers to serve customers on its platform.

As with vertical integration in most markets, vertical integration in the sharing economy could result in increased efficiency, but could in some circumstances result in anticompetitive foreclosure. Several panelists generally agreed that if platforms vertically integrated, providing a good or service as well as matching buyers and sellers, anti-competitive concerns could arise.¹³⁶ One noted that if a vertically integrated platform controls a large portion of supply, buyers might be unwilling to switch to other platforms if those platforms do not have enough participating suppliers.¹³⁷ However, another countered that vertical integration might still be desirable because of the benefits of having a “consolidated, dominant operator” in the transportation sector – a vertically integrated dominant platform might be better able to deal with negative externalities.¹³⁸ For example, a vertically integrated Uber might be better able to manage congestion, reducing transportation times in large cities.¹³⁹

Panelists also debated the plausibility of extensive vertical integration by a dominant platform. Some expressed doubt – one pointing out that these startups market themselves as marketplaces, which is their core competence.¹⁴⁰ Moreover, if they needed additional supply, they could attract more suppliers to join the platform rather than take on that function themselves.¹⁴¹ Another panelist found vertical integration more plausible.¹⁴² Finally, one panelist noted concerns that vertical restraints, such as

¹³³ *Id.* at 21 (Glen Weyl). *See also* E. Glen Weyl & Alexander White, *Let the Best ‘One’ Win: Policy Lessons from the New Economics of Platforms*, 12 COMPETITION POL’Y INT’L 29 (2014) (suggesting that if network effects are sufficiently large, it may be desirable to promote consolidation rather than fragmentation of platforms).

¹³⁴ Workshop Tr. at 34 (Glen Weyl). Differentiated platforms designed to serve different market niches, on the other hand, could provide benefits to participants. *See, e.g.*, Owyang, *Honeycomb 3.0*, *supra* note 39 (listing 280 different platforms serving 40 diverse sectors); EVANS & SCHMALENSEE, *supra* note 54, at 28.

¹³⁵ Workshop Tr. at 34 (Chiara Farronato).

¹³⁶ *Id.* at 41 (when “dominance moves to production, then the usual problems . . . arise”); *id.* at 40-41, 43 (Liran Einav) (“you just have the usual market-power considerations”).

¹³⁷ *Id.* at 41 (Chiara Farronato).

¹³⁸ *Id.* at 42 (Glen Weyl).

¹³⁹ *Id.* at 42-43.

¹⁴⁰ *Id.* at 44 (Joshua Gans).

¹⁴¹ *Id.* at 45 (Liran Einav).

¹⁴² *Id.* at 42 (Glen Weyl). *See also* Vikram Mansharamani, *What Happens When the Sharing Economy Stops Sharing and Starts Owning?*, PBS NEWSHOUR: MAKING SENSE (Feb. 4, 2016, 10:45 AM), <http://www.pbs.org/newshour/making-sense/what-happens-when-the-sharing-economy-stops-sharing-and-starts-owning/> (quoting Uber CEO Travis Kalanick as saying that the Uber service is more expensive than it should be “because you’re not just paying for the car — you’re paying

exclusive contracts or other contracts that reference rivals,¹⁴³ could be used to either impede or promote competitive results.¹⁴⁴

VI. Conclusion

As this Chapter suggests, although the general economic questions raised by sharing economy platforms are not novel, serious study of sharing economy platforms is largely in its early stages.¹⁴⁵ Research to date suggests that platforms can succeed by providing thick marketplaces, effective and inexpensive searching and matching mechanisms, and confidence-building trust mechanisms. Platforms have facilitated entry by new suppliers who offer products and services that many consumers view as cheaper, more convenient, or otherwise better than those available elsewhere. The ability of suppliers to use personal assets in supplying goods and services may make certain sharing economy transactions particularly attractive to participants. As sharing economy marketplaces evolve, competition issues may arise relating, for example, to the potential for network effects associated with the platform and vertical integration of platforms into supplying goods or services over the platform.

for the other dude in the car. When there's no other dude in the car, the cost of taking an Uber anywhere becomes cheaper than owning a vehicle.”).

¹⁴³ Jonathan M. Jacobson & Daniel P. Weick, *Contracts That Reference Rivals as an Antitrust Category*, ANTITRUST SOURCE, Apr. 2012, at 1, <https://www.wsgr.com/publications/PDFSearch/jacobson-0412.pdf> (contracts that reference rivals are contract with terms that “affect, directly or indirectly, the terms available to a contracting party’s competitors”).

¹⁴⁴ Workshop Tr. at 32, 35 (Joshua Gans).

¹⁴⁵ Much of this Chapter has focused on the experience of the leading sharing economy platforms in a few sectors, and it is difficult to assess how the experience of these platforms will translate to other sharing economy platforms in new and diverse settings. See Manjoo, *supra* note 50 (opining that the Uber model may be difficult to apply to other sectors).

Chapter Two: Trust Mechanisms in the Sharing Economy

I. Introduction

Every market transaction requires both buyer and seller to have some information about the good or service offered. The amount of information necessary for a specific transaction to occur varies enormously and depends on a number of factors, including the nature of the good or service being sold and the type of interaction between buyer and seller. When credible information about the good or service is limited, establishing trust between buyer and seller can help ensure that a transaction takes place.

Consider, for example, the conundrum of a traveler in an unfamiliar, distant city, who has several choices for lodging, but cannot directly examine any of them beforehand. One choice is a national chain hotel franchise, such as Sheraton or Holiday Inn. Another is a local, non-chain hotel. Yet another might be a condominium owned by an individual and booked through a short-term rental website such as Airbnb. The traveler's choice will depend not only upon his taste (for example, does he require a hotel with an exercise facility and an on-site restaurant) and his desired price point, but also whether he is willing to trust the particular seller to describe accurately the characteristics of the room and facilities. Is the room clean? Is it safe? Will it be quiet enough for him to sleep? Conversely, the owner's decision to provide lodging depends on unknown characteristics of the traveler. Will he wreck the room? Will he pay in a timely manner?

Direct information about the quality of the lodging and information about the seller's reputation have related roles in helping a traveler choose a room. Reputation may take on a more important role when the traveler has access to less information about quality. A large hotel chain is able to provide travelers with direct information about the quality of its rooms in an unknown city (the rooms are likely to be similar to rooms offered by the same chain in other cities the traveler has already visited) and can establish a reputation for providing that quality consistently. A traveler familiar with the rooms offered by Best Western or Marriott Courtyard likely expects similar quality rooms regardless of whether the particular room is located in Maine or Arizona.

A traveler is unlikely to have had direct experience with a local, non-chain hotel. Whether the non-chain is able to attract unfamiliar travelers largely depends on its ability to provide reliable information about its reputation. Indeed, travelers may seek information about such a hotel by reading reviews from AAA or those posted on third-party websites, such as TripAdvisor or Yelp. Moreover, the hotel's persistence as a visible, physical presence may provide some information about quality to the traveler. The traveler likely knows that there are certain minimum legal standards to which all hotels in a given geographic area must adhere.

Unlike a chain or non-chain hotel, an individual owner of a room, apartment, or house advertised on a sharing economy platform will have an idiosyncratic product, need not have invested anything to begin offering lodging, and may not qualify as a hospitality business that triggers enforcement of health and safety codes. Reviews of these accommodations are unlikely to be found on third-party websites like TripAdvisor or Yelp. This means that a traveler's baseline information will relate less to brand

recognition, and will depend more on information provided directly by the seller. In such situations, establishing some level of trust and reputation is necessary for sellers to attract buyers.

This Chapter explores the various mechanisms that sharing economy platforms and third parties have developed to provide trust.

II. Asymmetric Information, Adverse Selection, and the Market for Lemons

Markets tend to function better in terms of matching buyers and sellers at competitive prices when both groups have sufficient relevant information. In most instances, however, sellers have more information about the goods and services offered for sale than buyers do. This kind of information asymmetry can result in a “market for lemons,” in which supply may be limited to low quality goods, because sellers of high quality goods cannot convince buyers to pay enough to make selling them profitable.¹⁴⁶ If the problem of adverse selection – where the incentives in the market favor low quality – is severe enough, the market may dissolve as buyers may be unwilling to make a purchase at any price.¹⁴⁷

Aside from reputation and trust, there are a number of ways to mitigate these kinds of market failures. They include providing mechanisms for ensuring the availability of credible information about quality, for example, through third-party inspection or certification; legal requirements that broadly apply to merchants, such as consumer protection laws that explicitly prohibit deceptive conduct on the part of sellers and therefore create incentives for truthful and credible disclosures; or mandated disclosures of certain kinds of information. Private law regimes, such as contract law and terms of service, also may create incentives for credible disclosures.

A. Factors That Influence the Importance of Trust

The extent of a buyer’s need to trust a seller can depend on a number of factors. The most important ones are whether a buyer can assess the quality of the good before purchase, and whether the exchange of money for a product or service can occur simultaneously. Transactions on sharing economy platforms may lack both of these features. In addition, participants on sharing economy platforms may not be able to use some mechanisms used in other contexts to establish reputation and trust.

For example, a brick-and-mortar seller’s investment in a physical space typically implies that the seller will remain in business through at least the short term, and therefore can serve as a signal to the

¹⁴⁶ George Akerlof, *The Market for “Lemons”: Quality, Uncertainty, and the Market Mechanism*, 84 Q. J. ECON. 488 (1970). Akerlof’s example is the market for used automobiles, in which buyers often have a difficult time determining quality. Because buyers have trouble distinguishing between high- and low-quality used cars, Akerlof surmised that “bad cars drive out the good because they sell at the same price as good cars.” *Id.* at 490. In other words, a seller with a high-quality used car may decide not to enter the marketplace at all because he cannot earn a premium for selling a good car.

¹⁴⁷ *Id.* at 495 (“The presence of people in the market who are willing to offer inferior goods tends to drive the market out of existence.”); Workshop Tr. at 55 (Ginger Jin) (“To the extreme, such information asymmetry could even invite outright fraudulent behavior from sellers and lead to a collapse of the whole market.”).

consumer about the seller's quality level.¹⁴⁸ Further, in brick-and-mortar stores the buyer often has an opportunity to inspect the good physically. Moreover, the seller's investment in a physical location provides leverage to regulators and law enforcement in the event a dispute arises with a buyer.

In contrast, online transactions have no physical location for a prospective customer to visit, and payment occurs over the platform rather than in person. The online presence may not signify a considerable investment in staying in business. And an online marketplace presents limited opportunity for physical inspection by the buyer, although many online sellers do provide photographs and physical descriptions of products.¹⁴⁹ In addition, payment generally occurs before the buyer receives a good, so buyers need to trust both that the good is as represented and that it will actually be shipped.

A seller's reputation is an important factor in facilitating transactions in online marketplaces, and a seller's favorable reputation can provide important leverage for regulators seeking to ensure consumers are protected when shopping online. As one panelist noted, in the "late 1990s and early 2000s, [online] sellers [were] sort of marginal sellers and not in the mainstream. And now we see . . . other established stores" taking advantage of the online marketplace.¹⁵⁰ Additionally, in the past a startup online seller may not have had a favorable reputation, but as those startups have survived and matured, their reputations have become more significant and valuable.

Sharing economy transactions are mediated online and therefore share many of the same information problems as more traditional online transactions. However, a primary distinctive feature of the sharing economy platforms is that they are two- or multi-sided, in that they serve to connect groups of heterogeneous buyers and heterogeneous sellers.¹⁵¹ Whereas traditional online markets can attract a significant number of buyers to purchase from a single seller, sharing economy platforms often match multiple buyers to multiple sellers.

The fact that there is heterogeneity of both sellers and buyers means that information asymmetry can run in both directions.¹⁵² As one panelist noted, "if you're an Uber driver, the rider has to worry about the quality of their driver; but the driver also has to worry about the quality of the rider. . . . The [Airbnb] host also has very important reasons to worry about what the guest will be like."¹⁵³ Although not unique to sharing economy platforms – a traditional taxi driver also has to worry about the quality of riders to some extent – multi-sided informational asymmetry is more pronounced in markets operating in

¹⁴⁸ This report refers to a "brick-and-mortar" seller as an entity that sells goods and services from a physical location that is open to the public either through in-person or telephone contact.

¹⁴⁹ Researchers have found that online inspection is an imperfect substitute for physical inspection. See Greg Lewis, *Asymmetric Information, Adverse Selection and Online Disclosure: The Case of eBay Motors*, 101 AM. ECON. REV. 1536 (2011) (showing a significant relationship between the price of a vehicle sold on eBay and the number of photos for each individual listing).

¹⁵⁰ Workshop Tr. at 59 (Ginger Jin).

¹⁵¹ See *supra* Chapter 1, Sections II & III.

¹⁵² Workshop Tr. at 58 (Chrysanthos Dellarocas).

¹⁵³ *Id.*

the sharing economy. As one panelist noted, “we need bi-directional trust to be built much more than in the case of [traditional online] markets.”¹⁵⁴

Moreover, in the sharing economy, a user relies both on the reputation of her transaction partner and on the reputation of the platform itself, and it may be difficult to distinguish between the two.¹⁵⁵ Although the platform may have made substantial investments in establishing a reputation, individual users on the platform may not have done so. Because of this distinction between platform and user investment in reputation, law enforcers or regulators may have less leverage over individual participants in the sharing economy. Law enforcers or regulators may face difficulties even identifying individuals operating on certain sharing economy platforms. For this reason, the sharing economy generally requires well-functioning reputation mechanisms to mitigate information asymmetry.

III. Overview of Mechanisms Used to Mitigate Information Asymmetry in Sharing Economy Markets

One might expect significant information asymmetry to prevent the sharing economy from growing, and yet the sharing economy appears to be growing continuously. One reason is that platforms are using technology to solve or at least ameliorate existing information asymmetry. As one panelist explained, “the reason that this information asymmetry problem does not stop the sharing economy from prospering is because the internet also provides a number of new tools to address the problem. It allows us to see the buyer experiences of those who have bought from the same sellers – maybe 10,000 miles away, maybe years ago – but the system allows us to share those buyer experiences in a very convenient way.”¹⁵⁶

Certain efforts developed by traditional online sellers to reduce information asymmetry can be categorized as direct substitutes for efforts typically undertaken by brick-and-mortar sellers. These include providing quality images and video of products for sale, product descriptions and technical specifications, and other efforts to provide information online that would be available to an in-store shopper. Some vendors provide customers the opportunity to chat online with a sales associate. In addition, many online vendors offer liberal return policies to reduce consumer apprehension associated with purchasing an item they have not physically inspected.¹⁵⁷ Other examples include adopting security

¹⁵⁴ *Id.*

¹⁵⁵ Matchen Comment at 2 (“[W]hen a Customer is asked to rate their Uber experience, they are rating Uber as well. They will take into consideration the fee and that will be in their mind when rating their ‘experience.’ So when a driver has a bad rating it could not be them who is rated, it could be [the overall] Uber experience.”).

¹⁵⁶ Workshop Tr. at 56 (Ginger Jin); *see also* Mercatus Ctr. Comment at 13 (“With the recent growth of the sharing economy, even more robust reputational feedback mechanisms now exist that help consumers solve information problems and secure a greater voice in commercial interactions. These mechanisms have been integrated into platforms connecting buyers and sellers and have become an essential feature of these sectors.”); *see generally* Adam Thierer et al., *How the Internet, the Sharing Economy, and Reputational Feedback Mechanisms Solve the “Lemons Problem,”* (Mercatus Working Paper, Mercatus Center at George Mason University, May 2015), <http://mercatus.org/publication/how-internet-sharing-economy-and-reputational-feedback-mechanisms-solve-lemons-problem>.

¹⁵⁷ *See, e.g.,* *Shipping and Returns*, ZAPPOS, <http://www.zappos.com/shipping-and-returns> (“If you are not 100% satisfied with your purchase for any reason, just go through our easy return process . . . to print out a FREE return label. You have 365 days to return an item to us in its original condition”).

measures for online credit card purchases or other digital payment methods, and robust customer complaint services. Sharing economy platforms also may supply, or help users supply, many of these features.

Sharing economy platforms also have adopted certain measures to reduce information asymmetry that do not necessarily have obvious brick-and-mortar analogues. These measures fall broadly into two categories. The first category is developing a reputation rating system. The paradigmatic example is the seller rating system developed by eBay whereby consumers who purchase an item on eBay have the opportunity to rate their experience with the seller from whom they purchased the item.¹⁵⁸ According to eBay, “[t]he number of positive, negative, and neutral Feedback ratings a member has received over time are part of the Feedback score,” and in most instances, the total score is an aggregate of the individual ratings, with one point added for each positive rating, one point subtracted for each negative rating, and no points added or subtracted for each neutral rating.¹⁵⁹ eBay also has a different “star” rating whereby a seller receives a different colored star next to her numerical rating based upon the seller’s total feedback rating.

In addition to platform-generated ratings systems, third-party websites also serve to rate sellers engaged in online transactions, including sales over sharing economy platforms. Although third-party rating or review systems have brick-and-mortar analogues, internet technology improves these systems. As one panelist explained, “there are far better rating systems now for consumers to rely on. External sources . . . provide customer reviews and feedback in a whole variety of fora There’s a lot more third party information available to consumers to help them be smarter shoppers.”¹⁶⁰

The second category is direct intervention by platforms to promote trust by buyers and sellers. Broadly, these interventions serve to shift risk from buyers and sellers to the platform itself. One approach is to limit or curate entry onto the platform. As one panelist explained, “the platform can define who is allowed and who is not allowed It ranges from anyone who has a credit card can log on the platform, or you have to go through a credit rating check, you have to go through even a criminal record check.”¹⁶¹ An example is the background check Lyft requires of its drivers before it allows them to serve riders using Lyft’s platform.¹⁶² By limiting the number of sellers or buyers able to use the platform, the platform is potentially reducing the number of transactions that occur on the platform, and thus limiting its revenue in the short run. One rationale for curating entry, however, is to send a signal to the marketplace about the quality of platform participants. In this way, the platform is substituting its own reputation for the reputation of individual buyers and sellers transacting on the platform. In the long run, a stronger reputation for high quality may lead to more transactions and more revenue.

Another direct intervention a platform may take is to guarantee reimbursement to dissatisfied buyers or sellers in the event of a negative experience. One panelist explained that “[m]any platforms

¹⁵⁸ *Feedback, Scores, Stars, and Your Reputation*, EBAY, <http://pages.ebay.com/help/feedback/scores-reputation.html>.

¹⁵⁹ *Id.*

¹⁶⁰ Workshop Tr. at 57 (Steven Salter).

¹⁶¹ *Id.* at 56 (Ginger Jin).

¹⁶² Lyft Comment Attachment at 6.

have used some platform guarantee policy; they try to assure buyers that they are protected.”¹⁶³ This guarantee can be “hard” in that the platform agrees to reimburse buyers in the event of an unfavorable transaction, or “soft” in that the platform holds the buyers’ payment in escrow for some period. Platform-supplied insurance is another form of direct intervention by the platform.

A. Reputation Rating Systems

Many sharing economy platforms have review and rating systems that provide feedback on the quality of goods and services offered on the platform and/or feedback on past performance of platform participants. These “reputation rating systems” vary widely in design, content, and effect. Panelists generally agreed that reputation rating systems appear to be critical for sharing economy platforms to overcome problems associated with information asymmetry that would otherwise threaten the existence of those markets. As one panelist explained, “the design of online reputation systems is not a new question. There is a body of literature and practical evidence that dates pretty much since the year 2000, when the system started to appear in the context of eBay and other early stage electronic markets. So for the most part, those systems seem to be working reasonably well – at least well enough to enable those markets to exist and grow.”¹⁶⁴

Reputation mechanisms take many forms. In general, the platform asks buyers to rate their experience with a seller. The rating can be as simple as a positive, negative, or neutral rating, or a rating on a larger scale, such as one to five or one to ten. Platforms differ in whether they allow reviewers to leave free-form textual comments available for other participants to read and in whether both buyers and sellers are reviewed. Many platforms publish an aggregated score that factors in each individual review for other participants to view. Many platforms also take steps to ensure only those with verified transactions are able to review a specific participant. Below we discuss the reputation rating systems employed by Uber and Airbnb as described in the two companies’ comments.

1. Specific Reputation Rating Systems

Uber’s reputation rating system requires both the rider and the driver to rate each other at the end of every trip.¹⁶⁵ Each is rated by the other on a scale of one to five stars, and each is able to see the other’s star rating before beginning a trip. In Uber’s view, “[t]his rating system does three critical things: it (1) incentivizes high quality service, (2) establishes accountability, and (3) promotes courteous conduct and helps to mitigate the discrimination that is all too common in traditional for-hire transportation.”¹⁶⁶

According to Uber, the two-way rating system allows riders to “expect highly rated drivers to provide polite and helpful service,” and protects drivers by allowing them to “feel comfortable picking up a highly [] rated rider, even in an out-of-the-way area or at a time of night that might otherwise

¹⁶³ Workshop Tr. at 56 (Ginger Jin).

¹⁶⁴ *Id.* at 66 (Chrysanthos Dellarocas).

¹⁶⁵ Uber Comment at 5.

¹⁶⁶ *Id.*

discourage them.”¹⁶⁷ Further, in Uber’s view, its reputation rating system “mitigates the impact of any potential bias. The rating system consists only of an average numerical rating. A low rating on one trip is therefore folded into the rider’s or driver’s overall average and, in contrast to the rating systems of other platforms, never appears as a standalone rating. There are also no written comments in Uber’s system. This removes yet another opportunity for a biased reviewer to have an outsized impact on a rider’s or driver’s reputation.”¹⁶⁸

In addition to its reputation rating system, Uber has implemented a complaint processing system it believes complements its reputation rating system. According to Uber, “[a]t the end of every ride, both the rider and the driver are automatically prompted to send immediate written feedback to Uber’s support team,” which enables Uber to address customer concerns.¹⁶⁹ Accordingly, although Uber does not publish written comments about platform participants, its complaint processing system does allow riders and drivers to express written views about their experiences.

One commenter, however, expressed frustration about Uber’s reputation rating system, especially from a driver’s perspective. The commenter argued that Uber will “fire” a driver if his rating falls below 4.6 stars, and that the desire among drivers to maintain a high rating leads to “stressed out” drivers “not paying attention.”¹⁷⁰ Moreover, the commenter noted that “when a Customer is asked to rate their Uber experience, they are rating Uber as well. They will take into consideration the fee and that will be in their mind when rating their ‘experience.’”¹⁷¹

Airbnb’s reputation mechanism operates somewhat differently from Uber’s. Unlike Uber, which relies primarily on aggregated five-star ratings, Airbnb uses a combination of written reviews and numerical star ratings to convey information to platform participants about another participant’s reputation. Airbnb states that an individual may write a review only “after a reservation is confirmed on the site,” which enables other users to “trust that any review [] see[n] on a profile page [is] of an actual person booking with or hosting another member of the community.”¹⁷² According to Airbnb, reviews are limited to 500 words¹⁷³ and its “default position is not to censor, edit, or delete reviews.”¹⁷⁴ Moreover, it permits guests and hosts to leave a response to any review received by the platform within the last two weeks.¹⁷⁵

¹⁶⁷ *Id.* See also Relay Rides Comment at 2 (“At the end of the trip, the owners and renters rate each other and give comments about their experience. Businesses like eBay have shown that this kind of feedback loop is very powerful in pushing both parties to adhere to the agreement, respect the property and each other.”).

¹⁶⁸ Uber Comment at 5-6.

¹⁶⁹ *Id.* at 6.

¹⁷⁰ Matchen Comment at 1-2.

¹⁷¹ *Id.* at 2.

¹⁷² *What are Airbnb’s review guidelines?*, AIRBNB, <https://www.airbnb.com/help/article/262/what-are-the-airbnb-review-guidelines>.

¹⁷³ *How do reviews work?*, AIRBNB, <https://www.airbnb.com/help/article/13/how-do-reviews-work?topic=203>.

¹⁷⁴ *What are Airbnb’s review guidelines?*, *supra* note 172.

¹⁷⁵ *How do reviews work?*, *supra* note 173.

In addition to written reviews, Airbnb's reputation rating system also includes "star ratings." As one panelist familiar with Airbnb's system explained, "[t]here are several pages of questions that people get asked after a transaction. There's textual information Then there are the star ratings, and there are different categories of those ratings."¹⁷⁶ Airbnb's platform, therefore, includes a "primary" score rating, which is intended to convey a user's overall experience with another user on the platform, and several sub-categories, which include: accuracy, communication, cleanliness, location, check in, and value. Airbnb also allows a user to connect his profile on Airbnb with his profile on Facebook to determine whether any of his contacts on Facebook is a friend of a user on Airbnb, potentially facilitating trust through broader social networks that operate outside of the sharing economy. As one panelist explained, the ability to "utilize the social networks – your friends, your group, your colleagues and so forth – all these tools have been used rigorously by the new sharing economy platforms."¹⁷⁷

Airbnb's post-transaction questionnaire includes "questions which are never shown on the site but are seen either by the Airbnb platform and/or by the party being reviewed."¹⁷⁸ One important question asked by the platform is "would you recommend this listing or would you recommend this guest?"¹⁷⁹ The answer is anonymous and not linked to the consumer. This is "a really important question for the review system, because some incentives that people may have not to reveal all the information about their transaction should disappear in this case where the other person would not see that."¹⁸⁰

Finally, Airbnb's platform allows participants to contact one another prior to making any transaction. As Airbnb explains, "[b]efore making a reservation, hosts and guests can message each other through our platform to ask any questions that may arise about a pending trip. This ability continues through the reservation, to allow continued communication within the confines of the Airbnb website, diminishing fraud."¹⁸¹

In addition to platform-generated reputation rating systems, the sharing economy also includes reputation rating systems developed by third parties, which help reduce information asymmetry. As one panelist opined, "[t]here's a lot more third party information available to consumers to help them be smarter shoppers."¹⁸² The panelist stated that Carfax "allows us to see the repair and accident history of used cars, which was not available or even not imaginable in the traditional old fashioned way of trading used cars."¹⁸³ Whereas in the past, a used-car buyer may have relied on a car dealer to provide information about the history of an automobile, including relying on the reputation of the dealer to assess the quality of that information, a buyer can now obtain similar information even if buying the automobile from an individual.

¹⁷⁶ Workshop Tr. at 60 (Andrey Fradkin).

¹⁷⁷ *Id.* at 56 (Ginger Jin).

¹⁷⁸ *Id.* at 60 (Andrey Fradkin).

¹⁷⁹ *Id.*

¹⁸⁰ *Id.*

¹⁸¹ Airbnb Comment at 5.

¹⁸² Workshop Tr. at 58 (Steven Salter).

¹⁸³ *Id.* at 56 (Ginger Jin).

One long established third-party rating system that also operates in the sharing economy is the Better Business Bureau ("BBB"). A panelist from the BBB explained that in developing reputation ratings for businesses, the BBB "looks primarily at complaints but also considers the responsiveness of the business to those complaints – whether they resolve them or not. But we also look at external factors like proper licensing, and the presence of government actions taken against the business."¹⁸⁴ The BBB, like Airbnb, also publishes user-generated narrative content: "[w]e publish the text of the consumer's complaint. We publish the text of the business's response. And then any final back-and-forth between the parties as well We face the challenges that the platforms face in weeding out fake reviews."¹⁸⁵ Although the BBB does publish reviews of platforms operating in the sharing economy, these reviews are fundamentally different from ratings of platform participants made on a platform itself.

Other third-party websites have similar characteristics to platforms operating in the sharing economy even though they do not facilitate peer-to-peer transacting. These include TripAdvisor, Yelp, Angie's List, and others. Each website allows users to review businesses in various sectors of the economy. For example, the Yelp site allows users to search for various businesses and sort the results based upon location, reputation rating, and other factors. According to Yelp, it "uses automated software to recommend the most helpful and reliable reviews for the Yelp community The software looks at dozens of different signals, including various measures of quality, reliability, and activity on Yelp."¹⁸⁶ Whether and to what extent third-party review sites like these supplement, substitute, or complement reputation mechanisms embedded in sharing economy platforms is worth future study.

2. Evidence That Reputation Rating Systems Are Effective

The panelists generally agreed that, although rating systems do not function perfectly or eliminate all information asymmetry between buyers and sellers, rating systems likely have facilitated in part the tremendous growth of sharing economy markets.¹⁸⁷ One paper surveying the then-existing empirical literature evaluating reputation rating systems concluded that "a growing body of empirical evidence seems to demonstrate that these systems have managed to provide remarkable stability in otherwise risky trading environments."¹⁸⁸ Indeed, there is some evidence that reputation rating systems operate more effectively in the sharing economy than they do in other markets. One panelist noted that a much higher percentage of people who transact on Airbnb leave reviews than of those who utilize TripAdvisor or Expedia.¹⁸⁹

¹⁸⁴ *Id.* at 72 (Steven Salter).

¹⁸⁵ *Id.* at 73.

¹⁸⁶ *About, YELP*, <http://www.yelp.com/about>.

¹⁸⁷ Workshop Tr. at 66 (Chrysanthos Dellarocas) ("[T]he design of online reputation systems is not a new question. There is a body of literature and practical evidence that dates pretty much since the year 2000, when the system started to appear in the context of eBay and other early stage electronic markets. So for the most part, those systems seem to be working reasonably well – at least well enough to enable those markets to exist and grow.").

¹⁸⁸ Chrysanthos Dellarocas, *The Digitization of Word-of-Mouth: Promise and Challenges of Online Reputation Mechanisms*, 49 *MGMT. SCI.* 1407 (2003). One panelist, describing Airbnb's reputation mechanism, explained that its "review system seems to be working pretty well just because of the tremendous growth that Airbnb has experienced. So something is clearly working correctly." Workshop Tr. at 60 (Andrey Fradkin).

¹⁸⁹ Workshop Tr. at 60 (Andrey Fradkin).

At a more granular level, panelists highlighted research showing that reputation rating systems seem to solve information asymmetry problems in online transactions.¹⁹⁰ Specifically, research shows that ratings influence potential buyers in their purchasing behavior. Many studies have shown that buyers will pay some premium for goods and services if the individual seller has a higher rating,¹⁹¹ although the studies reach differing conclusions about the size of the premium and others show zero price premium.¹⁹² One paper conducted a randomized controlled field experiment whereby a high-reputation eBay dealer sold matched pairs of goods under his established identity and as a new seller without an established identity.¹⁹³ The researchers found that buyers would pay a higher price for the same good sold by an established seller.¹⁹⁴ Researchers also found that positive feedback has a positive effect on the probability of sale.¹⁹⁵ In other words, a seller with a higher reputation score on eBay can not only command a higher price, but also is more likely to make a sale than a seller with a lower reputation score.

Panelists also highlighted research showing that reputation rating systems may screen especially bad actors and deter the worst types of fraudulent behavior.¹⁹⁶ As one panelist explained, “one of the things that reputation mechanisms do perhaps very well is weed out the particularly egregious situations – the real bad situations on eBay where you actually have fraudulent sellers.”¹⁹⁷ One study supporting this view found that a seller on eBay is more likely to exit the platform if his reputation score is lower.¹⁹⁸

¹⁹⁰ Dellarocas, *supra* note 188 (surveying literature); Paul Resnick & Richard Zeckhauser, *Trust Among Strangers in Internet Transactions: Empirical Analysis of eBay's Reputation System*, in 11 *ECONOMICS OF THE INTERNET AND E-COMMERCE* (Michael R. Baye ed., 2002) (same); Patrick Bajari & Ali Hortaçsu, *Economic Insights from Internet Auctions*, 42 *J. ECON. LIT.* 457 (2004) (same).

¹⁹¹ Workshop Tr. at 63 (Chris Nosko) (“[T]here is a lot of research that shows that . . . reviews . . . seem to matter in terms of the price that an item will clear at on auction. So higher reviewed sellers get higher prices.”). *See, e.g.*, Ginger Zhe Jin & Andrew Kato, *Price, Quality, and Reputation: Evidence from an Online Field Experiment*, 37 *RAND J. ECON.* 983 (2006); Daniel Houser & John Wooders, *Reputation in Auctions: Theory, and Evidence from eBay*, 15 *J. ECON. & MGMT. STRAT.* 353 (2006); Paul Resnick et al., *The Value of Reputation on eBay: A Controlled Experiment*, 9 *J. EXP. ECON.* 79 (2006); Luis Cabral & Ali Hortaçsu, *The Dynamics of Seller Reputation: Evidence from eBay*, 58 *J. INDUS. ECON.* 54 (2010); Mikhail Melnik & James Alm, *Does a Seller's eCommerce Reputation Matter?*, 50 *J. INDUS. ECON.* 337 (2002); Jeffrey A. Livingston, *How Valuable is a Good Reputation? A Sample Selection Model of Internet Auctions*, 87 *REV. ECON. & STAT.* 453 (2005); Patrick Bajari & Ali Hortaçsu, *The Winner's Curse, Reserve Prices and Endogenous Entry: Empirical Insights from eBay Auctions*, 3 *RAND J. ECON.* 329 (2003); Sulim Ba & Paul A. Pavlou, *Evidence of the Effect of Trust Building Technology in Electronic Markets: Price Premiums and Buyer Behavior*, 26 *MIS Q.* 243 (2002).

¹⁹² David H. Eaton, *Reputation Effects in Online Auction Markets* (Mar. 2005) (unpublished manuscript), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=739765.

¹⁹³ Resnick et al., *supra* note 191.

¹⁹⁴ *See id.* (finding that the difference in buyers' willingness to pay was 8.1% of the sales price).

¹⁹⁵ *See* Jin & Kato, *supra* note 191 (“most studies found some expected effects of seller reputation on the likelihood of sale”); Resnick et al. *supra* note 191 (surveying literature); Livingston, *supra* note 191; Bajari & Hortaçsu, *supra* note 191; Eaton, *supra* note 192; Resnick & Zeckhauser, *supra* note 190.

¹⁹⁶ Jin & Kato, *supra* note 191 (finding that “reputable sellers are less likely to default or deliver counterfeit” goods).

¹⁹⁷ Workshop Tr. at 78 (Chris Nosko); *see also id.* (finding that “reputable sellers are less likely to default or deliver counterfeit” goods).

¹⁹⁸ Cabral & Hortaçsu, *supra* note 191.

In addition, there is evidence that reviews authored by “elite” reviewers have an impact on future transactions on the platform. As one panelist explained, “[m]y research has shown that reviews which have been rated as useful by readers in a commercial context, they actually correlate with fewer product returns, which is one metric of making a good or a bad decision.”¹⁹⁹

Taken together, the panelists generally agreed that there is a strong basis upon which to conclude that reputation rating systems facilitate trade on online platforms, and that these mechanisms reduce information asymmetry with enough effectiveness to allow the enormous growth of these platforms. Much of the evidence showing that reputation mechanisms serve to reduce information asymmetry and facilitate online trading, however, comes from examining eBay’s platform. Examining the effects of reputation mechanisms on platforms in which the seller is trading a service rather than selling a good would be a helpful next step in considering the impact reputation mechanisms have had on the sharing economy at large.

3. Evidence That Reputation Rating Systems Are Imperfect

Although the panelists generally agreed that reputation rating systems reduce information asymmetry in online markets and work well enough to allow sharing economy platforms to grow, they also generally agreed that existing reputation rating systems do not function perfectly. Panelists identified several imperfections and suggested various ways potentially to improve reputation rating systems.

a. Ratings Biased Upward and Toward Extreme Experiences

Panelists pointed to two potential biases in aggregate reputation scores. First, aggregated reputation ratings may be biased upward because many users tend only to leave positive feedback. Researchers have found that feedback on eBay is overwhelmingly positive. A 2001 paper indicates that 99.1% of comments left by buyers were positive, 0.6% were negative, and 0.3% were neutral.²⁰⁰ One reason for this upward bias is that disappointed buyers often do not leave any feedback whatsoever rather than leave negative feedback.²⁰¹ In one panelist’s words, “a substantial number of buyers seem to be left out and disappear and walk with their feet.”²⁰² Ratings may be misleading if, in one panelist’s view, “the people that don’t leave a review . . . have a worse experience on average than the people that do leave a review.”²⁰³ If that is the case, then a seller’s aggregate rating may not reflect his or her “true” quality.

¹⁹⁹ Workshop Tr. at 68 (Chrysanthos Dellarocas). Nachiketa Sahoo, Chrysanthos Dellarocas & Shuba Srinivasan, *The Impact of Online Product Reviews on Product Returns* (Boston U. School of Mgmt., Research Paper No. 2491276, 2015), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2491276.

²⁰⁰ Resnick & Zeckhauser, *supra* note 190; Chrysanthos Dellarocas & Charles A. Wood, *The Sound of Silence in Online Feedback: Estimating Trading Risks in the Presence of Reporting Bias*, 54 MGMT. SCI. 460 (2008).

²⁰¹ Chris Nosko & Steven Tadelis, *The Limits of Reputation in Platform Markets: An Empirical Analysis and Field Experiment* (Nat’l Bureau of Econ. Research, Working Paper No. 20830, 2015), <http://www.nber.org/papers/w20830.pdf>.

²⁰² Workshop Tr. at 62 (Chris Nosko).

²⁰³ *Id.* at 61 (Andrey Fradkin).

If all ratings on the same platform exhibit an upward bias to the same extent, however, the platform's rating system would nevertheless allow users to sort between higher and lower quality sellers to some degree. Moreover, platform participants with high ratings tend to get more business and earn additional high ratings, potentially skewing results. As one panelist explained, "we're more likely to engage with products and suppliers who already have good ratings and we're more likely to give them good ratings in return, because they are the best, most likely."²⁰⁴

In any event, one potential solution for an upward bias in reputation ratings, in one panelist's view, is to report on the number of transactions that did not result in a review: "[i]f the market starts penalizing parties for not receiving feedback, then this can actually help maybe put things into some more perspective."²⁰⁵ Another potential solution would be for the platform to take steps to make it more likely that users will leave reviews, such as Uber's practice of requiring riders to rate the prior driver before booking a subsequent ride.

A second bias relates to the observation that users leave feedback more frequently as their experience diverges further from the average experience. One panelist opined that ratings are skewed to extreme experiences: "[w]e are more inclined to speak up if we have extreme experiences than if we have average experiences."²⁰⁶ Depending upon the number of ratings an individual seller has from buyers that have had extreme experiences, and whether the extreme experiences were positive or negative, it may bias that seller's reputation rating upward or downward.

b. Ratings Can Be Manipulated for Strategic Purposes

In addition to the problem associated with platform users deciding not to leave reviews – suggesting that reputation scores do not accurately reflect the experience of all users on the platform – panelists pointed out that in some instances, users who do leave reviews do not always leave a review that accurately represents their experience.

One thread of research has shown that it is possible to manipulate online ratings systems by posting fake reviews. Researchers have shown empirically that entities wishing to manipulate ratings can use fake online identities to post dishonest feedback either to inflate a particular reputation or to tarnish one.²⁰⁷ Posting fake reviews either to bolster or to tarnish the reputation of a specific actor may have limited applicability to sharing economy platforms where sellers are individuals rather than businesses and tend to be large in number. Reviews or ratings made by fake profiles, however, may be a significant issue for third-party review websites that seek to rate businesses. Indeed, the research that found such manipulation examined ratings data from third-party websites TripAdvisor and Expedia, and

²⁰⁴ *Id.* at 66 (Chrysanthos Dellarocas).

²⁰⁵ *Id.* at 67.

²⁰⁶ *Id.* at 66; see also Chrysanthos Dellarocas & Ritu Narayan, *A Statistical Measure of a Population's Propensity to Engage in Post-Purchase Online Word-of-Mouth*, 21 STAT. SCI. 277 (2006).

²⁰⁷ Dina Mayzlin et al., *Promotional Reviews: An Empirical Investigation of Online Review Manipulation*, 104 AM. ECON. REV. 2421 (2014).

showed that extremely low ratings were more likely for the same hotel on TripAdvisor than on Expedia, because TripAdvisor took fewer steps to prohibit fake reviews.²⁰⁸

Another thread of research has identified a more subtle form of bias directly applicable to reputation rating systems on sharing economy platforms. As one panelist explained, “there are some reasons why the review system might not capture all the relevant information. One reason might be strategic – if people are afraid of retaliation in the review system. So if I left a bad review, I might be afraid of being retaliated against.”²⁰⁹ Another panelist concurred: “[i]f both parties rate one another, there can be this hold-up problem where people are afraid to say anything negative. And this is becoming more of an issue in the sharing economy . . . because both parties are risky to one another – much more than in commercial transactions.”²¹⁰ A different explanation for this effect relates to social mores. In one panelist’s view, “if I became friends with my hosts, I might not say something mean about them.”²¹¹ His research, however, shows that although this behavior exists, it does not significantly affect ratings in the aggregate.²¹²

Nevertheless, platforms have taken steps to reduce the impact of these biases. Most platforms and third-party review sites take various steps to ensure that reviewers have actually engaged in the transaction they are reviewing, thus reducing the possibility of outright fake reviews.²¹³ Airbnb has sought to reduce bias associated with bilateral holdup by publishing buyer and seller reviews simultaneously. As one panelist explained, since the middle of 2014, Airbnb does “not show a given review until the other party left a review.”²¹⁴

c. Impact of Experience

The panelists also pointed out that the content of online reviews or reputation ratings has a different impact on different groups of users. In general, they agreed that more experienced platform users may respond to reviews differently than new or less experienced users, *i.e.*, there is a platform learning curve. One panelist’s view is that some sophisticated eBay buyers “know how to ‘unbias’ the reviews that they’re given,”²¹⁵ for example, by accounting for the potential upward bias in reputation ratings. Another panelist further explained that certain consumers pay close enough attention to text

²⁰⁸ *Id.*; see also Fla. Bed & Breakfast Inns Comment at 3 (“Reputation systems are no longer impartial when companies like Expedia own Trip Advisor [sic] and are subject to manipulation in more than one way. Comments/reviews can be posted without proof of stay or services rendered.”).

²⁰⁹ Workshop Tr. at 61 (Andrey Fradkin); see also Cabral & Hortaçsu, *supra* note 191.

²¹⁰ Workshop Tr. at 67 (Chrysanthos Dellarocas); see also Cabral & Hortaçsu, *supra* note 191 (suggesting that buyers may be reluctant to leave the first negative review out of fear of tarnishing the seller’s positive reputation).

²¹¹ Workshop Tr. at 61 (Andrey Fradkin).

²¹² *Id.*

²¹³ See *infra* Chapter 2, Section III.B.3.b.

²¹⁴ Workshop Tr. at 61 (Andrey Fradkin).

²¹⁵ *Id.* at 63 (Chris Nosko); Jin & Kato, *supra* note 191 (showing that experienced buyers on eBay tend to avoid certain products and hypothesizing that buyers learn over time).

reviews such that “specific words on the text of reviews correlate positively or negatively with prices that sellers can obtain for similar items.”²¹⁶

Moreover, the impact of the difference in experience is felt not only by those reading the reviews or ratings and making decisions based upon them, but also by those making the reviews and ratings in the first instance. One panelist noted that a rater who “cares about their own reputation” may “try to cater to the audience” rather than rate accurately.²¹⁷ In so doing, the rater would import misinformation into the rating system, potentially skewing results. The skewing of results could be relatively more significant in the case of reviewers with reputations as popular reviewers, because research has shown that “reviews from identified reviewers carry more weight than those from anonymous reviewers.”²¹⁸

d. Cold Starts as a Problem for New Entrants

Panelists and commenters also identified the inherent problem new users on a platform face in building a reputation, a problem new entrants may face in operating a business in the traditional economy as well. As one commenter described, “[c]oming into a service with a clean slate, new users necessarily have no reputation to put forward.”²¹⁹ This problem is known as the “cold start.” The cold start makes it difficult for new users to be chosen by buyers or sellers in situations in which the platform allows users to choose and does not match buyers and sellers directly. This problem necessarily leads to the question, “[h]ow do you gain trust if you have no profile, you want to enter the market – who’s going to trust you?”²²⁰

Panelists generally agreed that reputation rating systems alone are unlikely to solve this problem. Reputation rating systems generally do a good job of identifying high- and low-quality users, but only once an individual user has engaged in a significant number of transactions. When the number of transactions an individual user has engaged in is low or even zero, even a well-functioning reputation rating systems would have trouble identifying whether the user is of high or low quality.

One panelist opined that solving the “cold start” problem requires more direct intervention by the platform.²²¹ One option is for the platform to place restrictions on who it allows to use the platform in the first place. Such efforts to curate entry, typically seen on the seller side rather than on the buyer side, would reduce the risk of transacting with a user that has a small number of ratings. By curating entry, the platform would, in effect, substitute its own reputation for that of individual users. If the platform

²¹⁶ Workshop Tr. at 64 (Chrysanthos Dellarocas); *see also* Pai-Ling Yin, *Information Dispersion and Auction Prices* (Stan. Inst. for Econ. Pol’y Research, Working Paper No. 02-024, 2006), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=690201 (suggesting that a well-designed web page has a sizeable effect on sale prices).

²¹⁷ Workshop Tr. at 65 (Ginger Jin).

²¹⁸ *Id.* at 64 (Chrysanthos Dellarocas).

²¹⁹ Bénédicte Dambrine, Joseph Jerome & Ben Ambrose, Future of Privacy Forum, *User Reputation: Building Trust and Addressing Privacy Issues in the Sharing Economy* 8 (June 2015), *attached to* Future of Privacy Forum Comment.

²²⁰ Workshop Tr. at 68 (Chrysanthos Dellarocas).

²²¹ *See id.* *See generally infra* Chapter 2, Section III.B.

has a reputation for doing a good job screening potential users, then a user – typically a buyer – need not rely as heavily on a seller’s individual reputation when deciding whether to transact.²²²

Another platform intervention helpful to solving the cold start problem would be to require new members to “pay in” to the platform: “[t]heoretically, you can require new members to post a bond. You can use escrow services until somebody has established themselves.”²²³ If new members post a bond, then users choosing whether to deal with a new member will know that there is compensation potentially available if they are dissatisfied with the transaction, which will make it more likely that users will be willing to transact with new members.

e. Reputation Milking and the Final Period Problem

Panelists identified an additional problem with reputation systems whereby an established seller on the platform with a favorable reputation rating stops being a high-quality seller, another problem that can also occur in the traditional economy. Because it likely will take time for the reputation rating system to adjust to the seller’s change in quality, buyers may continue to treat the changed seller as a high-quality user and could potentially come away from a transaction dissatisfied. The problem of “reputation milking” is especially acute if the seller plans to exit the platform entirely and therefore has no interest in maintaining his reputation rating going forward. As one panelist explained, this problem occurs when “somebody builds a good reputation and then they can try to milk it. Or when they want to exit the market, then they cheat a few times and then they exit gracefully and take a one way ticket to Brazil or something like that.”²²⁴ Indeed, research confirms the existence of this problem, known as the “final period problem.”²²⁵

Although it is unclear whether the final period problem affects a large number of transactions, panelists identified several adjustments to reputation rating systems and platform interventions that could potentially mitigate the problem. First, a platform could alter how it calculates a user’s reputation score by weighting older transactions less heavily and newer transactions more heavily. This would allow users more easily to identify when a high-quality seller has changed to become a low-quality seller than if the system weighted all transactions equally. Second, an effective reputation rating system supplied by a third party – one that stays with a user even after he exits the platform – would likely prevent or mitigate the problem of reputation milking because sellers would retain some incentive to maintain a good reputation. Finally, a direct platform intervention, such as the platform agreeing to reimburse a dissatisfied buyer, would reduce the potential harm caused by reputation milking but potentially raise the platform’s costs overall. As one panelist explained, “the end game problem is something that really cannot be solved very easily by reputation alone. And that’s where platform guarantees or dispute resolution or some alternative mechanisms can play a role.”²²⁶

²²² See *infra* Chapter 2, p. 34.

²²³ Workshop Tr. at 68 (Chrysanthos Dellarocas).

²²⁴ *Id.* at 68.

²²⁵ Cabral & Hortaçsu, *supra* note 191 (finding that sellers receive more negative feedback than their lifetime average just before exiting the platform).

²²⁶ Workshop Tr. at 68 (Chrysanthos Dellarocas).

f. Potential Adjustments that May Improve Reputation Rating Systems

Although panelists generally agreed that existing reputation rating systems do a good job of reducing information asymmetry in sharing economy marketplaces, they offered several recommendations that platforms might use to reduce the asymmetry further. First, a platform might report a user's percentile rating in addition to (or instead of) the user's raw score.²²⁷ A percentile rating would allow buyers more easily to evaluate how a given seller rates in comparison to other sellers on the platform.

Second, a platform could also report a user's number of unrated or "silent" transactions next to the user's overall reputation mechanism. This could have the effect of mitigating the impact of the upward bias in online reputation rating mechanisms. As one panelist noted, "the percentage of transactions where people did not report feedback is informative."²²⁸ If platforms report the percentage of unrated transactions, then users could use that information to adjust each individual's reputation score and adapt their transaction decisions accordingly. Moreover, a platform reporting the percentage of silent transactions could also potentially reduce the impact of platform users failing to rate their transaction partner out of fear of a retaliatory rating.²²⁹

Third, one panelist opined that reputation rating systems are more effective when the platform allows users to input and view narrative reviews in addition to a raw reputation score. In this panelist's view, narrative reviews "can be much more nuanced and informative than just the numbers," and there is evidence that people do read the reviews.²³⁰ The impact and feasibility of displaying text reviews in addition to reputation scores is likely to vary somewhat from market to market within the broader sharing economy.

Fourth, the problem of false reviews submitted to harm a competitor's reputation or to raise one's own relative score can be mitigated by allowing only verified platform users to submit reviews. In one panelist's view, platform verification makes it difficult for a user to manipulate the system by posting a number of false ratings.²³¹ Another approach to limiting the impact of false or strategic reviews is for the platform itself to filter out fake or dubious reviews using a computer algorithm, or to allow users to "rate the rater" by voting for particularly helpful reviews.²³²

Finally, panelists suggested that adjusting the way platforms calculate a user's reputation score to weight recent transactions more heavily than older transactions would result in a more accurate reputation signal. As one panelist explained, "the optimal reputation mechanism has to discount the past, because if you just let somebody accumulate score, it's very difficult to detect if somebody has

²²⁷ *Id.* at 67 ("This can alleviate a little bit the extent to which things seem skewed.").

²²⁸ *Id.*

²²⁹ Ginger Jin et al., Presentation Slides at FTC Workshop, The "Sharing" Economy: Issues Facing Platforms, Participants, and Regulators 10 (June 9, 2015), https://www.ftc.gov/system/files/documents/public_events/636241/panel2.pdf.

²³⁰ Workshop Tr. at 67. (Chrysanthos Dellarocas).

²³¹ *Id.*

²³² Ginger Jin et al., *supra* note 229, at 10. One commenter opined that "[an] independent agency might help prevent glowing 'sock puppet' reviews or unfair criticisms. Certification might even deflate mutual excess flattery." Van Alstyne Comment at 27.

[changed] in quality.”²³³ In other words, although more distant performance is certainly relevant to a seller’s present quality, it is less relevant than more recent performance, and the most accurate reputation rating mechanism ought to reflect this temporal effect. Weighting recent transactions more heavily could not only reduce the prevalence of seller reputation milking, but also allow sellers that have improved in quality over time to enjoy the benefits of an improved reputation.

4. Platform Incentives and Bundling Reputation with the Platform

Panelists also discussed whether there is any conflict of interest in having the platform rather than a third-party supply the reputation-rating mechanism. Platforms sometimes earn fees based upon the number of transactions that occur on the platform. Accordingly, the platform’s incentive to increase the number of transactions may result in the platform having an incentive to inflate the quality of users’ reputations on the platform.²³⁴

In general, however, panelists agreed that the platform’s incentives usually align with consumers’ interest; the platform generally wants to ensure that users have a good experience and will continue to use the platform. This suggests that platforms have an incentive to make sure that reputation rating systems communicate accurate information. As the Short-Term Rental Advocacy Center noted, platforms operating in this space are “intermediaries connecting buyers and sellers in an increasingly competitive marketplace, [and] it is in their best interest to ensure both the validity and accuracy of listings, as well as the corresponding reviews of travelers. Failing to do so puts the reputation of the platform at risk, which is the benchmark by which the majority of consumers will base a decision.”²³⁵

Panelists pointed out that there are a number of consumer benefits associated with having a platform bundle the market-making and reputation-rating functions together. As one panelist explained, “in principle, it is advantageous to have reputation systems embedded in the platform because . . . reputation alone has certain weaknesses. So reputation has to be supplemented by the platform guarantees, background checks, some form of dispute resolution mechanisms, and maybe some way of ascertaining that somebody who posts feedback has actually transacted. And it’s much easier to do this if the system is embedded inside the platform.”²³⁶ Accordingly, these economies of scope suggest that bundling the reputation rating system with other services provided by the platform serves consumers well.²³⁷

²³³ Workshop Tr. at 70 (Chrysanthos Dellarocas).

²³⁴ *Id.* (Platforms “have an incentive to make it seem that things are kind of better than they are. A little better, so that there are fewer dissatisfied customers, that fewer transactions would go bad. There is this conflict of ‘how much information do you reveal?’”).

²³⁵ Travel Tech. Ass’n Comment at 2.

²³⁶ Workshop Tr. at 69 (Chrysanthos Dellarocas).

²³⁷ Travel Tech. Ass’n Comment at 5 (“Short-term rental platforms have taken measures over time to integrate comprehensive and important reputational feedback mechanisms into their platforms. Doing so has brought a level of trust to the transaction and in turn, comfort to travelers – often at a level that far exceeds that achieved by government regulation. In fact, in a 2015 consumer research study on the sharing economy by PricewaterhouseCoopers LLP, 64% of consumers said that in the sharing economy, peer regulation is more important than government regulation.”).

On the other hand, panelists explained that the platform does not necessarily have the incentive to provide accurate reputation ratings to consumers in all situations. First, a platform may have the incentive to inflate the quality of users' reputations to make the platform more attractive relative to its platform competitors.²³⁸ Second, panelists explained, bundling the reputation rating system with the market-creating function of platforms creates the potential for user lock-in. If a seller devotes time and resources to building a reputation on one platform, that seller may be reluctant to start over and build a reputation on a new competing platform even if the new competitor offers superior terms. As one panelist explained, "reputation is [] a trust building mechanism, but it's also an incentive to stay in the platform. It is greater switching costs; it's a lock-in mechanism."²³⁹ In this panelist's view, the platform's incentive to provide the best reputation rating system can conflict with its desire to keep users on its platform: if the platform shows a seller's score just for six months, for example, this reduces the platform's lock-in on the seller compared to showing a seller's score for several years. In this case, "optimal design and incentives for the platform can be in conflict."²⁴⁰

Finally, in assessing the costs and benefits of bundling market-making and reputation rating systems together, one panelist highlighted the importance of considering whether a third-party may be better suited to take on the role of maintaining a reputation rating system. In this panelist's view, aggregating a single user's reputation across platforms could generate benefits: if a user has "a reputation on Yelp, a reputation on eBay, and a reputation on Amazon," there may be "some economic efficiencies to aggregating that information together and hav[ing] a more comprehensive picture of what [the user] look[s] like in the whole world of e-commerce."²⁴¹ But individual platforms "may not have the incentive to really collect all that information and get it onto one platform. So that's probably what the third party certification website could do."²⁴²

B. Platform Interventions

A platform "intervention" is an action a platform takes to shift some transaction risk from users on the platform to the platform itself. Such interventions can complement reputation ratings systems and, in some cases, improve consumer protection. As one panelist explained, there is evidence that "platforms have been moving more and more toward these sorts of mechanisms. And you see the newer platforms, like Uber, actively intervening in ways that eBay certainly didn't do in the early days."²⁴³

Panelists and commenters discussed many different types of platform interventions. The first and most obvious is curated access. Rather than allow any individual to sign up for a platform, the platform undertakes some effort to pre-screen users. This can be as simple as requiring a buyer on the platform to provide valid credit card information before being allowed to use the platform, or as complicated as a thorough background check that investigates a potential ride-sharing driver's criminal history and driving record. On the one hand, platform pre-screening can reduce the thickness of the market by

²³⁸ See *supra* note 234.

²³⁹ *Id.* at 69.

²⁴⁰ *Id.* at 70.

²⁴¹ *Id.* (Ginger Jin).

²⁴² *Id.* at 70-71.

²⁴³ *Id.* at 74 (Chris Nosko).

reducing the total number of buyers and sellers eligible to engage in transactions on the platform. On the other hand, pre-screening indicates to buyers and sellers that the platform has done some amount of due diligence on users, which can signal that a platform establishes a minimum level of quality in its users.

Another type of intervention is known as a “platform guarantee.” Platform guarantees can take many forms, but all essentially function as platform-provided insurance in the event a buyer or seller is dissatisfied with a particular transaction. A guarantee could be an explicit guarantee by the platform to reimburse dissatisfied users. It could also take the form of an escrow service, such as Airbnb holding a guest’s payment in escrow until after the transaction is complete.²⁴⁴ A platform guarantee could also be an explicit insurance product, such as Airbnb-provided insurance for hosts and guests against any injury or damage that occurs during a stay.

If a platform actually matches buyers and sellers rather than allowing them to select one another on their own, the platform’s matching function can also operate like a platform intervention. As one panelist explained, “how do we match buyers and sellers together without them even knowing what’s going on behind the scenes? Because we know something about the buyer preferences and the seller preferences.”²⁴⁵ This is made possible because “oftentimes the platform knows a lot about” the users.²⁴⁶ Matching using this knowledge reduces the likelihood that either user will end up dissatisfied. In this way, the quality of the platform’s matching function serves as a signal to users about the likelihood that a transaction will be mutually beneficial.

Perhaps the best way to understand platform guarantees is to consider them in action. Airbnb offers several guarantees to hosts and guests that use its platform. First, Airbnb curates entry by linking “a person’s offline identification (such as a driver’s license or a passport) with the online profile they’ve created on Airbnb, giving both hosts and guests helpful information before they proceed with a reservation.”²⁴⁷ Next, Airbnb’s payment processing system allows it to deny payment to a host if an accommodation is not as it was described.²⁴⁸ Airbnb also offers insurance to hosts for up to \$1 million in damages to the listed property as well as liability insurance in the event a guest is injured during her stay.²⁴⁹ Finally, Airbnb offers an alternative dispute resolution process for guests and hosts who are dissatisfied with a particular transaction.²⁵⁰

Lyft also provides several guarantees to platform users. In particular, Lyft requires drivers to submit Social Security numbers and engages in a nationwide criminal record check and driving record check.²⁵¹ In addition, Lyft provides insurance coverage that varies depending upon whether the driver is

²⁴⁴ *Id.* at 59 (Andrey Fradkin) (Airbnb “processed the payments and it held them in escrow until the transaction occurred.”).

²⁴⁵ *Id.* at 74 (Chris Nosko).

²⁴⁶ *Id.*

²⁴⁷ Airbnb Comment at 4.

²⁴⁸ *Id.* at 4.

²⁴⁹ *Id.* at 4.

²⁵⁰ *Id.* at 5.

²⁵¹ Lyft Comment Attachment at 6. As discussed below, Workshop participants questioned whether the background checks conducted by Lyft and Uber are sufficient to protect consumers, and some regulators have alleged that their safety claims are misleading. *See infra* p. 79.

in the process of picking up or dropping off a passenger, or is waiting (with the app on) to be matched with a passenger.²⁵²

Panelists explained that platform guarantees have both positive and negative effects from a consumer welfare perspective. In general, a platform guarantee can shift risk away from platform users or “from whoever will suffer from the information problem. And this shift of risk . . . may enhance buyer willingness to use the platform.”²⁵³ Platform guarantees can work as complements to reputation rating mechanisms, and can specifically help solve the cold start and reputation milking problems that can bedevil reputation mechanisms.²⁵⁴ According to a panelist, the platform guarantee likely is a better tool to deal with the final period problem than a reputation mechanism.²⁵⁵

Platform interventions, however, are capable of addressing only limited problems. They do not prevent consumers from being deceived in the first instance. For example, even if a payment is held in escrow or new supplier entrants are screened, these interventions do not prevent all consumer harm. Rather, they operate to make a dissatisfied user whole only after a problem has occurred, and may be imperfect at fully addressing the harm. For example, if a consumer is hurt on a property rented out by a host operating on Airbnb, insurance supplied by Airbnb does not prevent the injury or damage from happening in the first place.

Moreover, just like reputation mechanisms, platform guarantees can also pose problems. Although a guarantee by the platform obviates somewhat the need for platform users to trust a user on the other side of the platform that is of uncertain quality, to be effective in reducing information asymmetry the guarantee requires the user to trust the platform instead. One panelist questioned why users systematically “would trust the platform more than individual sellers? We know this marketplace is still in flux and many platforms may not exist sometime down the road. So I think it’s still an open question of why the buyers would trust the platform more.”²⁵⁶ In this vein, a platform guarantee may be “just a tool for [the platform] to expand quickly, rather than to provide a better incentive for due diligence in weeding out the bad [users].”²⁵⁷

Whether substituting platform reputation for user reputation reduces information asymmetry depends upon the quality of the platform’s reputation, which can be a function of whether the platform is

²⁵² Lyft Comment Attachment at 7 (If the application is off, “[a] driver’s personal insurance is the insurance policy.” If the application is turned on but the driver has not yet accepted a ride, “Lyft provides Contingent Liability protection if [the driver’s] personal insurance doesn’t.” Once the ride request is accepted, “Lyft’s liability coverage is primary to a driver’s personal insurance. It’s designed to cover a driver’s liability for property damage and bodily injury of passengers and/or third parties.”).

²⁵³ Workshop Tr. at 75 (Ginger Jin). See also Xiang Hui, Maryam Saeedi, Zeqian Shen & Neel Sundaresan, *Reputation and Regulations: Evidence from eBay*, MGMT. SCI. (forthcoming, 2016), <http://pubsonline.informs.org/doi/abs/10.1287/mnsc.2015.2323> (finding that a buyer protection program complements the seller reputation badge and results in an efficiency gain that increases welfare by 4.7%).

²⁵⁴ *Id.* at 75-76 (Because “the platform guarantee can enhance people’s trust from day one,” the cold start issue becomes less of a problem if the platform supplies a guarantee.).

²⁵⁵ *Id.* at 76.

²⁵⁶ *Id.*

²⁵⁷ *Id.*

a new entrant or more established. Regardless of whether the platform is new or established, a platform guarantee can pose certain risks similar to moral hazard in insurance markets. As one panelist explained, a platform guarantee is “just like any insurance policy: it transforms the problem of using your own money to using someone else’s money. And that would open doors for users to take advantage of the system. . . . Now that they’re insured by the platform, they’re less vigilant in checking out the reputation system, for example.”²⁵⁸ Moreover, “[the] platform guarantee actually [c]ould attract some strategic sellers to enter, because the buyers now trust the platform and the low-quality sellers may have more incentive to enter the platform, which undermines the potential value of the platform guarantee.”²⁵⁹ Notwithstanding that platform guarantees could potentially result in some strategic behavior by users, all panelists generally agreed that such guarantees can and do benefit platform users by covering some gaps left by reputation mechanisms.

IV. Conclusion

Panelists generally agreed that reputation-rating systems and platform guarantees reduce information asymmetry in online and sharing economy markets. One panelist opined that “the fact that those markets exist and they grow exponentially is a testament to the fact that those systems seem to be doing reasonably good work, at least with respect to building an adequate level of trust.”²⁶⁰ Panelists also agreed that reputation rating systems and platform guarantees do not reduce information asymmetry to zero in sharing economy markets. There is evidence that issues such as the cold start problem or the reputation milking effect persist despite the fact that platforms generally have an incentive to ensure that users on the platform have a good experience.

Panelists disagreed about the benefits of moving from current “good” functioning reputation mechanisms to “perfect” ones,²⁶¹ and about whether regulation is necessary or desirable in reducing information asymmetry in sharing economy markets. In one panelist’s view, there are opportunity costs for platforms to improve already well-functioning reputation rating systems, and that it is difficult to determine whether platforms ought to deploy scarce resources toward “making marginal improvements to the reputation system or to other aspects of the platform.”²⁶² With regard to regulation, one commentator cautioned that “regulators should avoid prescriptive rules, and instead encourage companies and developers to continue to create innovative features that facilitate trust.”²⁶³

²⁵⁸ *Id.* at 76-77.

²⁵⁹ *Id.* at 76.

²⁶⁰ *Id.* at 77-78 (Chrysanthos Dellarocas). Another panelist explained that “when you look at the literature that people have written about [ratings systems], people say, ‘well look at eBay. Look how well eBay is doing. And could eBay exist without a well-functioning reputation system?’ And to a certain extent, I think that’s right.” *Id.* at 62 (Chris Nosko).

²⁶¹ *Id.* at 77 (Chrysanthos Dellarocas) (“[W]hether the solution that is optimal for the platform is also the optimal solution for a social planner . . . would be a second order effect.”).

²⁶² *Id.* at 79 (Andrey Fradkin).

²⁶³ Application Developers All. Comment at 2. Another panelist observed that whether regulation is necessary depends upon the object of regulation: if the goal is “to weed out the really bad transactions and the really bad actors, then reputation systems probably do a really good job of that,” but if the goal is to maximize social welfare, then the relevant question is how many transactions “are on the fence or on the border between being mediocre versus really bad?” Workshop Tr. at 78 (Chris Nosko). As a recent paper by the OECD’s Committee on Consumer Policy observed, “policy makers need more evidence and

Chapter Three: Competition, Consumer Protection, and Regulation in the Sharing Economy

I. Introduction

The Workshop examined competition, consumer protection, and regulatory issues posed by the rise of sharing economy platforms, exploring how regulators can pursue legitimate regulatory goals such as those relating to health, safety, or consumer protection, while avoiding regulations that may unnecessarily chill innovation, entry, and competition. The sharing economy can produce disruptive innovation that greatly benefits consumers. Platforms and suppliers, however, should not be permitted to engage in unfair or deceptive acts or practices simply because they are introducing innovative products or services. One panelist offered another perspective, suggesting that “many regulations . . . have come to burden innovation and become a formidable barrier to new forms of entry and entrepreneurialism.”²⁶⁴ Another suggested that appropriately tailored regulations could both protect consumers and the public and foster broad public acceptance of and participation in the sharing economy.²⁶⁵

analysis to determine how effective these mechanisms are in achieving consumer protection outcomes.” OECD, *Protecting Consumers In Peer Platform Markets: Exploring The Issues* (OECD Digital Economy Papers, No. 253, 2016), http://www.oecd-ilibrary.org/science-and-technology/protecting-consumers-in-peer-platform-markets_5jlvwz39mlzw-en. The OECD paper suggests two, inter-related issues for further work:

- How well are the initiatives put in place by peer platforms to build trust among consumers working? Can we assess the effectiveness of pre-screening and verification functions? What about the reputation and rating systems? How well do the guarantees, insurance programmes, and payment protections work? How effective are the community guidelines, and dispute resolution and redress systems? And how can policy makers ensure that these mechanisms are effective in protecting consumers and promoting informed choices?
- How do these types of trust-building mechanisms interface with existing consumer laws and other types of consumer protection and public safety regulations? How do they compare to other, more formal types of self-regulation, which often involves codes of conduct, accountability measures and enforcement mechanisms? To what extent can these initiatives be considered an effective substitute for consumer protection laws and regulatory oversight?

Id. at 23-24.

²⁶⁴ Workshop Tr. at 152 (Adam Thierer).

²⁶⁵ See *id.* at 94-95 (Catherine J.K. Sandoval). International discussions of the sharing economy have focused on the importance of consumer trust for broad acceptance and participation in the sharing economy. Indeed, the issue of consumer trust in the sharing economy was one of the main themes of the June 2016 OECD Ministerial on the Digital Economy. See *Trust in the Digital Economy*, OECD, <http://www.oecd.org/internet/ministerial/themes/trust/> (“Panel 3.1 Consumer Trust and Market Growth”). In addition, the OECD Competition Committee has examined possible advocacy and enforcement approaches to the emergence of sharing economy platforms, also discussing experiences in particular sectors such as financial services and legal services. See *Best Practice Roundtables on Competition Policy*, OECD, <http://www.oecd.org/daf/competition/roundtables.htm>. The International Competition Network (ICN), based on a broad survey it conducted with its member competition agencies, prepared a report on how antitrust agencies can successfully advocate competition considerations to regulatory and legislative entities that hinder disruptive innovations, including sharing economy platforms. See Int’l Competition Network, *ICN Special Project 2016: Government Advocacy and Disruptive Innovations*, ICN 2016 SINGAPORE, <http://www.internationalcompetitionnetwork.org/uploads/library/doc1094.pdf>.

Balancing these considerations can be challenging for state and local regulators. As part of its competition advocacy program, the Commission has already been active in providing advice to lawmakers and regulators considering how to amend their laws and regulations that apply to the sharing economy. Through that program, regulators can request the views of Commission staff regarding how proposed changes in laws and regulations could affect competition.²⁶⁶ In response to four such requests, the Commission staff has submitted letters offering its views regarding proposed regulations affecting platform-based for-hire transportation service.²⁶⁷

Chairwoman Ramirez has explained some of the underlying principles informing the advice provided by FTC staff in these advocacy letters:

[E]nforcers and policymakers have to strike a balance. We must allow competition and innovation in the form of these new peer-to-peer business models to flourish. At the same time, where necessary, targeted regulatory measures may be needed to ensure that these new business models have appropriate consumer protections; but they should be no greater than necessary to address those concerns.²⁶⁸

Toward these ends, the FTC staff advocacies have generally cautioned regulators “not to impose legacy regulations on new business models simply because they happen to fall outside of existing regulatory schemes.”²⁶⁹ In the Commission’s view, any necessary regulations “should be flexible enough to allow new forms of competition” and “narrowly tailored to the specific public policy goals that have been identified.”²⁷⁰

²⁶⁶ See Workshop Tr. at 6 (Maureen Ohlhausen) (“Upon request from a legislator, we can and frequently do provide neutral, unbiased analysis of the likely economic impact of pending legislation.”). Specific statutory authority for the FTC’s competition advocacy program is found in Sections 6(a) and (f) of the FTC Act, under which Congress authorized the FTC “[t]o gather and compile information concerning, and to investigate from time to time the organization, business, conduct, practices, and management of any person, partnership, or corporation engaged in or whose business affects commerce,” and “[t]o make public from time to time such portions of the information obtained by it hereunder as are in the public interest.” 15 U.S.C § 46(a), (f) (2015).

²⁶⁷ In the last few years, the Commission has submitted letters to four jurisdictions discussing the competitive effects of proposed regulations in the passenger-vehicle transportation services marketplace: Chicago, Illinois; Colorado; the District of Columbia; and Anchorage, Alaska. See Comment from FTC Staff to Brendan Reilly, Alderman, Chi. City Council (Apr. 15, 2014), https://www.ftc.gov/system/files/documents/advocacy_documents/ftc-staff-comment-honorable-brendan-reilly-concerning-chicago-proposed-ordinance-o2014-1367/140421chicagoridesharing.pdf; Comment from FTC Staff to Debbie Ossiander, Assembly Member, Anchorage Assembly (Apr. 19, 2013), https://www.ftc.gov/sites/default/files/documents/advocacy_documents/ftc-staff-comment-anchorage-assembly-member-debbie-ossiander-concerning-ao-no.2013-36-proposing-changes-regulatory-framework-licensing-and-permitting-taxicabs-limousines-and/130426anchoragecomment.pdf; Comment from FTC Staff to the Colo. Pub. Utils. Comm’n (Mar. 6, 2013), https://www.ftc.gov/sites/default/files/documents/advocacy_documents/ftc-staff-comment-colorado-public-utilities-commission-concerning-proposed-rulemaking-passenger/130703coloradopublicutilities.pdf; Comment from FTC Staff to the D.C. Taxicab Comm’n (June 7, 2013), https://www.ftc.gov/sites/default/files/documents/advocacy_documents/ftc-staff-comments-district-columbia-taxicab-commission-concerning-proposed-rulemakings-passenger/130612dctaxicab.pdf.

²⁶⁸ Ramirez, *supra* note 42, at 2.

²⁶⁹ *Id.* at 7.

²⁷⁰ *Id.* at 8.

This Chapter reviews broad topics concerning regulation of the sharing economy, summarizing at a high level the views presented by Workshop panelists and commenters.

II. Regulating the Sharing Economy: Central Themes

At the Workshop, participants expressed a variety of concerns and ideas regarding the complex issues surrounding government regulation of sharing economy providers. Panelists and commenters opined that, as in many industries, some amount of government regulation of the sharing economy is needed to protect consumers and the public from harm and to promote public goals. Workshop participants, however, also argued that unnecessary or misguided regulation could harm customers and competition in this dynamic, innovative sector. Others opined that certain features of sharing economy platforms, such as reputation review mechanisms, may serve to protect consumers and thereby reduce the role for government regulation.²⁷¹

Some participants suggested that regulators should exercise restraint, embrace flexibility, and avoid taking preemptive action based on the mere potential for harm. Several also cautioned that using regulations designed for traditional suppliers to govern sharing economy suppliers might, by design or by mistake, serve to protect incumbent competitors without actually benefiting the public.

Participants discussed the challenges of protecting the privacy of sharing economy participants' data, particularly in light of the central role of transactional and reputational data in this space. They also emphasized the potential benefits of such data to government entities; for example, data generated from transactions on platforms such as Uber and Lyft could help municipalities better understand traffic flows and other issues of importance to their policymaking.

The remainder of this Chapter surveys some of the thoughts offered on these topics during the Workshop.

Balancing Objectives: Assessing whether and how to regulate platforms and participants in the sharing economy requires regulators to balance sometimes-competing objectives. One commenter identified the goal as "striking a balance between competition and consumer protection so that overall consumer welfare is optimized."²⁷² Similarly, the New York City Taxi & Limousine Commission emphasized that "[b]alancing [its] regulatory goals and encouraging innovation and competition remains a priority."²⁷³

Some Workshop participants focused on how regulation could impede innovation and entry by sharing economy platforms and suppliers. One commenter pointed out that incumbents seek "protectionist measures from local and state governments to prevent their markets from being disrupted

²⁷¹ See *supra* Chapter 2, pp. 38-40; see *infra* pp. 59-61 & Chapter 4, Section IV.A.2.

²⁷² Internet Ass'n Comment at 2. See also R Street Inst. Comment at 2 (while sharing economy platforms enhance competition, "consumer protections and safety are legitimate objectives.").

²⁷³ N.Y.C. Taxi & Limousine Comm'n Comment at 4; Internet Ass'n Comment at 2 (pointing to particular considerations such as the benefits from the sharing economy and ways in which it may provide better consumer protection than traditional suppliers).

by ‘sharing economy’ services.”²⁷⁴ A report submitted by a foreign competition authority likewise emphasized the innovative nature of sharing economy marketplaces, and warned that regulations that prevent participation would cause “high losses” in competition and “negative repercussions on the welfare of the consumer.”²⁷⁵

Some Workshop participants, particularly those associated with incumbents, emphasized that traditional suppliers must satisfy a number of regulatory requirements and argued that failing to apply these requirements to sharing economy suppliers will undermine the realization of the goals underlying those regulations. One hotel industry panelist argued that traditional providers “follow a strict set of rules and regulations to ensure the safety and security of ... guests and communities,” and warned that “an unlevel playing field [] is compromising consumer safety, endangering the character and security of residential neighborhoods.”²⁷⁶ A former taxi industry regulator declared that “there is absolutely, positively no difference between taxis, limos, jitneys, Ubers, Lyfts” and that all should be subject to regulation for “basics” such as safety and consumer protection.²⁷⁷ These comments suggest that existing regulations also should be applied to new entrants because they provide services similar to those provided by traditional providers.²⁷⁸

A number of participants recognized the need for some regulation of the sharing economy, but said that such regulation, for various reasons, should differ in some respects from existing regulation.²⁷⁹ Some existing regulations, they argued, “were designed for different practices” and are now outdated and poorly suited for the sharing economy.²⁸⁰ Services provided in the sharing economy, they asserted, do not present the same sort of safety risks as services provided by traditional suppliers.²⁸¹ Indeed, one panelist emphasized that forty state and local governments “already have in place smart, forward-looking regulations that both ensure public safety and consumer protection, and embrace the innovations that Uber and others have introduced.”²⁸²

²⁷⁴ TechFreedom & Int’l Ctr. for Law & Econ. Comment at 2-3. *See also* Workshop Tr. at 151-52 (Adam Thierer).

²⁷⁵ CATALAN COMPETITION AUTH., *supra* note 12, at 11.

²⁷⁶ Workshop Tr. at 115 (Vanessa Sindors).

²⁷⁷ Workshop Tr. at 106, 121-22 (Matthew Daus).

²⁷⁸ *See generally infra* Chapter 4, Section III.B.

²⁷⁹ *See, e.g.*, Workshop Tr. at 87-88 (Arun Sundararajan) (describing how regulation should be tailored to reflect the use of trust mechanisms and the degree of professionalism of platform suppliers); *id.* at 94-97 (Catherine J.K. Sandoval) (describing how California regulated TNCs but tailored the insurance regulations to accommodate part-time TNC drivers, who do not need continuous commercial-level insurance coverage); *id.* at 103-04 (Ashwini Chhabra).

²⁸⁰ *Id.* at 156 (Sofia Ranchordás). *See also* Comput. & Commc’ns Indus. Ass’n Comment at 5 (noting that “regulators should focus on updating regulation across the board with an eye on encouraging a vibrant, competitive marketplace for all players”); Free State Found. Comment at 3 (“[s]haring economy platforms should be free to develop without the strictures of any new sector-specific regulations or older regulations designed for incumbent providers”); CHRISTOPHER KOOPMAN, MATTHEW MITCHELL & ADAM THEIRER, THE SHARING ECONOMY AND CONSUMER PROTECTION REGULATION: THE CASE FOR POLICY CHANGE 19 (2014), <http://mercatus.org/sites/default/files/Koopman-Sharing-Economy.pdf> (arguing against simply “rolling old regulatory regimes onto new technologies and sectors”).

²⁸¹ *See, e.g.*, Internet Ass’n Comment at 5 (“although opponents of ridesharing platforms often cite to safety concerns as a ground for regulation, there are several reasons why ridesharing can be considered *safer* than taking a taxi”).

²⁸² Workshop Tr. at 103 (Ashwini Chhabra).

One panelist argued that, while “we should regulate the sharing economy” to address legitimate concerns, we should “prioritize[]” the innovations it offers.²⁸³ One commenter opined that regulators should “pursu[e] the least competition-restrictive means in serving a legitimate public policy goal.”²⁸⁴ This approach comports with approaches suggested in FTC advocacy letters and by FTC Chairwoman Ramirez that policymakers should “strike a balance” by designing restrictions on platforms that are “no greater than necessary” to solve a specific problem.²⁸⁵ Two commentators propose adoption of a “regulatory framework that simultaneously allows the key efficiencies the platforms seek to offer and assures that they adequately address the rights of consumers and third parties.”²⁸⁶

Level Playing Field: Various Workshop participants suggested that regulations should be the same for all suppliers competing in a particular sector, regardless of whether a supplier is a platform-based new entrant or a traditional supplier.²⁸⁷ Several pointed out that sharing economy providers might gain unfair advantages simply by bypassing existing regulations that apply to incumbents.²⁸⁸ Keynote speaker Commissioner Catherine J.K. Sandoval of the California Public Utilities Commission criticized a “school of thought” holding that sharing economy providers should offer service first and then seek regulatory approvals, arguing that it is “illegal” and undermines “public confidence.”²⁸⁹

A separate set of rules for legacy competitors and new sharing economy entrants could potentially give one group a competitive advantage derived not from superior foresight, skill, or business acumen, but from unequal regulatory treatment. Commissioner Ohlhausen put the point clearly in her opening remarks when she cautioned that the government “picking winners by creating a regulatory differential in favor of new entrants should be just as undesirable as retaining regulations that deter meaningful entry.”²⁹⁰

Suggesting that all market participants competing in a particular sector should face the same or similar regulatory requirements raises the question of what those regulations ought to be. It also raises

²⁸³ *Id.* at 155 (Sofia Ranchordás).

²⁸⁴ Comput. & Commc’ns Indus. Ass’n Comment at 2; *see also* Internet Ass’n Comment at 4-5.

²⁸⁵ Ramirez, *supra* note 42, at 2.

²⁸⁶ Edelman & Geradin, *supra* note 111, at 295.

²⁸⁷ *See, e.g.*, Workshop Tr. at 153 (Adam Thierer) (“there’s always this need about leveling the playing field in sectors that are undergoing comprehensive technological transformation”); Taxicab, Limousine & Paratransit Ass’n First Comment at 1 (arguing that incumbents “should be allowed to follow these new looser or more flexible rules” applied to new entrants); Workshop Tr. at 108, 121 (Matthew Daus); Workshop Tr. at 115-16 (Vanessa Sindors).

²⁸⁸ Nat’l Employment Law Project Comment at 2; *see also* Partnership for Working Families Comment at 2 (urging the FTC to “[e]nsure a level regulatory playing field between on-demand companies and established industries in their sectors.”).

²⁸⁹ Workshop Tr. at 97 (Catherine J.K. Sandoval) (criticizing the “offer first, license later” approach). Two commentators have dubbed this strategy of beginning operations without meeting regulatory requirements “spontaneous private deregulation,” arguing that this approach has been increasing over the last decade, particularly in the sharing economy. Benjamin G. Edelman & Damien Geradin, *Spontaneous Deregulation: How to Compete with Platforms that Ignore the Rules*, HARV. BUS. REV., Apr. 2016, at 4, <https://archive.harvardbusiness.org/cla/web/pl/product.seam?c=43839&i=43841&cs=03cd442117f246b7350f7c772465a3ab>. *See also* Brishen Rogers, *The Social Costs of Uber*, 82 U. CHI. L. REV. DIALOGUE 85, 87 (2015), https://lawreview.uchicago.edu/sites/lawreview.uchicago.edu/files/uploads/Dialogue/Rogers_Dialogue.pdf.

²⁹⁰ Workshop Tr. at 8 (Maureen Ohlhausen); *see also id.* at 12-13 (Liran Einav) (noting that sharing economy platforms may be able to “bypass regulation, whether it’s good regulation or bad regulation” and observing that although bypassing bad regulations could increase efficiency, bypassing good regulations could result in consumer harm).

the question of whether differences between traditional suppliers and platform-based suppliers may warrant different regulatory treatment.²⁹¹ The answer to those questions will necessarily turn on assessments of market conditions and regulatory needs specific to each sector in which traditional suppliers and platform suppliers compete. Nevertheless, some Workshop participants suggested that regulators look to achieve regulatory parity by choosing the least restrictive measures needed to achieve the regulatory goal, one advocating that regulators “level the playing field by ‘deregulating down’ . . . , not by ‘regulating up.’”²⁹²

Protectionism and Regulatory Capture: Some Workshop participants expressed concern that regulators might apply existing regulation to sharing economy providers due to industry capture of regulators, industry control of regulatory boards, or error.²⁹³ In any case, the result would benefit incumbent suppliers and harm consumers and sharing economy suppliers. One commenter claimed that incumbents often “seek out protectionist measures from local and state governments to prevent their markets from being disrupted by ‘sharing economy’ services.”²⁹⁴ Another commenter argued that these efforts are frequently successful because “[s]tate or local licensing boards often fall victim to regulatory capture,” and entrants may lack resources “to fight back.”²⁹⁵ Such regulations can have lasting impact, as it may be difficult to convince officials “to remove anticompetitive policies in the face of resistance from incumbents.”²⁹⁶

Potential entrants therefore may face a “‘Brother, May I’ scenario,” described by Commissioner Ohlhausen, in which a prospective entrant “effectively has to request permission from the incumbent firms” to offer its services in the marketplace.²⁹⁷ By increasing the costs entrants face, protectionist policies may “push new entrants out of the market or at least decrease their competitiveness.”²⁹⁸ Moreover, even “well-meaning restrictions that have the unintended consequence of creating anticompetitive barriers” can work to favor incumbents and impede entry,²⁹⁹ and thus potentially prevent consumers from realizing the benefits associated with disruptive innovation.

²⁹¹ See *infra* Chapter 4, Section III.B.

²⁹² See, e.g., Mercatus Ctr. Comment at 7; see also Workshop Tr. at 153 (Adam Thierer); Free State Found. Comment at 3 (advocating that regulators “remove unnecessary regulations wherever they apply”).

²⁹³ See, e.g., Mercatus Ctr. Comment at 5-6 (describing “the phenomenon of ‘regulatory capture’” and discussing the explanations that have been advanced for it); TechFreedom & Int’l Ctr. for Law & Econ. Comment at 3; Workshop Tr. at 8 (Maureen Ohlhausen).

²⁹⁴ TechFreedom & Int’l Ctr. for Law & Econ. Comment at 3. Senator Cruz described how “[o]ver and over again, government is sought out as an ally of incumbent businesses to restrict competition from new entrants.” Letter from Senator Ted Cruz to Edith Ramirez, Chairwoman, Fed. Trade Comm’n 1 (July 17, 2015), https://www.ftc.gov/system/files/documents/public_comments/2015/07/02030-96648.pdf; see also Info. Tech. & Innovation Found. Comment at 2 (“incumbents often retreat behind state and local laws and regulations that shelter them”).

²⁹⁵ Comput. & Commc’ns Indus. Ass’n Comment at 3-4.

²⁹⁶ Info. Tech. & Innovation Found. Comment at 3.

²⁹⁷ Workshop Tr. at 7-8; (Maureen Ohlhausen); see also Maureen K. Ohlhausen & Gregory P. Luib, *Brother, May I?: The Challenge of Competitor Control over Market Entry*, 4 J. ANTITRUST ENFORCEMENT 111, 111 (Apr. 2016), https://www.ftc.gov/system/files/documents/public_statements/801861/150917brothermayi.pdf.

²⁹⁸ Free State Found. Comment at 9.

²⁹⁹ Info. Tech. & Innovation Found. Comment at 3.

Regulatory Restraint and Flexibility: Workshop participants emphasized that the rapidly evolving nature of the sharing economy requires a regulatory approach flexible enough to allow adaptation to novel and potentially unforeseen situations. Some emphasized that regulators should appreciate the uncertainty surrounding regulatory decisions arising from factors such as the early stage of development of the sharing economy, the speed and variability with which it is growing and evolving, the novel tools used for transacting and building trust, and various consumer protection and other regulatory concerns.³⁰⁰ Commissioner Ohlhausen has said that, because the predictions of regulators regarding developing markets “can be spectacularly wrong,” “adopting a posture of regulatory humility is a general principle of good government.”³⁰¹

Some participants suggested various ways in which regulators could enhance flexibility in decision-making so that it would be easier to accommodate new concerns that arise and to eliminate unnecessary regulations.³⁰² For example, the Catalan Competition Commission advised that in the sharing economy “[t]he standards which set the ‘rules of the game’ should be the result of techniques of regulation and viewpoints broader and more flexible than the traditional.”³⁰³ Chairwoman Ramirez has advised that “[r]egulatory frameworks . . . should be flexible enough to allow new forms of competition,” and further that they should be “reviewed and revised periodically to facilitate and encourage the emergence of new forms of competition.”³⁰⁴ A commenter suggested that regulatory flexibility is needed because “[i]t is not possible for regulators to keep up with the pace of technology.”³⁰⁵ One panelist explained that regulatory flexibility requires regulators to be cautious and perhaps decide not to regulate “right away” when a potential problem presents itself.³⁰⁶ Another panelist agreed, suggesting that regulators should “let it play [out] for a few years, see how things evolve.”³⁰⁷

At the Workshop, Commissioner Ohlhausen explained that “[m]isguided government regulation can be the barrier to innovation,” and therefore “regulators should tread carefully, particularly when

³⁰⁰ See, e.g., Workshop Tr. at 17-18 (Liran Einav); *id.* at 156 (Sofia Ranchordás); *id.* at 154-55 (Ashwini Chhabra) (“[W]e should be very careful about the kind of public policies we try to craft today. Because none of us have a crystal ball that can perfectly predict the exciting future that lies ahead.”). See generally Sofia Ranchordás, *Does Sharing Mean Caring? Regulating Innovation in the Sharing Economy*, 16 MINN. J.L. SCI. & TECH. 1 (2015).

³⁰¹ Maureen K. Ohlhausen, Commissioner, Fed. Trade Comm’n, Room to Run: Regulatory Responses to Dynamic Changes in the Organization of Work, Remarks before the Am. Action Forum 2-3 (July 30, 2015), https://www.ftc.gov/system/files/documents/public_statements/691841/150730roomtorunspeech.pdf. See also Workshop Tr. at 8 (Maureen Ohlhausen).

³⁰² See, e.g., Workshop Tr. at 156-57 (Sofia Ranchordás). See generally Sofia Ranchordás, *Innovation-Friendly Regulation: The Sunset of Regulation, the Sunrise of Innovation*, 55 JURIMETRICS 201 (2015); Ranchordás, *supra* note 300.

³⁰³ CATALAN COMPETITION AUTH., *supra* note 12, at 13. See also Comput. & Commc’ns Indus. Ass’n Comment at 2 (“regulations should be adaptive and flexible”).

³⁰⁴ Ramirez, *supra* note 42, at 8.

³⁰⁵ Comput. & Commc’ns Indus. Ass’n Comment at 7. See also CALinnovates Comment at 5 (“[t]hese technologies are adapting and adjusting to the market quicker than regulation can keep up”).

³⁰⁶ Workshop Tr. at 156 (Sofia Ranchordás). See also Free State Found. Comment at 10 (“Preemptive regulatory action based on conjectural harms leads to inefficient economic outcomes and often unintended consequences.”); The Travel Tech. Ass’n Comment at 4 (“We do not believe that preemptive measures relating to platform liability and consumer risk are necessary.”). *But see* Ranchordás, *supra* note 302, at 210 (“While delayed or excessive regulation might have a negative impact on the innovation process, inadequate and hasty approval of innovation is also problematic.”); Workshop Tr. at 48 (Weyl) (arguing that “it’s wrong to say that uncertainty should lead [] to forbearance” by regulators).

³⁰⁷ Workshop Tr. at 48 (Liran Einav).

considering hypothetical, rather than demonstrated, consumer harm.”³⁰⁸ A commenter argued that “preemptive regulation” was “most likely to stymie innovation among marketplace participants and decrease competition by increasing the barriers to entry in the marketplace.”³⁰⁹ Along similar lines, another panelist advocated for a “permissionless innovation” approach, under which “new innovators are free to experiment”³¹⁰ with innovative business models “without first coming and seeking a blessing from” government.³¹¹ He explained that it is not necessary to have “a preemptive regulatory policy in place to solve [every] problem,” noting that “to the extent harms develop or accidents happen, we deal with them after the fact through other mechanisms.”³¹² He joined a comment that argued that “ex post remedies,” including “[p]rivate insurance, contracts, torts and product liability law, [and] antitrust enforcement,” can be superior to “traditional regulation,” since the former have the “benefit of not discouraging innovation or competition.”³¹³

Other panelists, however, articulated different viewpoints, one explaining that “it’s wrong to say that uncertainty should lead [regulators] to forbearance,” because regulators may not “have the luxury of saying . . . ‘Let’s wait and see.’”³¹⁴ He thought that there could be “dynamic reasons” for an activist policy.³¹⁵ Another panelist expressed the view that, once regulation is deemed necessary, a flexible regulator should allow for the possibility that regulations may need to be adapted more frequently to reflect changing circumstances, for example by including “sunset clauses to limit the potential for regulations to outlive their usefulness.”³¹⁶ Yet another panelist urged the development of “best practices” that “encourage innovation and personal empowerment.”³¹⁷

FTC Role: Workshop participants weighed in regarding possible roles that the FTC could play, both in advising on the competitive effects of state and local regulation³¹⁸ and in exercising its authority to protect consumers against unfair methods of competition and unfair and deceptive acts and practices. Regarding the FTC’s exercise of its enforcement authority under Section 5 of the FTC Act, Commissioner Ohlhausen opened the Workshop by assuring attendees that the event was not intended “as a prelude to some planned, big, enforcement push in [the sharing economy],” and rather emphasized the Commission’s competition advocacy program.³¹⁹ Commissioner Sandoval welcomed this

³⁰⁸ Workshop Tr. at 8 (Maureen Ohlhausen).

³⁰⁹ The Travel Tech. Ass’n Comment at 4-5. *See also* Free State Found. Comment at 11-12.

³¹⁰ Workshop Tr. at 154 (Adam Thierer).

³¹¹ *Id.* at 153-54. *See also id.* at 180 (Adam Thierer) (arguing that “successful innovation comes from entrepreneurs [acting] without first coming and seeking a blessing from somebody before they did something interesting and innovative”).

³¹² *Id.* at 153-54..

³¹³ Mercatus Comment at 7.

³¹⁴ Workshop Tr. at 48 (Glen Weyl).

³¹⁵ *Id.*

³¹⁶ *Id.* at 155 (Sofia Ranchordás) (advocating “experimentation in the field so that new entrepreneurs can experiment with new forms of sharing economy practices, but also experimenting with the rules themselves”).

³¹⁷ *Id.* at 112 (David Hantman).

³¹⁸ *See supra* note 267 (listing four advocacies that the FTC has submitted on these issues).

³¹⁹ Workshop Tr. at 6 (Maureen Ohlhausen) (“Interest in new developments in the economy by the FTC does not automatically portend a flurry of future enforcement actions.”).

statement.³²⁰ Several commentators agreed that the FTC should “tread lightly” in this area.³²¹

A number of participants urged the FTC to use its powers to oppose anticompetitive regulations, to “be on the lookout for de facto incumbency protection schemes,”³²² “push back” against such measures,³²³ and “advocate against anticompetitive barriers to sharing economy companies.”³²⁴ One commenter declared that the FTC should “[b]lock the institution or application of rules that are justified in the name of public safety or welfare but are applied unevenly and primarily as a protection of monopolists or entrenched market participants.”³²⁵

Self-Regulation, Reputation Mechanisms, and Branding: Workshop participants and commenters considered ways in which the sharing economy platforms are able to engage in “self-regulation,” *i.e.*, to assume functions traditionally undertaken by government regulators.³²⁶ One panelist explained that self-regulation is “simply the performing of regulatory activities by entities other than the government.”³²⁷ This panelist observed that a sharing economy platform “is mediating transactions between two trading parties,” allowing for “the possibility that [the platform] can take on some of the regulatory responsibility that we have had to give to different entities in the past.”³²⁸ Several commenters suggested caution, one urging that “regulators tread extremely lightly in this emerging sector, allowing firms and industries to self-regulate to the extent practical.”³²⁹

³²⁰ *Id.* at 98 (Catherine J.K. Sandoval) (“I thought it was a very important that Commissioner Ohlhausen repeated that the FTC is not, at this point, contemplating enforcement action.”).

³²¹ Info. Tech. & Innovation Found. Comment at 2 (“As Commissioner Ohlhausen indicated in her opening remarks at the Workshop, it is important that the FTC tread lightly in this emerging area of the economy so as not to impede innovations that are generating enormous value for consumers.”); Internet Association Comment at 8 (“urg[ing] agencies such as the FTC to show restraint and to place weight on the attributes of the sharing economy that benefit and empower consumers”); TechFreedom & Int’l Ctr. for Law & Econ. Comment at 9.

³²² CALinnovates Comment at 2-3 (suggesting that the “FTC can act as a sort of super cop or appellate court to review anew actions”). See also TechFreedom & Int’l Ctr. for Law & Econ. Comment at 3.

³²³ Info. Tech. & Innovation Found. Comment at 3.

³²⁴ Consumer Elec. Ass’n Comment at 4.

³²⁵ CALinnovates Comment at 2.

³²⁶ Chairwoman Ramirez acknowledged the potential utility of self-regulation when she observed that “robust self-regulation [is] an important tool for consumer protection that potentially can respond more quickly and efficiently than government regulation.” Edith Ramirez, Chairwoman, Fed. Trade Comm’n, Opening Remarks at the FTC Workshop on Enforceable Codes of Conduct: Protecting Consumers Across Borders, at 2 (Nov. 29, 2012), https://www.ftc.gov/sites/default/files/documents/public_statements/opening-remarks-commissioner-edith-ramirez/121129codesconductremarks.pdf.

³²⁷ Workshop Tr. at 158 (Arun Sundararajan). The concept of self-regulation also can extend to situations in which “the government delegates to a third party the implementation” of a regulation. Molly Cohen & Arun Sundararajan, *Self-Regulation and Innovation in the Peer-to-Peer Sharing Economy*, 82 U. CHI. L. REV. DIALOGUE 116, 124 (2015), https://lawreview.uchicago.edu/sites/lawreview.uchicago.edu/files/uploads/Dialogue/Sundararajan_Cohen_Dialogue.pdf.

³²⁸ Workshop Tr. at 158-59 (Arun Sundararajan). The panelist continued by noting that “demonstrated enforcement capabilities and the perception of legitimacy are essential for the success of self-regulatory organizations.” *Id.* at 159. Further, to exercise control, platforms must be able to impose “sanctions . . . [that are] costlier than the benefits of misbehavior.” Cohen & Sundararajan, *supra* note 327, at 129.

³²⁹ Andrew Moylan & R.J. Lehmann, *Five Principles for Regulating the Peer Production Economy* 4 (R Street Policy Study No. 26, 2014), attached to R Street Inst. Comment.

Indeed, panelists hypothesized that Uber and Airbnb have been successful because their business models allow them to “substitute[] private regulation for public regulation,”³³⁰ potentially establishing nationwide regulatory standards that do not vary across states and localities.³³¹ A panelist suggested that in coming years there will be “platform competition between different local regulators,” including platforms acting as local regulators and “the local governments that traditionally regulated these services.”³³²

Several panelists, however, questioned the effectiveness of a “self-regulation mechanism” under all circumstances, with a former chair of the New York City Taxi Commission indicating that “not everything[] can be delegated for self-regulation.”³³³ He emphasized that to ensure that the platform properly performs the function delegated to it, there must be “a real enforcement mechanism,” including recordkeeping, inspections, and “strict fines.”³³⁴ Another panelist agreed that self-regulation should be limited to certain situations, describing it as merely “part of the tool kit” to use if it “works to address certain types of [] market failures ... more effectively,” and warned that it should not be seen as “a panacea for all the harms.”³³⁵

The question of monitoring a platform’s conduct was addressed by one panelist who advocated a form of self-regulation involving “delegated regulation through data,” under which regulators affirmatively delegate responsibility for regulatory enforcement to platforms.³³⁶ Their performance might be monitored by government using “audited evidence,” rather than simply turning data over to the government.³³⁷ He saw significant benefits from delegated regulation through data, which in his view would facilitate effective enforcement in a variety of areas, from collecting taxes to preventing discrimination.³³⁸ The same Workshop participant noted that “*de facto* we have already been delegating things [to platforms] that we used to look to the government” to do.³³⁹ He has suggested that self-regulation, if effective, could decrease burdens on regulatory bodies, with responsibility assigned to platforms that could be well-positioned to monitor conduct and flexibly respond to participants’ needs.³⁴⁰

As discussed in Chapter 2, reputation ratings systems and other trust mechanisms can benefit consumers by providing them with information regarding suppliers and reducing the need for regulation.³⁴¹ Moreover, these systems are evolving and “play alongside of many other types of social

³³⁰ Workshop Tr. at 25 (Joshua Gans).

³³¹ See *id.* at 21-22 (Glen Weyl).

³³² *Id.* at 22.

³³³ *Id.* at 127 (Matthew Daus).

³³⁴ *Id.* at 126-27.

³³⁵ *Id.* at 165 (Maurice Stucke); see also *id.* at 166 (Arun Sundararajan) (“nobody is suggesting . . . nongovernmental self-regulation is a panacea”); *id.* at 155 (Sofia Ranchordás) (“I don’t think that self-regulation is able to solve all the problems”).

³³⁶ *Id.* at 159 (Arun Sundararajan).

³³⁷ *Id.*

³³⁸ *Id.* See also Cohen & Sundararajan, *supra* note 327, at 117, 129-32.

³³⁹ Workshop Tr. at 85 (Arun Sundararajan). See generally Cohen & Sundararajan, *supra* note 327.

³⁴⁰ See Cohen & Sundararajan, *supra* note 327, at 129-32.

³⁴¹ See *supra* Chapter 2, Section III.A.2. See generally Cohen & Sundararajan, *supra* note 327, at 128-29.

mechanisms and legal mechanisms to try to enforce good behavior.”³⁴² Others saw the potential in utilizing such mechanisms, but emphasized the importance of ensuring that platform incentives align with the achievement of regulatory goals, as well as regulatory oversight to confirm that a platform’s regulatory mechanisms are in fact serving the intended function.³⁴³ One regulator opined that “[w]hile reputation-based systems can help business owners with customer service issues, they are not a substitute for regulatory oversight.”³⁴⁴

One Workshop participant emphasized the importance of the type of market failure that a platform is attempting to address, highlighting “the relative effectiveness of platform-based regulation” in solving market failures resulting from “information asymmetry.”³⁴⁵ In contrast, he suggested that platforms may not be “best suited to internalize” “market failure that come[s] from externalities” – *i.e.*, costs imposed or benefits conferred on third parties, such as “congestion . . . or neighbor noise.”³⁴⁶ Separately, he and a coauthor suggested that “[s]ome form of third-party regulatory intervention” may be required to address the latter type of market failures.³⁴⁷ Other commentators agreed that there may be strong justifications for “legal interventions [that] seek[] to address circumstances in which companies impact noncustomers and the public at large,” and therefore supported restricting conduct that “breach[es] laws and regulations that address externalities and other important policy objectives.”³⁴⁸

Privacy Concerns Raised by Collection and Storage of Participants’ Data: As central parts of their operations, platforms collect, retain, and process large amounts of data regarding their participants and their transactions, including ratings, written reviews, profiles, login credentials, payment information, consumers’ geolocation(s), and consumer preferences, among other details. One panelist observed that often a “platform itself is controlling” a “significant volume” and “significant variety of data” that can have “significant value.”³⁴⁹ Such data collection can generate concerns about the privacy of platform participants.³⁵⁰

³⁴² Workshop Tr. at 169 (Adam Thierer).

³⁴³ See generally *supra* Chapter 2, Section III.A.4.

³⁴⁴ N.Y.C. Taxi & Limousine Comm’n Comment at 5.

³⁴⁵ Workshop Tr. at 87-88 (Arun Sundararajan).

³⁴⁶ *Id.* at 87.

³⁴⁷ Cohen & Sundararajan, *supra* note 327, at 122; see also Workshop Tr. at 88 (Arun Sundararajan).

³⁴⁸ Edelman & Geradin, *supra* note 111, at 295, 309.

³⁴⁹ Workshop Tr. at 161 (Maurice Stucke). Apart from privacy issues involving the handling of information by platforms, there may also be concerns about how consumer participants in sharing economy transactions handle personal data. As an OECD paper points out, there is an “additional challenge for peer platform markets, which is the responsibilities that are also placed on the peers for protecting the data they obtain about each other in the course of their transactions. Relying on these non-professional actors to take appropriate steps to avoid compromise of consumer data may present an even greater risk of consumer detriment.” OECD, *supra* note 263, at 15. The OECD paper does note that, in some cases, sharing economy business models might be structured to mitigate such concerns, explaining that “the business model that many peer platforms use, where the platform acts as the payment intermediary, may reduce the number of entities with access to a peer consumer’s payment information: instead of both the driver and the payment mechanisms having access to the consumer’s payment card, only the platform has the information.” *Id.* at 16.

³⁵⁰ See, e.g., Workshop Tr. at 165 (Sofia Ranchordás) (“I think we as consumers do really care about how privacy is being managed.”); Dambrine, Jerome & Ambrose, *supra* note 219 (examining privacy issues arising in collecting data for reputation systems).

One panelist suggested that privacy was the “best example” of problems “inherent to” sharing economy platforms.³⁵¹ She suggested viewing platforms as having a “fiduciary relationship” with users when it comes to a consumer’s information, which includes “a duty to act in the best interests of the consumer,” as there is “a relationship based on trust and based on economic dependency.”³⁵² She noted, however, that the nature of this duty would often be unclear because “platforms are in the middle of two peers, and it’s not clear whether they’re acting in benefit of the consumer or of the provider.”³⁵³ Another panelist criticized the use of the fiduciary concept, pointing out that fiduciary relationships arise in very limited circumstances and arguing that such an approach would impose undue burdens on platforms and their participants.³⁵⁴

Some Workshop participants cautioned that efforts to protect privacy would impose costs on sharing economy marketplaces and participants, noting in particular that these platforms rely extensively on the collection of large amounts of information about users through transactions and trust mechanisms.³⁵⁵ Similarly, one panelist described the need to “balance” the “fundamental tension” between the need for “large amounts of information” for effective trust mechanisms and the need for privacy and data security on the platform.³⁵⁶

The Commission has emphasized the importance of this balance through its prior work.³⁵⁷ Indeed, honoring consumer privacy does not mean consumers’ data should never be disclosed. Rather, platforms may mitigate privacy concerns by clearly and conspicuously disclosing what information will remain private and what will not, enabling consumers to make informed decisions. However, if a platform misrepresents the extent to which it will make information public,³⁵⁸ or fails to reasonably secure its systems or data,³⁵⁹ the platform could be subject to a Commission action under Section 5 of the FTC

³⁵¹ *Id.* at 156 (Sofia Ranchordás); *but cf.* Kennedy, *supra* note 91, at 14 (“[C]oncerns about privacy and security are not unique to platforms.”).

³⁵² Workshop Tr. at 171 (Sofia Ranchordás).

³⁵³ *Id.* at 172.

³⁵⁴ *See id.* at 172-73 (Adam Thierer).

³⁵⁵ Dambrine, Jerome & Ambrose, *supra* note 219, at 3 (“some of the steps needed for users to build and maintain their reputation on a sharing economy platform can create privacy challenges”). *See also* Application Developers All. Comment at 2 (“Paradoxically, many features in apps that result in greater consumer safety and trust in one way, may generate concerns about data collection in another.”); Workshop Tr. at 173 (Adam Thierer).

³⁵⁶ Workshop Tr. at 173 (Adam Thierer) (The sharing economy “is built on data and the free flow thereof. And its success is inextricably tied up with the fact that if you want people to have more trust in these platforms, it obviously is going to necessitate the sharing of a lot of information.”).

³⁵⁷ *See infra* notes 361-65 and accompanying text.

³⁵⁸ For example, Commission settled an action it brought against a company alleging that the company violated Section 5 by misleading consumers when it solicited reviews for doctors from consumers without disclosing adequately that these reviews would be publicly posted on the internet. *See* Practice Fusion, Inc., No. C-4591 (Fed. Trade Comm’n Aug. 15, 2016), <https://www.ftc.gov/system/files/documents/cases/160816practicefusiondo.pdf> (consent order).

³⁵⁹ *See FTC v. Wyndham Worldwide Corp.*, 799 F.3d 236 (3d Cir. 2015) (holding that the FTC could challenge certain data security practices as “unfair” under 15 U.S.C. § 45(a)). For example, Commission settled actions it brought against two companies alleging that they violated Section 5 by misrepresenting the security of their mobile apps and by failing to secure the transmission of consumers’ sensitive personal information via the apps. *See* Credit Karma, Inc., No. C-4480 (Fed. Trade Comm’n Aug. 13, 2014) (consent order), <https://www.ftc.gov/system/files/documents/cases/1408creditkarmado.pdf>; Fandango, LLC, No. C-4481 (Fed. Trade Comm’n Aug. 13, 2014), <https://www.ftc.gov/system/files/documents/cases/>

Act. Section 5 applies fully to the sharing economy and authorizes law enforcers to address privacy concerns, as several participants stated.³⁶⁰

Previous reports produced by the Commission and staff, including the Privacy Report,³⁶¹ the Internet of Things Report,³⁶² and the Big Data Report,³⁶³ provide further guidance on privacy issues, particularly in the online context. For example, the Commission has provided guidance as to how “long-standing Fair Information Practice Principles of notice, choice, access, accuracy, data minimization, security, and accountability should apply” in contexts such as the internet of things.³⁶⁴ Similarly, Commission staff has issued business education materials on privacy and data security.³⁶⁵ Through these materials, the Commission and staff have advised that companies address privacy concerns by, for example, adopting and implementing clear and conspicuous privacy disclosures that provide transparency to consumers, respect consumer choice, maintain reasonable security, and limit the provision of identifiable data consistent with the company’s disclosures.

Provision of Platform Data to Governments: Although recognizing the importance of data privacy, several panelists emphasized that sharing data with government entities can help government officials address questions regarding the impact of the sharing economy and formulate effective regulations.³⁶⁶ One panelist suggested a partnership between cities and these platforms so that cities

[140819fandangodo.pdf](#) (consent order). *See also* ASUSTeK Computer Inc., No. C-4587 (Fed. Trade Comm’n July 28, 2016), <https://www.ftc.gov/enforcement/cases-proceedings/142-3156/asustek-computer-inc-matter>.

³⁶⁰ The Travel Tech. Ass’n Comment at 4 (explaining that FTC and state and local regulators “already possess the requisite ability to address [any] unfair or deceptive businesses practices”); Geoffrey Manne & Ben Sperry, *Innovation Death Panels and Other Economic Shortcomings of the White House Proposed Privacy Bill*, TRUTH ON THE MKT. (Mar. 18, 2015), <https://truthonthemarket.com/2015/03/18/innovation-death-panels-privacy-bill/>, attached to Int’l Ctr. for Law & Econ. Comment (“To the extent that they exist, many privacy harms online are currently dealt with by the marketplace itself, bolstered by the Federal Trade Commission under its Section 5 authority as well as state oversight.”).

³⁶¹ FED. TRADE COMM’N, PROTECTING CONSUMER PRIVACY IN AN ERA OF RAPID CHANGE (2012), <https://www.ftc.gov/sites/default/files/documents/reports/federal-trade-commission-report-protecting-consumer-privacy-era-rapid-change-recommendations/120326privacyreport.pdf>.

³⁶² FED. TRADE COMM’N, INTERNET OF THINGS: PRIVACY AND SECURITY IN A CONNECTED WORLD (2015), <https://www.ftc.gov/system/files/documents/reports/federal-trade-commission-staff-report-november-2013-workshop-entitled-internet-things-privacy/150127iotrpt.pdf>.

³⁶³ FED. TRADE COMM’N, BIG DATA: A TOOL FOR INCLUSION OR EXCLUSION? UNDERSTANDING THE ISSUES (2016), <https://www.ftc.gov/system/files/documents/reports/big-data-tool-inclusion-or-exclusion-understanding-issues/160106big-data-rpt.pdf>.

³⁶⁴ FED. TRADE COMM’N, *supra* note 362, at 19, 27-46.

³⁶⁵ These guidance pieces include publications such as Start with Security, Mobile App Developers: Start with Security, Marketing Your Mobile App, the Business Blog, and Careful Connections: Building Security in the Internet of Things. *Start with Security: A Guide For Business*, FED. TRADE COMM’N (June 2015), <https://www.ftc.gov/tips-advice/business-center/guidance/start-security-guide-business>; *Mobile App Developers: Start with Security*, FED. TRADE COMM’N (Feb. 2013), <https://www.ftc.gov/tips-advice/business-center/guidance/mobile-app-developers-start-security>; *Marketing Your Mobile App: Get It Right from the Start*, FED. TRADE COMM’N (Apr. 2013), <https://www.ftc.gov/tips-advice/business-center/guidance/marketing-your-mobile-app-get-it-right-start>; *Business Blog*, FED. TRADE COMM’N, <https://www.ftc.gov/news-events/blogs/business-blog>; *Careful Connections: Building Security in the Internet of Things*, FED. TRADE COMM’N (Jan. 2015), <https://www.ftc.gov/tips-advice/business-center/guidance/careful-connections-building-security-internet-things>.

³⁶⁶ *See, e.g.*, Workshop Tr. at 128 (Brooks Rainwater); Partnership for Working Families Comment at 2; Workshop Tr. at 122 (Matthew Daus); *id.* at 128-29 (Ashwini Chhabra).

could “actually delve in and look at that data across the country.”³⁶⁷ In that panelist’s view, such data sharing could shed light on whether Uber drivers or Airbnb hosts are providing services part-time and therefore perhaps should be “regulated in a different way than those” providing services full-time.³⁶⁸ Other commenters went further, with one stating that platforms should be required to “supply municipalities and the public with the data needed to fully understand the impact of their operations and develop effective regulatory responses.”³⁶⁹ Another commenter cautioned that “more data is needed about on-demand companies’ impact on consumers” and that “[p]olicy-makers cannot simply rely on the information provided by these companies.”³⁷⁰

As with many approaches to regulation in the sharing economy, requiring platforms to share data with local governments may have costs as well as benefits. Platform representatives maintained that while they try to provide data to government, they must “weigh [benefits to government] against privacy concerns of [their] users.”³⁷¹ Several panelists emphasized that provision of anonymized data could still be very helpful to cities and at the same time protect the privacy interests of platform participants.³⁷² Uber’s representative described a program his company has for providing data to cities on pickup and drop-off locations at the zip-code level.³⁷³ Airbnb’s representative agreed with the need for platforms to provide data that could shed light on whether hosting should be viewed as a primarily personal or primarily commercial activity,³⁷⁴ a topic explored more fully in Chapter 4.³⁷⁵

III. Conclusion

The perspectives presented at the Workshop and in comments received underscore the challenge of regulating sharing economy platforms and suppliers. On the one hand, the disruptive innovation introduced by sharing economy platforms can greatly benefit consumers, and regulators should avoid imposing unnecessary regulatory burdens that could prevent or impede their success. On the other hand, appropriately tailored regulatory measures may help protect consumers, promote public safety, and meet other legitimate public goals. Some Workshop participants supported balancing these competing goals by limiting regulation to targeted measures no broader than needed to achieve the regulatory goals, an approach similar to that taken by the Commission. Determining what regulations are necessary to meet legitimate regulatory needs, however, poses a variety of complex issues.

³⁶⁷ Workshop Tr. at 120 (Brooks Rainwater). *See also id.* at 128 (explaining that with more data sharing by platforms, “cities would feel a lot more comfortable knowing what’s happening on the ground,” such as “show[ing] that these ridesharing services could actually bring added value beyond” what taxis provide).

³⁶⁸ *Id.* at 120.

³⁶⁹ Partnership for Working Families Comment at 2.

³⁷⁰ Nat’l Employment Law Project Comment at 3.

³⁷¹ Workshop Tr. at 129 (Ashwini Chhabra).

³⁷² *See, e.g., id.* at 144 (David Hantman) (underscoring the need to protect personal data, but agreeing that Airbnb “should be sharing more anonymized data”); *id.* at 122 (Matthew Daus) (explaining that “we don’t want everyone’s personal data,” and that anonymized data should be very helpful); *id.* at 129 (Ashwini Chhabra).

³⁷³ *Id.* at 128-29 (Ashwini Chhabra). However, a commenter reported that Uber was fined over \$7 million for failing to provide the state of California with data on rider accessibility as required. Nat’l Employment Law Project Comment at 1-2.

³⁷⁴ Workshop Tr. at 144 (David Hantman).

³⁷⁵ *See infra* Chapter 4, Section III.B.

Some Workshop participants, particularly those representing established suppliers competing with sharing economy suppliers, supported imposing a single set of standards on all suppliers to ensure a level playing field and protect consumers and the public. Other participants, however, emphasized that regulations should be tailored to address the particular concerns posed by platform-based suppliers. In part, they argued that reputation systems and other trust mechanisms provided by platforms, as well as self-regulation, can significantly lessen regulatory concerns. In addition, some expressed skepticism about the efficacy of certain existing regulation. Participants suggested flexibility in regulatory approach, and urged caution in adopting new regulations for activity that is evolving as participants experiment and tinker with new business models.

Workshop participants briefly discussed the privacy concerns that arise in the sharing economy, citing the large amounts of information platforms assemble, particularly about participants and their transactions. A few participants highlighted the tension between privacy concerns and the information flows that are central to the operation of the sharing economy. Participants also recognized that the Commission's authority under Section 5 of the FTC Act applies to the sharing economy and allows the Commission to address various consumer protection and privacy concerns. Finally, participants underscored the importance for policymakers to obtain access to data on economic activity conducted over platforms, both for municipal planning and for assessing particular regulatory issues presented in specific sectors.

Chapter Four: Regulation of Sharing Economy Suppliers in the Transport and Lodging Sectors

I. Introduction

This Chapter reviews potential regulatory issues raised by the entry of platform providers in the short-term lodging and for-hire transportation sectors. Section II discusses how these platforms facilitate transactions in their respective sectors, the benefits they provide participants, and the competitive impact they have had and continue to have in these marketplaces.

Section III examines challenges that regulators encounter in these two sectors. They face competing arguments: incumbents contend that new entrants compete unfairly by avoiding regulatory requirements necessary to protect consumers and the public; platforms argue that differences in their operations justify different regulatory treatment. This section also considers whether the platform-based suppliers in these two sectors provide services similar in important respects to those provided by incumbent suppliers.

Section IV addresses concerns that have arisen in each of these sectors in several specific policy areas, focusing particularly on consumer protection and public safety issues. This discussion also considers how platform trust mechanisms and platform intervention mechanisms such as insurance address regulatory objectives. The section then discusses how sharing economy providers attend to certain public goals, such as tax collection, preservation of residential areas, and service to traditionally underserved groups or areas. While not usually associated with competition issues, regulation directed to these goals can affect the ability of platform suppliers to enter sharing economy marketplaces and compete with each other and with traditional suppliers providing similar goods or services.

II. Competitive Impacts in the Short-Term Lodging and For-Hire Transport Sectors

The Workshop highlighted the dramatic impact that sharing economy platforms and the providers using them have had in the short-term lodging and for-hire transport sectors. By providing services to enable transactions between those supplying and buying services and goods in these marketplaces, platforms enable new suppliers to enter the market.³⁷⁶ These platform-based suppliers compete with traditional suppliers and may keep costs low by leveraging underutilized assets and providing services through innovative business models. Operating through transportation network companies ("TNCs"),³⁷⁷ drivers using their personal vehicles have taken large portions of the for-hire transport business away from traditional taxis and have expanded the market for for-hire transportation service. The number of Airbnb hosts renting out their residences also has expanded rapidly, potentially serving previously

³⁷⁶ See *supra* Chapter 1, Section II (explaining that platform suppliers and consumers are both consumers of transactional services provided by the platform).

³⁷⁷ As explained above, TNCs are platforms that facilitate the provision of for-hire transportation service. See *supra* pp. 12-13.

unmet needs and expanding the market, but also potentially taking business from hotels and bed-and-breakfasts.³⁷⁸

For-Hire Transport

Workshop participants described how TNCs, such as Uber and Lyft, facilitate the provision of for-hire transport by drivers who typically use their personal cars and set their own hours.³⁷⁹ Generally, potential drivers register with the TNC, which vets them to determine whether they meet the TNC's standards governing matters such as driving record, licensing, and vehicle condition.³⁸⁰ Drivers may have regulatory standards to meet as well.³⁸¹ TNCs permit drivers to use their personal cars rather than acquire a dedicated vehicle and/or a license to operate a taxi.

Drivers accepted by the platform install the TNC's app on their smartphones and turn it on when they are available to pick up fares.³⁸² Passengers install the TNC's app on their smartphones, check it to see whether there are available drivers nearby, and send a request to the TNC.³⁸³ The app can enable passengers to get an estimate of the fare once they input a destination.³⁸⁴ The TNC alerts nearby drivers, one of whom accepts and picks up the passenger. The app sets the fare and facilitates payment, with the passenger's payment typically split between the driver and the TNC. Riders and drivers rate each other after the ride.

TNCs described how they reduce the costs of entry, increase the supply of drivers for hire, and improve the quality of services.³⁸⁵ They explained how increased entry benefits consumers, who can obtain quicker pickups, superior riding experiences, lower fares, and better service in traditionally underserved areas.³⁸⁶ Reliance on smartphones can make it easier, safer, and more reliable for a

³⁷⁸ See *infra* notes 410-415 and accompanying text.

³⁷⁹ See generally Uber Comment; Lyft Comment; Lyft Comment Attachment. See also Workshop Tr. at 103-05 (Ashwini Chhabra). This is a general description; details may vary by company.

³⁸⁰ See Lyft Comment Attachment at 3.

³⁸¹ Workshop Tr. at 93-97 (Catherine J.K. Sandoval); Workshop Tr. at 103-04 (Ashwini Chhabra).

³⁸² See Lyft Comment Attachment at 6.

³⁸³ See *id.*

³⁸⁴ See, e.g., *How do I get a fare estimate for a vehicle option?*, UBER, <https://help.uber.com/h/cc1efc16-df15-47f3-8057-61c2b75ea529>.

³⁸⁵ See Lyft Comment at 1; Uber Comment at 2; Lyft Comment Attachment. A recent paper finds Uber drivers spend a higher percentage of their time and drive a higher share of miles with a passenger in their cars than do traditional taxi drivers, suggesting that TNCs may be a more efficient source of supply compared to traditional taxis. Judd Cramer & Alan B. Krueger, *Disruptive Change in the Taxi Business: The Case of Uber*, 106 AM. ECON. REV. 177 (2016).

³⁸⁶ See Lyft Comment at 1; Uber Comment at 2; Lyft Comment Attachment. Economists have recently begun efforts to quantify the consumer benefits that flow from entry by ride sharing companies. One working paper uses data from Uber covering four cities to estimate that UberX service generated \$6.8 billion in consumer surplus in the United States in 2015. Peter Cohen et al., *Using Big Data to Estimate Consumer Surplus: The Case of Uber* (Nat'l Bureau of Econ. Research, Working Paper No. 22627, 2016), <http://www.nber.org/papers/w22627>. Another working paper uses data from taxi rides to infer that \$2.4 billion per year in consumer surplus would be generated if taxis used the matching technology employed by ride sharing companies. Nicholas Buchholz, *Spatial Equilibrium, Search Frictions and Efficient Regulation in the Taxi Industry* (Aug. 22, 2016) (unpublished manuscript).

passenger to find a ride.³⁸⁷ Drivers can work when their schedules permit.³⁸⁸ Their earnings can provide primary incomes, supplement other income, or carry them through periods of unemployment.³⁸⁹

Benefits may also extend beyond the gains associated directly with TNC transactions. For example, one commenter provided research indicating that taxis may have improved their service in response to new competition from TNCs.³⁹⁰ In addition, the availability of TNC drivers may reduce drunk driving accidents.³⁹¹ In its comment to the Commission, Uber presented excerpts from reports, filings, statements, and other documents prepared by U.S. and foreign national competition authorities and others generally recognizing the benefits associated with the introduction of platform-based, for-hire transport service.³⁹²

Not surprisingly, large-scale entry of new platform-based suppliers into the for-hire transport and short-term lodging sectors has had a dramatic impact on competitive conditions in these sectors. Not only has total supply expanded dramatically, but the variety of choices has increased as well. One report suggested that Uber has helped reduce cab fares around the world.³⁹³

In the for-hire transport sector, the Uber platform alone is estimated to have registered 162,000 for-hire drivers in the United States.³⁹⁴ TNC drivers are now reportedly a leading source of supply of for-hire transportation service in a number of cities. One panelist contended that they are "taking [the market] over completely,"³⁹⁵ and a taxi association commenter expressed concern that "small business taxicab and limousine operators . . . are no match for Uber's global market power."³⁹⁶

http://scholar.princeton.edu/sites/default/files/nbuchholz/files/taxi_draft.pdf. Despite taking different analytical approaches, the findings in these two working papers appear qualitatively consistent.

³⁸⁷ Uber Comment at 1-2.

³⁸⁸ A study by a Princeton professor and Uber's head of policy research found that "Uber's driver-partners fall into three roughly equal-sized groups: driver-partners who are partnering with Uber and have no other job (38 percent), driver-partners who work full-time on another job and partner with Uber (31 percent), and driver-partners who have a part-time job apart from Uber and partner with Uber (30 percent)." Hall & Krueger, *supra* note 113, at 10.

³⁸⁹ *See id.* at 11. Indeed, various commentators have suggested that the rapid rise of Uber, Airbnb, and other sharing economy platforms is in significant part attributable to poor economic conditions that require people to drive for hire and rent rooms to earn an adequate income. *See, e.g.,* Daniel E. Rauch & David Schleicher, *Like Uber, but for Local Government Law: The Future of Local Regulation of the Sharing Economy*, 76 OHIO ST. L.J. 901, 910 ("[T]he Great Recession was a crucial catalyst. On the 'consumer' side, the crash raised thriftiness and imposed credit constraints, creating new interest in renting over owning. At the same time, unemployment and underemployment created a large pool of 'gig' workers available to drive for Uber, sell odd-jobs through TaskRabbit, or otherwise work in the sharing economy.") (footnotes omitted). However, one panelist argued that this "slack" in the economy will continue even as the economy improves. Workshop Tr. at 30-31 (Liran Einav).

³⁹⁰ *See* Wallsten (Tech. Policy Inst.) Comment.

³⁹¹ *See* Mothers Against Drunk Driving Comment at 1.

³⁹² Uber Comment, Appendix at 7-22.

³⁹³ Jill Ward, *Uber Effect Sees Taxi Fares Tank Around the World, Deutsche Says*, BLOOMBERG (May 19, 2016, 7:52 AM), <http://www.bloomberg.com/news/articles/2016-05-19/uber-effect-sees-taxi-fares-tank-around-the-world-deutsche-says>.

³⁹⁴ Hall & Krueger, *supra* note 113, at 2.

³⁹⁵ Workshop Tr. (Matthew Daus) at 121. In San Francisco, the largest cab company said it would seek bankruptcy protection, citing competition from Uber and Lyft as key contributors. Joe Fitzgerald Rodriguez, *Yellow Cab to File for Bankruptcy*, S.F. EXAMINER (Jan. 6, 2016, 1:00 AM), <http://www.sfexaminer.com/yellow-cab-to-file-for-bankruptcy/>; Brian

Short-Term Lodging

Airbnb and other lodging platforms facilitate the rental of private residences on a short-term basis.³⁹⁷ Generally, prospective hosts register a residence with a platform – providing descriptions, pictures, available dates, and other information useful to prospective renters.³⁹⁸ The platform provides the app, links to relevant information, advice regarding how to advertise and provide lodging services, and some rules for participants using the site.³⁹⁹ The platform may inform prospective hosts of potentially applicable regulations, but leaves compliance up to the hosts.⁴⁰⁰

Prospective renters also can register as users with a short-term lodging platform, allowing them to search, identify options, contact hosts, and reach a rental agreement.⁴⁰¹ The platform receives and holds the rental payment, disbursing the amount after deducting its fee and only after the renter has arrived.⁴⁰² The platform also provides an opportunity for both hosts and renters to rate their transactions.

As with TNCs, short-term lodging platforms greatly reduce the barriers to supplying short-term rental lodging.⁴⁰³ Hosts have low costs of supply because they can rent out their own homes, and can obtain access to a wide pool of potential customers simply by listing their residences.⁴⁰⁴ Renters benefit from the increased supply and variety of lodgings. A host's residence may be cheaper than a hotel room and better meet the renter's individual preferences, such as an interest in staying in a residential neighborhood with few or no traditional hotels. Moreover, as Airbnb reports, spillover benefits may

Solomon, *Uber's First Casualty? San Francisco's Largest Taxi Company Filing for Bankruptcy*, FORBES (Jan. 6, 2016, 4:37 PM), <http://www.forbes.com/sites/briansolomon/2016/01/06/ubers-first-casualty-san-franciscos-largest-taxi-company-filing-for-bankruptcy/>; Will Oremus, *The End of the Taxi Era*, SLATE (Jan. 8, 2016, 5:58 PM), http://www.slate.com/articles/technology/technology/2016/01/yellow_cab_in_san_francisco_is_just_the_beginning_uber_s_war_on_cabs_is.html.

³⁹⁶ Taxicab, Limousine & Paratransit Ass'n Second Comment, at 2. *See also* Solomon, *supra* note 395; Oremus, *supra* note 395.

³⁹⁷ This is a general description; details may vary by company.

³⁹⁸ *See generally* Airbnb Comment. *See also* Workshop Tr. at 117-18 (David Hantman); *Share Your Home*, ONEFINESTAY, <http://www.onefinestay.com/homes/register/>; *List Your Property*, HOMEAWAY, <https://www.homeaway.com/info/lyp>.

³⁹⁹ *See generally* Airbnb Comment. *See also* Workshop Tr. at 117-18 (David Hantman); *Share Your Home*, *supra* note 398; *List Your Property*, *supra* note 398.

⁴⁰⁰ *See, e.g., New York, NY*, AIRBNB, <https://www.airbnb.com/help/article/868/new-york--ny> (listing types of regulations that potentially could apply to hosting activity in New York City and providing links to various departments' web pages providing information on such regulations). *But cf.* Hotel Ass'n of N.Y.C. First Comment at 9-10 (claiming that Airbnb's disclosures on its website are "misleading" statements that "hid[] the truth" regarding regulations that would likely preclude hosting, and that it is possible to provide much clearer information regarding relevant restrictions).

⁴⁰¹ The process through which the match is made can differ among platforms and change over time, based on the platform's assessments of how to shape the market. *See generally* Fradkin, *supra* note 100. For example, HomeAway changed its algorithm for determining which homes are the best match for the query, drawing complaints from listing owners who experienced a reduction in inquiries. *See* Monica Nickelsburg, *Frustrated Homeowners Say Expedia's HomeAway Changes 'Dramatically Impact' Their Rentals*, GEEKWIRE (May 4, 2016, 10:49 AM), <http://www.geekwire.com/2016/frustrated-homeowners-say-expedias-homeaway-changes-dramatically-impact-their-rentals/>.

⁴⁰² Workshop Tr. at 117 (David Hantman).

⁴⁰³ *See* Airbnb Comment at 2-3.

⁴⁰⁴ *See id.* at 3; Workshop Tr. at 117-18 (David Hantman).

result from the availability of lower-priced offerings through Airbnb, with travelers visiting cities more often and for longer stays, or spending some of their cost-savings on restaurants or entertainment.⁴⁰⁵

In the short-term lodging sector, platforms such as Airbnb have had an enormous impact on the number and variety of short-term rentals in many cities across the country and around the world. Some analyses suggest that previously many of the customers served would not otherwise have rented lodgings, and that competitive impacts have been concentrated on lower-end hotels and bed-and-breakfasts.⁴⁰⁶ For a period, some major hotel industry leaders downplayed the degree of competition between their businesses and Airbnb.⁴⁰⁷ Airbnb's representative at the Workshop expressed a similar view, stating that Airbnb is "not competing" with hotels,⁴⁰⁸ and that, despite Airbnb's success, "hotels are as full as they've ever been, and are able to charge historically high rates."⁴⁰⁹

There is evidence, however, that Airbnb hosts currently place competitive pressure on hotels and bed-and-breakfasts.⁴¹⁰ Commenter Hudson Area Lodging reported that "more than a dozen legitimate B&Bs have closed since Airbnb's inception in 2008."⁴¹¹ Another commenter, the Hotel Association of New York City, commissioned a study that concluded New York City hotels lost nearly 2.9 million room nights, or over \$450 million, to Airbnb hosts over a one-year period.⁴¹² Indeed, some industry

⁴⁰⁵ See Airbnb Comment at 1-3.

⁴⁰⁶ MKM Partners, *Airbnb Short-Sheeting Midtier Hotels*, BARRON'S (Nov. 19, 2015), <http://www.barrons.com/articles/airbnb-short-sheeting-midtier-hotels-1447947825>. An economics paper estimates Airbnb's impact on Texas hotels using econometric methods, and finds that "the sharing economy is making inroads by successfully competing with . . . incumbent firms," particularly lower-priced hotels and those not serving many business travelers. See Georgios Zervas, Davide Proserpio & John W. Byers, *The Rise of the Sharing Economy: Estimating the Impact of Airbnb on the Hotel Industry 1* (B.U. Sch. Mgmt., Research Paper No. 2013-16, 2015), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2366898.

⁴⁰⁷ One article collected statements by hotel executives in conferences in 2015, showing that they generally viewed the competitive impact of Airbnb as limited, although a few argued that the ability of platform hosts to sidestep regulation hurt their businesses. Lydia DePillis, *Hotels Don't Actually Appear to Be That Scared of Airbnb – Yet*, WASH. POST (Feb. 26, 2016), <https://www.washingtonpost.com/news/wonk/wp/2016/02/26/hotels-dont-actually-appear-to-be-that-scared-of-airbnb-yet/>. See also Austin Carr, *What Hotel Operators Really Think of Airbnb*, FAST COMPANY (Mar. 20, 2014, 1:39 PM), <http://www.fastcompany.com/3027976/what-hotel-operators-really-think-of-airbnb> (quoting statements by hotel industry executives in 2014 suggesting that they were not concerned by Airbnb's rise and ambitions).

⁴⁰⁸ Workshop Tr. at 119 (David Hantman). See also Alison Griswold, *Airbnb is Becoming a Real Threat to the Hotel Business in Big US Cities*, QUARTZ (Dec. 29, 2015), <http://qz.com/582553/airbnb-is-becoming-a-real-threat-to-the-hotel-business-in-big-us-cities/> ("Despite [its] rapid growth, Airbnb has maintained that it is not competitive with traditional hotels so much as complementary.").

⁴⁰⁹ Workshop Tr. at 113 (David Hantman).

⁴¹⁰ Griswold, *supra* note 408 (describing Airbnb as a competitive threat to hotels, at least in the near future).

⁴¹¹ Hudson Area Lodging Comment at 2. See also Fla. Bed & Breakfast Inns Comment at 1; Prof'l Ass'n of Innkeepers Int'l Comment Attachment at 1; Pa. Ass'n of Bed & Breakfast Inns Comment at 1.

⁴¹² Press Release, Hotel Ass'n of N.Y.C., *Airbnb's \$2 Billion Negative Impact on Lodging Industry and NYC Economy* (Oct. 30, 2015), <http://www.hanyc.org/news/airbnbs-2-billion-negative-impact-on-lodging-industry-and-nyc-economy/>; HVS CONSULTING & VALUATION, *AIRBNB AND IMPACTS ON THE NEW YORK CITY LODGING MARKET AND ECONOMY* (2015), <http://www.hanyc.org/wp-content/uploads/2015/11/HVS-Impact-Study-FINAL-Airbnb-and-the-NYC-Lodging-Market-11-05-15.pdf> (report prepared for Hotel Ass'n of N.Y.C.).

sources report that some hotels are opening to compete directly with Airbnb's offerings,⁴¹³ learning how to adopt some of Airbnb's business strategies,⁴¹⁴ and others are even listing their available rooms on Airbnb.⁴¹⁵

III. Regulatory Challenges in the Short-Term Lodging and For-Hire Transport Sectors

A. Regulatory Fairness

Traditional suppliers in both the short-term lodging and for-hire transport sectors have argued that the competition they face from platform-based suppliers, described in the previous section, is unfair, because they must meet regulatory requirements that platform-based operators either ignore or are not required to meet.⁴¹⁶ Commentators have described this lack of regulatory observance as "spontaneous private deregulation," and detailed the difficulties it poses for incumbents.⁴¹⁷

Hotels and bed-and-breakfasts have repeatedly called for regulators to set standards applicable to all participants to create a level playing field. A hotel industry panelist asserted that "a competitive market means that everyone plays by the same rules," for example "to protect consumer safety, and security, and the integrity of neighborhoods and communities."⁴¹⁸ She maintained that the failure to enforce such requirements would prevent the achievement of regulatory goals and create an unfair competitive advantage for hosts using Airbnb or similar platforms.⁴¹⁹ One bed-and-breakfast association explained that its members would be disadvantaged if competing properties "are not required to comply with legitimate regulatory mandates."⁴²⁰ Others expressed similar concerns that lack of regulation created an uneven playing field.⁴²¹

⁴¹³ See Sarah Schmalbruch, *A New Type of Hotel Is Upping Its Game to Compete with Airbnb*, BUS. INSIDER (Aug. 21, 2015, 1:16 PM), <http://www.businessinsider.com/cool-new-extended-stay-hotels-2015-7> ("A whole new crop of long term hotels are popping up, and they're setting their sights on competing with rental sites like Airbnb.").

⁴¹⁴ See *What Hotels Can Learn from Airbnb & How They Can Compete*, HIGHER LEVEL SOFTWARE, <http://www.high-level-software.com/what-hotels-can-learn-from-airbnb-how-they-can-compete/>.

⁴¹⁵ See Sarah Kessler, *To Fill Rooms, Hotels Are Turning to Airbnb*, FAST COMPANY (Dec. 14, 2015, 8:30 AM), <http://www.fastcompany.com/3054570/behind-the-brand/to-fill-rooms-hotels-are-turning-to-airbnb>.

⁴¹⁶ Am. Hotel & Lodging Ass'n Comment at 1; Workshop Tr. at 115 (Vanessa Sindors). See also Prof'l Ass'n of Innkeepers Int'l Comment Attachment at 1 (PAII "is concerned about matters of fairness and safety" that have arisen "in the short-term rental market over the past few years.").

⁴¹⁷ Edelman & Geradin, *supra* note 289, at 4; Rogers, *supra* note 289, at 85. Some argue that platforms can make use of this user base to influence regulatory action. See, e.g., Matt Stempeck, *Are Uber and Facebook Turning Users into Lobbyists?*, HARV. BUS. REV. (Aug. 11, 2015), <https://hbr.org/2015/08/are-uber-and-facebook-turning-users-into-lobbyists>.

⁴¹⁸ Workshop Tr. at 143 (Vanessa Sindors).

⁴¹⁹ *Id.* at 115-16. See also Am. Hotel & Lodging Ass'n Comment at 1; Hotel Ass'n of N.Y.C. First Comment at 1; Hudson Area Lodging Comment at 1; Prof'l Ass'n of Innkeepers Int'l Comment Attachment at 2; Pa. Ass'n of Bed & Breakfast Inns Comment at 1.

⁴²⁰ Fla. Bed and Breakfast Inns Ass'n Comment at 1.

⁴²¹ See, e.g., Prof'l Ass'n of Innkeepers Int'l Comment Attachment at 1; Pa. Ass'n of Bed & Breakfast Inns Comment at 1.

Taxi operators likewise have argued that the competitive success of TNCs is due at least in part to the ability of TNC drivers to avoid regulatory burdens that they bear.⁴²² According to Workshop participants⁴²³ and commentators,⁴²⁴ TNC drivers enjoy an advantage because they are able to enter marketplaces without obtaining the requisite regulatory clearances that taxi operators must obtain, and to operate until regulators intervene (at which time a user base already has been established). One commenter asserted that, due to Uber's lobbying clout, "new entrants are able to operate under a different and more flexible set of regulations than incumbent operators."⁴²⁵ Moreover, when jurisdictions act to regulate TNCs and their drivers, participants argued, more lenient regulations for TNC drivers may be inadequate to achieve regulatory objectives and may unfairly burden taxi drivers.⁴²⁶

In explaining the California Public Utility Commission's rulemaking proceedings relating to TNCs and their drivers,⁴²⁷ Commissioner Sandoval described a "back and forth" pattern between TNCs and regulators, in which "unlawful" operation by TNCs resulted in regulators obtaining cease-and-desist orders, followed by regulation and enforcement.⁴²⁸ As in California, legislators and regulators in other jurisdictions have taken action to regulate TNCs and their drivers, in order to satisfy regulatory goals. Uber reported that 40 jurisdictions had taken such action, which it described as "smart regulations."⁴²⁹ Lyft also stated that "[p]olicymakers at all levels of government have invested a tremendous amount of time and effort in crafting regulations to accommodate this new industry."⁴³⁰ Taxi industry representatives, however, have expressed concerns that the protections are inadequate.⁴³¹

⁴²² See, e.g., Workshop Tr. at 107, 120-23 (Matthew Daus); Taxicab, Limousine & Paratransit Ass'n First Comment at 1-2.

⁴²³ Taxicab, Limousine & Paratransit Ass'n First Comment at 1-2; see also Nat'l Limousine Ass'n Comment at 1, 5.

⁴²⁴ See Edelman & Geradin, *supra* note 289, at 4; Rogers, *supra* note 289, at 85.

⁴²⁵ Taxicab, Limousine & Paratransit Ass'n Second Comment at 2.

⁴²⁶ See, e.g., Workshop Tr. at 107, 121-23 (Matthew Daus); Taxicab, Limousine & Paratransit Ass'n First Comment at 4-7.

⁴²⁷ Press Release, Cal. Public Utils. Comm'n, CPUC Establishes Rules for Transportation Network Companies (Sept. 19, 2013), <http://docs.cpuc.ca.gov/PublishedDocs/Published/G000/M077/K132/77132276.PDF>; Tomio Geron, *California Becomes First State to Regulate Ridesharing Services Lyft, Sidecar, UberX*, FORBES (Sept. 19, 2013, 3:40 PM), <http://www.forbes.com/sites/tomiogeron/2013/09/19/california-becomes-first-state-to-regulate-ridesharing-services-lyft-sidecar-uberx/>.

⁴²⁸ Workshop Tr. at 97 (Catherine J.K. Sandoval). Uber, for example, has been subject to cease-and-desist orders and heavy fines for operating without permission of the Pennsylvania Public Utilities Commission and failing to comply with California TNC regulations. See Daniel Moore, *Uber Fined Record \$11.4 Million by State Public Utility Board*, PITT. POST-GAZETTE (Apr. 21, 2016, 11:54 PM), <http://www.post-gazette.com/business/tech-news/2016/04/21/Uber-fined-11-4-million-by-state-Public-Utility-Commission-pennsylvania/stories/201604210168> (one commissioner explaining the record fine by stating that "Uber has engaged in the most unprecedented series of willful violations of commission orders and regulations in the history of this agency," including defying a cease-and-desist order); Douglas MacMillan, *Uber Bows to \$7 Million Fine in California*, WALL ST. J.: DIGITS (Jan. 14, 2016, 8:43 PM), <http://blogs.wsj.com/digits/2016/01/14/uber-bows-to-7-6-million-fine-in-california/> (reporting that Uber paid fine imposed for violating state law requiring reporting of various information).

⁴²⁹ Workshop Tr. at 103-04 (Ashwini Chhabra).

⁴³⁰ Lyft Comment at 1.

⁴³¹ See, e.g., Workshop Tr. at 107-08, 121-22 (Matthew Daus); MATTHEW W. DAUS & PASQUALINO RUSSO, ONE STANDARD FOR ALL: CRIMINAL BACKGROUND CHECKS FOR TAXICAB, FOR-HIRE, AND TRANSPORTATION NETWORK COMPANY (TNC) DRIVERS 2-6 (2015), *attached to* Russo Comment; Taxicab, Limousine & Paratransit Ass'n First Comment; Nat'l Limousine Ass'n Comment (describing deficiencies in the regulation of TNC drivers).

These new regulations are set against a backdrop of extensive state and local regulation of taxis, which the Commission has studied extensively, producing, among other things, a major report published in 1984.⁴³² Taxi regulations include traditional economic regulations such as entry restrictions limiting the number of vehicles or firms; fare regulation; minimum standards for drivers, vehicles, and service quality; and mandatory service to the disabled or in disadvantaged areas.⁴³³ With regard to entry restrictions, no panelist or commenter argued that TNCs or taxis ought to be subject to a system prevalent in many cities where the local authority strictly limits the number of licenses or “medallions” available to potential drivers. Regarding fare regulation, participants recognized that technological developments have enabled companies like Uber and Lyft to “protect against inflated fares” by providing “transparency of fare rate . . . and recorded trip routes,” potentially reducing the need for such regulation.⁴³⁴ Moreover, one commenter pointed to regulations mandating taxi fares that exceed the average charge by TNC drivers and thereby would harm consumers.⁴³⁵ The lack of support for entry restrictions and fare setting for TNCs is consistent with the views of FTC staff, who concluded in 1984 that, even in the traditional taxi industry, “restrictions on entry, minimum fare controls, and restrictions on ride-sharing . . . reduce rather than increase efficiency.”⁴³⁶

B. Similarities and Differences Between Traditional and Platform Suppliers

Similarities and differences between platform suppliers and traditional suppliers in the for-hire transport and short-term rental sectors may help determine whether regulators should extend or tailor existing regulations to sharing economy participants, or if aspects of sharing economy platforms limit the need for such regulation. Participants and commenters generally report that platform suppliers in both sectors are typically individuals or small entities, who are collectively numerous and diverse. Sharing economy suppliers also generally employ personal assets, residences and personal automobiles, and work as drivers or hosts part-time as a sideline. One Workshop panelist suggested that platform suppliers “blur the lines between personal and professional,” and noted that it has always been

⁴³² See MARK W. FRANKENA & PAUL A. PAUTLER, BUREAU OF ECON., FED. TRADE COMM’N, AN ECONOMIC ANALYSIS OF TAXICAB REGULATION 15-28 (1984), <https://www.ftc.gov/sites/default/files/documents/reports/economic-analysis-taxicab-regulation/233832.pdf> [hereinafter FTC TAXI REPORT].

⁴³³ See generally *id.* at 15-28.

⁴³⁴ Uber Comment at 2.

⁴³⁵ TechNet Comment at 2-3. Uber’s use of surge pricing – increasing prices in times of high demand – has been criticized as potentially confusing and harming consumers. See, e.g., Dara Kerr, *Detest Uber’s Surge Pricing? Some Drivers Don’t Like It Either*, CNET (Aug. 23, 2015, 8:00 AM), <http://www.cnet.com/news/detest-ubers-surge-pricing-some-drivers-dont-like-it-either>. In some cities, Uber now provides the customer with the cost of the ride including the surge factor upfront. See generally Press Release, Uber, Upfront Fares: No Math and No Surprises (June 23, 2016), <https://newsroom.uber.com/upfront-fares-no-math-and-no-surprises/>; Helen Zhao, *Uber is Making Surge Pricing More Transparent — But a Little Less Obvious*, L.A. TIMES (June 24, 2016, 3:08 PM), <http://www.latimes.com/business/technology/la-fi-tn-uber-surge-20160624-snap-story.html>. The Workshop did not address surge pricing, except in brief references from taxi industry representatives asserting that the fare flexibility reflected in surge pricing provides an unfair advantage to platform-based drivers. See Workshop Tr. at 139 (Matthew Daus).

⁴³⁶ FTC TAXI REPORT, *supra* note 432, at 65.

considered personal activity when individuals “give[] people rides” or “accommodate[] people in our homes.”⁴³⁷

Workshop participants observed that the services offered by TNC drivers are similar in important respects to those provided by taxis and limousines, particularly with regard to consumer protection and public safety considerations, such that they raise some similar regulatory issues. How TNC drivers and platforms operate, however, may create differences in the potential need for and shape of regulations. Taxi industry participants maintained that TNC drivers are essentially the same as taxi drivers. One panelist echoed arguments of regulators and taxi associations, declaring that TNCs provide “transportation for hire” no different from “taxis, limos,” and other for-hire transport services.⁴³⁸ Some commenters agreed, with one stating that “TNCs are just like many other companies used by consumers to arrange for for-hire passenger vehicle service. All companies recruit drivers, market for passengers who need immediate transportation service, dispatch drivers to pick up passengers, and charge passengers for rides.”⁴³⁹ Some Workshop participants argued that TNC drivers obtained an unfair competitive advantage by evading taxi regulations or complying with lesser standards for background checks and other requirements.⁴⁴⁰ The New York City Taxi & Limousine Commission said simply that such services are “for-hire service and . . . should be regulated as such.”⁴⁴¹

Uber and similar platforms dispute these contentions, generally arguing that they are technology companies that do not themselves provide a transport service but instead facilitate the provision of transport services by individual drivers.⁴⁴² They also have pointed out that TNC drivers differ from taxis in that they arrange rides via smartphones rather than via street hails or telephone dispatch,⁴⁴³ and work mostly part-time.⁴⁴⁴ They argue that coordinating rides through smartphones provides an opportunity for greatly increased efficiency.⁴⁴⁵ Another participant suggested that TNCs also may reduce safety concerns because they monitor rides – keeping track of the identity of the driver and passenger and where they go.⁴⁴⁶

⁴³⁷ Workshop Tr. at 85-86 (Arun Sundararajan). *See also* SUNDARARAJAN, *supra* note 12, at 141-42.

⁴³⁸ Workshop Tr. at 106 (Matthew Daus). *See also* New York City Taxi & Limousine Comm’n Comment at 1-2.

⁴³⁹ Taxicab, Limousine & Paratransit Ass’n First Comment at 2. *See also* Nat’l Limousine Ass’n Comment at 1.

⁴⁴⁰ *See, e.g.*, Taxicab, Limousine & Paratransit Ass’n First Comment at 1-2; Workshop Tr. at 107-08, 139 (Matthew Daus); DAUS & RUSSO, *supra* note 431.

⁴⁴¹ N.Y.C. Taxi & Limousine Comm’n Comment at 2.

⁴⁴² *Uber Guidelines for Law Enforcement Authorities*, UBER, <https://www.uber.com/legal/guidelines-for-law-enforcement> (“Uber is a technology company that has developed an app that connects users (riders) with driver partners who provide transportation to the user.”); Uber Comment at 1 (describing Uber as an app-based technology).

⁴⁴³ Workshop Tr. at 124 (Ashwini Chhabra).

⁴⁴⁴ *See* Hall & Krueger, *supra* note 113, at 17 (reporting that 60 percent of Uber drivers have either part-time or full-time employment apart from driving for Uber).

⁴⁴⁵ Uber Comment at 2 (Uber provides “[a]ccess to reliable transportation in an unprecedentedly short amount of time,” when traditional taxis “are typically unavailable,” and “from comfortable and safe locations”); Rogers, *supra* note 289, at 88 (“Uber has basically eradicated search costs.”); Cramer & Krueger, *supra* note 385 (finding that UberX drivers spend a higher percentage of time transporting riders than do taxi drivers).

⁴⁴⁶ Workshop Tr. at 52 (Joshua Gans).

One often-noted difference between taxis and the TNC model is that TNC drivers are usually individuals providing transportation part-time using their personal cars. They are “regular people who have driver’s licenses” rather than full-time, licensed professional taxi drivers.⁴⁴⁷ Despite this difference, others argue that because TNC drivers provide services similar to those afforded by individual cab drivers, who obtain a dedicated cab and license, they raise similar regulatory concerns. Such similarities were central to the California PUC’s decision to impose certain regulatory requirements, such as background checks and vehicle standards, on TNCs and their drivers to protect consumers and the public.⁴⁴⁸ The CPUC also rejected the claim that TNCs were “just an app” or a “means of communication used to arrange a service” and therefore outside its jurisdiction.⁴⁴⁹ Instead, it determined that TNCs provide a “transportation service” and adopted transportation network companies as a new category of regulated transportation provider.⁴⁵⁰

In contrast to the significant similarities between TNC drivers and taxi operators identified by Workshop participants, the discussion of the short-term lodging sector centered on asserted differences between hosts and hotels. While hosts and hotels both provide short-term accommodations, Workshop participants emphasized that they differ considerably in the types of facilities and nature of services they provide.⁴⁵¹ Hotels often offer scores or hundreds of separate rooms in one facility, with a full staff of professionals providing a range of services for guests; bed-and-breakfasts usually offer more personalized service with multiple rooms. In contrast, Airbnb hosts generally offer a single residential unit (apartment, house, or room).⁴⁵² They also often operate on a part-time basis, with limited professional training and experience.⁴⁵³ Airbnb’s representative described hosts as “regular people” trying to make “a little extra money,” and analogized their activity to taking in “roomers and boarders,” an “age-old activity.”⁴⁵⁴ As a result, the services they offer may be viewed as less professional than those afforded by commercial hotels.⁴⁵⁵

A major topic of one of the Workshop panels was whether Airbnb hosts only occasionally rent out space in their own residences, and thus plausibly engage in personal activity, or engage in extensive rental efforts that resemble commercial activity. Airbnb’s representative repeatedly emphasized that hosts predominantly are people who take lodgers “once in a while” in their own home.⁴⁵⁶ He argued that

⁴⁴⁷ *Id.* at 93 (Catherine J.K. Sandoval).

⁴⁴⁸ *Id.* at 94-95.

⁴⁴⁹ *Id.* at 94.

⁴⁵⁰ *Id.* at 91-94. In doing so, the CPUC recognized that they differed from taxis since they make pickups through pre-arranged communications, not hailing on the street. *Id.*

⁴⁵¹ *Id.* at 119 (David Hantman) (hotels and Airbnb hosts are “incredibly different things”).

⁴⁵² *Id.* at 118-19.

⁴⁵³ *Id.* at 114.

⁴⁵⁴ *Id.*

⁴⁵⁵ *Id.* at 119 (David Hantman). This difference in professionalism is not apparent in comparing taxi operators and platform-based drivers. One possible reason is that many consumers may view for-hire transport services as largely fungible if a ride is provided quickly and conveniently with a sufficient degree of assurance of safety. In contrast, consumers may view lodging services as significantly differentiated, with more potential for differences in levels of service.

⁴⁵⁶ *Id.* at 118 (“[M]ore than 90% of our people in New York, for instance, have only their own home that they list. It is people who do this for a once in a while, right?”). See also *id.* at 119, 134, 137, 144.

such transactions should not be subjected to the regulatory requirements placed on hotels, asking “does anybody really think that, if you’re hosting . . . your family, or your friends, or someone’s just borrowing your apartment . . ., that you should have to do all of the things that a hotel has to do?”⁴⁵⁷ However, he recognized that someone offering rentals “full-time as a business, in multiple locations” would be “very different.”⁴⁵⁸ Indeed, he stated that Airbnb has removed many of “the small number of people” with multiple listings and does not defend “rogue hotels.”⁴⁵⁹

A leading hotel industry association expressed some measure of agreement – recognizing that “those engaging in true ‘home sharing’ should be treated differently,” while repeatedly arguing that “those engaged in commercial activity, particularly those running businesses and renting out multiple properties, must pay their fair share of taxes and abide by commonsense safety, security, health, and fire standards.”⁴⁶⁰ Hotels and bed-and-breakfasts vigorously argued that large portions of rental activity on Airbnb are commercial in nature. One panelist argued that some hosts were running “rogue”⁴⁶¹ hotels, and “operating multiple properties as a business.”⁴⁶² A commenter similarly characterized Airbnb as “a vast illegal virtual hotel, without any of the safeguards provided by real hotels.”⁴⁶³ Others focused on the commercial, for-profit nature of the activity Airbnb enables.⁴⁶⁴

Hotel groups specifically contested Airbnb’s characterization of the rental activity on its platform as predominantly involving the occasional rental of the host’s residence.⁴⁶⁵ They relied extensively on a report prepared by the New York State Attorney General’s office using Airbnb data on hosting activity in New York City.⁴⁶⁶ That report found that the six percent of Airbnb hosts who rented out three or more units accounted for nearly 40 percent of the revenues earned by hosts on Airbnb, and that units serving as “Short-Term Rentals” (rather than primary residences) accounted for 38 percent of such revenues.⁴⁶⁷ Other commenters presented information suggesting that many Airbnb listings were for entire units that

⁴⁵⁷ *Id.* at 119 (adding “and that’s sort of what’s going on here”).

⁴⁵⁸ *Id.* at 114.

⁴⁵⁹ *Id.* at 118, 137.

⁴⁶⁰ Am. Hotel & Lodging Ass’n Comment at 1.

⁴⁶¹ Workshop Tr. at 137 (Vanessa Sindors).

⁴⁶² *Id.* at 116, 137.

⁴⁶³ Hotel Ass’n of N.Y.C. Second Comment at 4. *See also* Hotel Ass’n of N.Y.C. First Comment at 3-4.

⁴⁶⁴ *See, e.g.*, Steve Unger, Presentation at the Oregon Bed & Breakfast Guild Annual Conference: Will the Real Airbnb Please Stand Up? 3-5 (Mar. 2015), *attached to* Unger First Comment; Am. Hotel & Lodging Ass’n Comment at 1.

⁴⁶⁵ *See, e.g.*, Workshop Tr. at 143 (Vanessa Sindors); Hotel Ass’n of N.Y.C. First Comment at 2-3; Hotel Ass’n of N.Y.C. Second Comment at 3-4; Am. Hotel & Lodging Ass’n Comment at 1-2.

⁴⁶⁶ OFFICE OF THE ATTORNEY GENERAL OF THE STATE OF N.Y., AIRBNB IN THE CITY 10 (2014), <http://www.ag.ny.gov/pdfs/AIRBNB%20REPORT.pdf> [hereinafter NYAG REPORT].

⁴⁶⁷ *Id.* at 10, 13. The report included as “Short-Term Rentals” those units that were rented for a majority of the year through Airbnb on a short-term rental basis. *See also* JOHN W. O’NEILL & YUXIA OUYANG, PA. STATE UNIV., FROM AIR MATTRESSES TO UNREGULATED BUSINESS: AN ANALYSIS OF THE OTHER SIDE OF AIRBNB 3 (2016), http://www.ahla.com/uploadedFiles/Common/pdf/PennState_AirBnbReport_.pdf (a study funded by the Am. Hotel & Lodging Ass’n examining Airbnb hosting in 12 major cities, finding that hosts operating multiple units accounted for 40 percent of revenue earned on Airbnb in those cities, while full-time hosts (offering units 360 days per year) accounted for 26 percent of revenues).

might not be used as the hosts' primary residences.⁴⁶⁸ Airbnb's representative at the Workshop disputed the NYAG report's findings.⁴⁶⁹ Some Airbnb hosts reported in comments that they hosted renters in their own homes.⁴⁷⁰ Moreover, data in the NYAG's report suggest that a significant portion of rental activity on Airbnb may be performed by hosts occasionally taking lodgers into their homes.⁴⁷¹

IV. Specific Areas of Regulatory Concern

The previous section underscores the impact of new platform suppliers in the for-hire transport and short-term lodging sectors and the related regulatory challenges. Historically, each of these industries has long been subject to a number of sector-specific state and local regulations. This section addresses several specific areas of regulatory concern in one or both of these sectors that Workshop participants raised. While the debate in each of these regulatory areas has been extensive, this discussion focuses almost exclusively on the Workshop's examination of these issues.

A. Consumer Protection and Public Safety

1. General

A wide variety of state and local statutes and regulations are directed to protecting consumers or ensuring public safety in the short-term lodging and for-hire transportation sectors. Some of these protections result from broadly applicable provisions such as tort and contract law. Transactions in these sectors, particularly for-hire transportation service, are largely governed by sector-specific laws and regulations that are generally enforced by governmental bodies⁴⁷² and often implemented through licensing requirements and inspections.⁴⁷³ In addition, federal statutes and regulatory bodies impose legal requirements that regulate aspects of sharing economy transactions. Notably, Section 5 of the FTC Act's prohibition against unfair and deceptive acts and practices applies to platforms' supply of services to customers and suppliers using the platform, as well as transactions between suppliers and customers over the platform.⁴⁷⁴ If a platform makes material misrepresentations to either customers or suppliers, the platform could be subject to a Commission action as well.

⁴⁶⁸ See, e.g., ROY SAMAAN, LAANE, AIRBNB, RISING RENT, AND THE HOUSING CRISIS IN LOS ANGELES 8 (2015), attached to Sybil Rosen Comment (reporting that "whole unit rentals" accounted for between 59 percent to 64 percent of Airbnb listings in New York City, Los Angeles, and San Francisco); Am. Hotel & Lodging Ass'n Comment at 2 (citing *San Francisco Chronicle* report that five percent of Airbnb hosts in San Francisco had three or more listings and accounted for nearly 20 percent of all listings).

⁴⁶⁹ Workshop Tr. at 144 (David Hantman) (stating that the NYAG Report's findings were "all wrong," but that Airbnb would need to share data to "prove" its claims). He added that Airbnb had removed "the vast majority" of hosts with multiple listings. *Id.* at 118 (David Hantman).

⁴⁷⁰ See Appendix B.

⁴⁷¹ NYAG REPORT, *supra* note 466, at 10, 13 (reporting that NYC units that were rented out less and 90 days per year accounted for 35 percent of total revenues earned by NYC hosts and that 64 percent of revenues were attributable to rentals by hosts offering only one or two units).

⁴⁷² See generally FTC TAXI REPORT, *supra* note 432.

⁴⁷³ See U.S. Dept. of Commerce Issue Brief, *supra* note 13, at 18.

⁴⁷⁴ 15 U.S.C. § 45(a)(1).

Participants representing incumbents, platforms, and state and local government broadly embraced the importance of consumer protection and public safety in the provision of for-hire transport services and short-term lodging. A former taxi regulator pointed out that considerations of safety, consumer protection, and insurance were among “the basics that should never change.”⁴⁷⁵ The Uber representative appeared to agree, explaining that the regulatory measures Uber advocates to state and local governments address safety, consumer protection, and insurance considerations.⁴⁷⁶ The hotel industry panelist repeatedly stressed the importance of “ensuring the safety and security of our guests,”⁴⁷⁷ while Airbnb’s representative declared that “[w]e care an enormous amount about safety” and “can’t function” without it.⁴⁷⁸ California PUC Commissioner Sandoval emphasized “consumer protection and public safety” concerns, arguing that not only are passengers at risk, but also pedestrians and other drivers are as well.⁴⁷⁹ A panelist representing cities reported survey results showing that “public safety was the key concern” in cities’ assessments of the sharing economy.⁴⁸⁰

Representatives of traditional suppliers and others repeatedly expressed concern that platform suppliers would endanger consumers and public safety. One state senator declared that “illegal hotels . . . and the platforms which facilitate them, pose serious public safety hazards.”⁴⁸¹ Hotel industry representatives likewise asserted that Airbnb hosts are “compromising consumer safety.”⁴⁸² Commenters described a slew of requirements that hotels and bed-and-breakfasts must meet to ensure that they are safe and sanitary, but that Airbnb hosts may be ignoring.⁴⁸³ One expressed particular concern that platform suppliers “haven’t been properly educated and trained on safety and security matters” because they are not “formally in the lodging business.”⁴⁸⁴

⁴⁷⁵ Workshop Tr. at 121 (Matthew Daus). *See also* Taxicab, Limousine & Paratransit Ass’n First Comment at 2; N.Y.C. Taxi & Limousine Comm’n Comment at 3.

⁴⁷⁶ Workshop Tr. at 123-24 (Ashwini Chhabra); *see also* Lyft Comment at 1, 5.

⁴⁷⁷ Workshop Tr. at 115 (Vanessa Sindors); *see also* Am. Hotel & Lodging Ass’n Comment at 1.

⁴⁷⁸ Workshop Tr. at 117 (David Hantman).

⁴⁷⁹ *Id.* at 94 (Catherine J.K. Sandoval).

⁴⁸⁰ *Id.* at 111 (Brooks Rainwater). *See also* Brooks Rainwater, Nat’l League of Cities, Presentation Slides at FTC Workshop, The “Sharing” Economy: Issues Facing Platforms, Participants, and Regulators 9 (June 9, 2015), https://www.ftc.gov/system/files/documents/public_events/636241/rainwater.pdf.

⁴⁸¹ New York State Senator Krueger Comment at 3.

⁴⁸² Workshop Tr. at 115 (Vanessa Sindors).

⁴⁸³ *See* Am. Hotel & Lodging Ass’n Comment; Hotel Ass’n of N.Y.C. First Comment, at 2-4, (arguing that “hotels are required to be ‘safer’ than apartment buildings” to protect tourists unfamiliar with the building, citing fire and building codes, guest registries, posted rates, etc.); *id.* at 7-8 (hotels also employ security guards, have emergency procedures, safes for valuables, doormen, and 24-hour staffs, in part to meet safety concerns); Prof’l Ass’n of Innkeepers Int’l Comment Attachment at 2 (“encourag[ing] local authorities to put fire, health and safety standards in place for short-term rentals” of “homes, apartments and rooms” to the public); Fla. Bed & Breakfast Inns Comment (citing fire codes, health requirements, insurance, etc.); Pa. Ass’n of Bed & Breakfast Inns Comment at 2 (emphasizing need to follow all requirements, including a variety of fire regulations imposed on hotels); Samaan, *supra* note 468, at 22 (“AirBnB allows hosts to utilize their spaces like hotels without being subject to any of the same regulatory checks to which actual hotels have adapted over the years.”). *But cf.* Koplou Comment (owner of bed and breakfast would “eschew any and all other regulation or licensure” other than measures to ensure tax collection).

⁴⁸⁴ Prof’l Ass’n of Innkeepers Int’l Comment Attachment at 2.

Taxi industry participants expressed related concerns. One comment from a taxi regulator detailed a variety of public safety concerns regarding TNCs and their drivers, including lax standards, insufficient oversight of drivers, inadequate background checks, the difficulty of removing a “bad actor,” and ensuring adequate insurance.⁴⁸⁵ Others focused on harm that could result if the insurance TNC drivers carry or the background checks to which they are subject fail to meet standards set for taxi drivers.⁴⁸⁶ Another suggested that weakening regulations could increase incentives for competitors to engage in deceptive pricing and reduce efforts to ensure vehicle safety.⁴⁸⁷ Others argued that government regulation addressing these concerns could help promote consumer confidence in sharing economy transactions.⁴⁸⁸

Uber reported that various jurisdictions are responding to its entry with tailored regulation, particularly aimed at consumer and public safety, including requiring “rigorous criminal background checks and driving history reports,” as well as “adequate and appropriate insurance . . . to protect passengers and the public.”⁴⁸⁹ It maintained that these regulations, together with the various trust mechanisms Uber has adopted, provide appropriate consumer protection.⁴⁹⁰ Critics, however, argued that TNCs face lesser requirements than do taxi operators as to some matters, such as background checks and insurance.⁴⁹¹

Airbnb’s comment described its team of trust and safety staff available to hosts and renters, and outlined several safety programs, including verifying a participant’s offline identity (such as a passport), and providing information on best home-safety practices to educate hosts.⁴⁹² Its representative at the Workshop explained that it is working on safety initiatives and other matters,⁴⁹³ and argued that differing regulatory treatment is appropriate because hosts differ from hotels in that they only occasionally rent their own residences.⁴⁹⁴ He also explained that trust mechanisms greatly reduce safety

⁴⁸⁵ N.Y.C. Taxi & Limousine Comm’n Comment at 3-4.

⁴⁸⁶ See Workshop Tr. at 106-107 (Matthew Daus); Taxicab, Limousine & Paratransit Ass’n First Comment at 6-8; DAUS & RUSSO, *supra* note 431.

⁴⁸⁷ Taxicab, Limousine & Paratransit Ass’n First Comment at 2-3.

⁴⁸⁸ See, e.g., Workshop Tr. at 95 (Catherine J.K. Sandoval) (arguing that lack of insurance provisions are “will undermine confidence in the industry.”).

⁴⁸⁹ Workshop Tr. at 103-04 (Ashwini Chhabra). See also Lyft Comment Attachment at 6 (detailing aspects of Lyft’s background check).

⁴⁹⁰ See Airbnb Comment; Workshop Tr. at 103-05 (Ashwini Chhabra).

⁴⁹¹ *Id.* at 121-22 (Matthew Daus). See generally DAUS & RUSSO, *supra* note 431 (arguing that TNC background checks are inadequate to protect safety, citing lack of fingerprinting and other deficiencies). California enforcement officials have also brought actions alleging that Uber and Lyft have misrepresented the effectiveness of their safety requirements, such as their background checks, which have both been settled. Tracey Lien & Russ Mitchell, *Uber Sued Over Unlawful Business Practices; Lyft Settles*, L.A. TIMES (Dec. 9, 2014, 8:00 PM), <http://www.latimes.com/business/technology/la-fi-tn-uber-lyft-20141209-story.html> (describing civil lawsuits filed by district attorneys in Los Angeles and San Francisco and settlement with Lyft); Tracey Lien, *Uber Agrees to Settlement of up to \$25 Million in Misleading-Advertising Suit*, L.A. TIMES (Apr. 7, 2016, 4:08 PM), <http://www.latimes.com/business/technology/la-fi-tn-0408-uber-settlement-story.html> (reporting the settlement of the action against Uber).

⁴⁹² See Airbnb Comment at 4.

⁴⁹³ Workshop Tr. at 119 (David Hantman).

⁴⁹⁴ *Id.* at 119, 134, 137, 144.

concerns. “[F]air regulation [] is needed” in his view but “new information sharing between consumers, ratings and background checks, online reputation, really makes it a lot easier for consumers to get what they need.”⁴⁹⁵

2. Reputation Systems and Other Trust Mechanisms

In the for-hire transport and short-term lodging sectors, specific trust mechanisms have played key roles in addressing consumer protection and safety concerns. Platforms in both sectors use reputation mechanisms extensively to provide information to consumers and providers about the person with whom they are dealing. In addition, in both sectors, platforms have provided insurance, guarantees, and other interventions designed to promote confidence in transacting.

Airbnb’s representative argued that reputation systems had “lessened . . . the need for strong government intervention” by “reward[ing] good behavior and punish[ing] bad behavior.”⁴⁹⁶ Airbnb also described other ways it intervenes to reduce transaction concerns. For example, it takes the payment from the renter and does not remit payment to the host until 24 hours after check-in,⁴⁹⁷ and provides insurance coverage and guarantees to participants. One hotel association, however, stated that Airbnb’s ratings system and other trust mechanisms were “not safety or security measures at all,” because they do not protect against serious harm from fire or crime, but only against fraud.⁴⁹⁸

Ratings systems appear to have played an important role in addressing consumer protection and related concerns raised by drivers providing for-hire transport services through platforms. Uber’s reputation mechanism through which both riders and drivers rate each other, provides average scores after the driver accepts the ride but before the rider enters the car. In Uber’s view, the system “(1) incentivizes high quality service, (2) establishes accountability, and (3) promotes courteous conduct”⁴⁹⁹ Another TNC, Lyft, highlighted that it combines its reputation systems with “independently conducted background check[s] and vehicle inspection[s]” before permitting drivers to offer service through the platform, analogous to steps required by regulation.⁵⁰⁰ One comment submitted by academics and drivers, however, raised several issues concerning Uber and Lyft’s rating systems, including that the “ratings are failing to produce a reliable measurement of the actual quality of driving.”⁵⁰¹

As suggested in Chapters 2 and 3, trust mechanisms may play a significant role in reducing concerns resulting from information asymmetries, and therefore may reduce the need for some consumer protection and safety regulation designed to address such problems.⁵⁰² Platforms generally have strong incentives to use such mechanisms to protect their consumers. Platforms earn money by facilitating

⁴⁹⁵ *Id.* at 114.

⁴⁹⁶ *Id.* at 112.

⁴⁹⁷ Airbnb Comment at 4.

⁴⁹⁸ Hotel Ass’n of N.Y.C. Second Comment at 1-2.

⁴⁹⁹ Uber Comment at 5. *See also supra* note 165 and accompanying text.

⁵⁰⁰ Lyft Comment at 1.

⁵⁰¹ Raval Comment at 1-2.

⁵⁰² *See supra* Chapter 2, Sections III & IV; Chapter 3, pp. 59-61.

transactions between buyers and sellers, and thus have direct incentives to address consumer protection and safety concerns, because such concerns can impede transactions and therefore reduce the profitability of the platform. However, platforms may have weaker incentives to adopt these mechanisms to address externalities, *i.e.*, impacts on third parties or other public interests, since addressing such impacts may not directly promote transacting on the platform. Two commentators argued that those who are not customers of the platforms “cannot rely on contracts to shape platforms’ behavior” and “also cannot invoke market incentives.”⁵⁰³

Therefore, apart from a general concern for its reputation or the potential for regulation or enforcement action, a platform may have little monetary incentive to address issues that impose costs only on third parties. For example, pedestrians and other motorists are third parties who face risks from Uber drivers, and regulators may be less able to rely on platform actions to address those concerns.⁵⁰⁴ Platform participants (and platforms), however, still may have an interest in addressing such harms if they could be liable to third parties for such harms. For short-term lodging, the potential third-party impacts appear more diverse, involving disturbing the quiet enjoyment of others in their homes or making housing less affordable for residents.⁵⁰⁵ Absent enforcement of regulations, both platform-based drivers and hosts may lack incentives to act to meet other policy objectives such as paying taxes, providing service to disadvantaged or disabled persons, or promoting affordable housing.⁵⁰⁶

3. Insurance

An area in which platform interventions appear particularly important is the provision of adequate insurance covering platform-based suppliers for harm they may cause when providing for-hire transportation service. California PUC Commissioner Sandoval argued that, “insurance is absolutely critical for the growth of the [TNC] industry” since “lack of insurance will undermine confidence.”⁵⁰⁷ Industry representatives largely agreed with Commissioner Sandoval’s assessment that adequate insurance is crucial to the successful operation of ride-share platforms.⁵⁰⁸ Commissioner Sandoval similarly suggested that coverage for accidents during Airbnb stays will be important to hosts and renters considering whether to transact.⁵⁰⁹ She pointed out that the interests of third parties also may be affected – owners of buildings with Airbnb hosts may be liable for some injuries,⁵¹⁰ and pedestrians

⁵⁰³ Edelman & Geradin, *supra* note 111, at 309.

⁵⁰⁴ *Id.* at 309-10. However, measures to protect customers using the Uber platform (*e.g.*, driver background, car inspections, insurance requirements) may also reduce some of the risks drivers pose to those third parties. *See generally id.* at 310-13 (discussing potential externalities resulting from activities by platform suppliers of for-hire transport services).

⁵⁰⁵ *Id.* at 313. *See generally id.* at 313-15 (discussing potential externalities resulting from activities by platform suppliers of short-term lodging services and their guests); SUNDARARAJAN, *supra* note 12, at 140-41.

⁵⁰⁶ Edelman & Geradin, *supra* note 111, 318-24.

⁵⁰⁷ Workshop Tr. at 95 (Catherine J.K. Sandoval).

⁵⁰⁸ *See id.* at 123 (Matthew Daus) (“There has to be some form of acceptable insurance.”); *id.* at 130 (Ashwini Chhabra) (“You can’t talk too much about insurance” because “it seems to underpin” much of the debate).

⁵⁰⁹ *Id.* at 95 (Catherine J.K. Sandoval).

⁵¹⁰ Even those with less direct interests may need protection. Several credit unions also voiced concerns regarding whether insurance coverage for TNCs was adequate to protect lienholders. *See* Credit Union Nat’l Ass’n Comment; Ga. Credit Union Affiliates Comment.

injured by an Uber driver may need compensation.⁵¹¹

Personal car insurance and homeowners or renters insurance policies generally exclude most or all liability arising out of use of the insured property for commercial purposes, such as driving a personal car for hire or renting out a residence. Platforms in both of these sectors have taken steps to ensure that participants have adequate insurance coverage for transactions conducted over the platform, both by offering insurance directly and by facilitating the development of insurance products by insurance companies hesitant to insure risks without sufficient data.⁵¹²

TNC drivers use their personal cars to provide service, but personal auto insurance policies generally exclude “offering transportation for hire,”⁵¹³ and taxi regulations often set minimum levels of coverage that commercial operators must carry.⁵¹⁴ Both regulators and insurance companies initially found it difficult to tailor insurance requirements to TNC drivers.⁵¹⁵ Taxi operators typically carry commercial-level coverage at all times, but this could be prohibitively expensive and unnecessary for TNC drivers, who are often part-time workers. Ultimately, leading auto insurers and TNCs agreed on model legislation known as the “TNC Compromise Model,” under which higher insurance coverage is required for times when the vehicle is in commercial operation, as recorded through the app.⁵¹⁶ One panelist argued that such a hybrid insurance product “should be for everybody,” including part-time taxi drivers.⁵¹⁷ The Uber representative agreed, noting, however, that this would require that the taxi drivers adopt technology, similar to that used by TNC drivers, to record a driver’s activity.⁵¹⁸

Uber and Lyft provide insurance directly to their drivers for liability arising from supplying transportation services over the platform, pursuant to model legislation in a number of states that “puts

⁵¹¹ Workshop Tr. at 94-95 (Catherine J.K. Sandoval).

⁵¹² See *supra* Chapter 2, Section III.B, for a discussion of insurance offerings in these sectors, as well as other platform initiatives.

⁵¹³ Property Casualty Insurers Ass’n of Am. Comment at 1. (“Perhaps the best example of an exclusion or limitation for commercial activity on a personal lines policy is the ‘livery’ exclusion that excludes coverage for damage or injury arising out of an accident that occurs when the vehicle is used to offer transportation for hire.”).

⁵¹⁴ Workshop Tr. at 93-95 (Catherine J.K. Sandoval).

⁵¹⁵ *Id.* at 95-96; R.J. Lehmann, *Blurred Lines: Insurance Challenges in the Ride-Sharing Market* 6-9 (R Street Policy Study No. 28, 2014), attached to R Street Inst. Comment (describing the process through which California officials and TNCs addressed the question of insurance for TNC drivers). Relay Rides, which is a service for temporary car rentals, has also dealt with auto insurance policy issues. Its insurance provides the car owner with a \$1 million liability policy covering injuries and property damage, and also covers damage to his or her car. Those renting through Relay Rides can choose to purchase various levels of insurance. Relay Rides Comment at 2.

⁵¹⁶ Property Casualty Insurers Ass’n of Am. Comment at 1; Workshop Tr. at 95-96 (Catherine J.K. Sandoval); *id.* at 130-31 (Ashwini Chhabra). See also Press Release, Property Casualty Insurers Ass’n of Am., Insurance Rideshare Coverage Agreement Helps Protect the Public (Mar. 25, 2015), <https://www.pciaa.net/pciwebsite/cms/content/viewpage?sitePageId=40861>; Press Release, Uber, Insurance Aligned (Mar. 24, 2015), <https://newsroom.uber.com/introducing-the-tnc-insurance-compromise-model-bill/>. Coverage requirements and premiums can vary based on whether the driver is engaged in personal activity (with the app off), is available for hire (with the app on), or is transporting a passenger. Commissioner Sandoval explained that the “area of greatest contention” involved treatment of the period when the driver had the app on, available for a fare, but prior to being matched with a passenger. *Id.* at 95 (Catherine J.K. Sandoval).

⁵¹⁷ Workshop Tr. at 131-32 (Matthew Daus).

⁵¹⁸ *Id.* at 131-32 (Ashwini Chhabra).

the onus on Uber and any other TNC to carry coverage” if the driver lacks coverage.⁵¹⁹ In addition, Uber reported “working closely with the insurance industry as well to develop . . . new [insurance] products” that insurance companies can sell to TNC drivers directly.⁵²⁰ Insurance companies initially lacked the data to rate risks and offer policies to TNC drivers, but Uber provided the necessary data. As a result, some of the largest personal insurers have filed policies to cover TNC drivers in 11 states.⁵²¹ The Property Casualty Insurers Association of America reported that, at the time of the Workshop, 16 states had passed model legislation, and another 17 states were considering such legislation. It declared that in some states “clear insurance rules have spurred innovation among insurers who are starting to offer products tailored specifically to TNC drivers.”⁵²²

Insurance is also a significant issue for Airbnb hosts, as their personal homeowners insurance policies may provide little or no coverage for injuries to the guests that may occur during the course of a stay. The Property Casualty Insurers Association of America explained that “homeowners and renters policies frequently exclude or limit coverage for business or commercial activities” but that “[u]nfortunately, sharing economy participants often do not recognize their potential exposure for injury.”⁵²³ California PUC Commissioner Sandoval warned that those renting from hosts need to ask, if “you get a place through Airbnb and you have a slip and fall, are you covered?”⁵²⁴

In response to such concerns, Airbnb offers two insurance policies covering major risks faced by the parties transacting over the site. First, Airbnb offers a “host guarantee” protecting hosts from loss due to damage to their residence caused by renters.⁵²⁵ Second, as it learned about hosts’ concern for liability coverage, Airbnb offered insurance coverage for hosts’ liability for injuries to guests during a stay booked through Airbnb.⁵²⁶ While this insurance initially covered only losses not covered by other insurance (*e.g.*, by renter’s or homeowners policies), Airbnb subsequently expanded it to provide primary coverage for all losses.⁵²⁷ Although insurance companies were initially unwilling to provide coverage since there was not enough data for them to rate the risks, they ultimately offered coverage when Airbnb was able to provide sufficient data.⁵²⁸ In sum, one commenter reported that “the market has been quick to create solutions to liability concerns such as third-party insurance products uniquely geared toward protecting travelers, owners, hosts and operators.”⁵²⁹

⁵¹⁹ *Id.* at 130 (Ashwini Chhabra); Lyft Comment Attachment at 7-8.

⁵²⁰ Workshop Tr. at 124, 130-31 (Ashwini Chhabra).

⁵²¹ *Id.* at 130.

⁵²² Property Casualty Insurers Ass’n of Am. Comment at 2.

⁵²³ *Id.* at 1.

⁵²⁴ Workshop Tr. at 95 (Catherine J.K. Sandoval).

⁵²⁵ *Id.* at 133 (David Hantman); *The \$1,000,000 Host Guarantee*, AIRBNB, <https://www.airbnb.com/guarantee>.

⁵²⁶ Airbnb Comment at 4; *Host Protection Insurance*, AIRBNB, <https://www.airbnb.com/host-protection-insurance>.

⁵²⁷ Steven Musil, *Airbnb Beefs Up Liability Insurance Offering for Hosts*, CNET (Oct. 22, 2015, 12:00 AM), <http://www.cnet.com/news/airbnb-beefs-up-liability-insurance-offering-for-hosts/>.

⁵²⁸ Workshop Tr. at 133 (David Hantman).

⁵²⁹ The Travel Tech. Ass’n Comment at 4.

B. Taxation

A major concern of state and local governments is whether they are receiving payments of applicable taxes from sharing economy providers.⁵³⁰ The main motivation for becoming a platform supplier, or entering any business or occupation, is to earn an income, which is generally subject to state and federal income taxes. The Workshop did not address income taxes,⁵³¹ but instead addressed the collection of sector-specific taxes, particularly the “hotel occupancy” tax (or taxes⁵³²) applied to short-term rentals by hotels or bed-and-breakfasts.⁵³³ Workshop participants touched on topics such as whether these taxes are applicable to hosts, the extent to which hosts pay the taxes, and the extent to which platforms can and do play a role in collecting taxes on the transactions they process.

Traditional lodging providers reported that they are required to pay hotel taxes and contended that Airbnb hosts largely fail to pay them.⁵³⁴ They argued that platforms like Airbnb have an obligation to “ensure that taxes are paid,” particularly if the platform handles the rental payment.⁵³⁵ They pointed out that failure to pay applicable taxes harms cities by depriving them of revenue, and places traditional suppliers at an unfair competitive disadvantage.⁵³⁶

⁵³⁰ NAT’L LEAGUE OF CITIES, CENTER FOR CITY SOLUTIONS AND APPLIED RESEARCH, CITIES, THE SHARING ECONOMY AND WHAT’S NEXT 11 (2015), <http://www.nlc.org/Documents/Find%20City%20Solutions/City-Solutions-and-Applied-Research/Report%20-%20%20Cities%20the%20Sharing%20Economy%20and%20Whats%20Next%20final.pdf> (“As the sharing economy continues to grow, cities have become concerned with the potential loss of revenue that would normally come from taxes on traditional services such as hotels and taxis.”).

⁵³¹ The IRS launched a web site designed to help taxpayers participating in the sharing economy in August 2016. *See* Press Release, Internal Revenue Serv., IRS Launches New Sharing Economy Resource Center on IRS.gov, Provides Tips for Emerging Business Area (Aug. 22, 2016), <https://www.irs.gov/uac/irs-launches-new-sharing-economy-resource-center-on-irs.gov>. Some platforms report that they supply participants with Form 1099, for reporting miscellaneous income to the IRS. *See, e.g.*, Workshop Tr. at 135 (David Hantman). *But cf.* CAROLINE BRUCKNER, KOGOD TAX POL’Y CTR., AM. UNIV., SHORTCHANGED: THE TAX COMPLIANCE CHALLENGES OF SMALL BUSINESS OPERATORS DRIVING THE ON-DEMAND PLATFORM ECONOMY 17 (2016), <http://www.american.edu/kogod/news/upload/shortchanged-caroline-bruckner-kogod-au.pdf> (estimating that 2.5 million U.S. taxpayers participate in the sharing economy, and reporting that over 60% of survey respondents working for a sharing economy platform did not receive a Form 1099-K or Form 1099-MISC from their platform in 2015).

⁵³² Some jurisdictions may impose a variety of taxes – one panelist reported that New York City might have a number of separate taxes that could apply to hotels depending on the circumstances. Workshop Tr. at 135 (David Hantman) (“In New York, I think it’s between four and six taxes . . .”).

⁵³³ One panelist pointed out that taxi operators may also be required to pay sales tax or specific levies on taxi service, which TNC drivers may not be paying. Workshop Tr. at 139 (Matthew Daus).

⁵³⁴ *See, e.g.*, Hotel Ass’n of N.Y.C. First Comment at 1 (“If these virtual hotels pay any transient hotel related taxes at all, they do not pay the same taxes paid by hotels”); Hudson Area Lodging Comment at 1 (“Operating anonymously allow[s] AirBNB [sic] ‘Hosts’ to avoid all tax ramifications in most instances.”). *See also* U.S. Dept. of Commerce Issue Brief, *supra* note 13, at 16 (describing the controversy over tax payments by hosts).

⁵³⁵ Workshop Tr. at 115 (Vanessa Sindors); *see also* Am. Hotel & Lodging Ass’n Comment at 1; Pa. Ass’n of Bed & Breakfast Inns Comment at 1 (“[A]ny websites that are accepting reservations and revenue from travelers for the short-term rentals should be collecting and turning in this [tax] revenue.”); Prof’l Ass’n of Innkeepers Int’l Comment Attachment at 1 (“if online intermediaries are collecting room revenue from travelers on behalf of the property owners or managers, they should collect and dispense the proper taxes”).

⁵³⁶ *See, e.g.*, Fla. Bed & Breakfast Inns Comment at 2 (“States and local municipalities are also losing out economically when Sales Tax is not collected . . .”).

Airbnb argued that it can be unclear whether hotel taxes would be owed by a host occasionally renting his property, but maintained that if cities think taxes are owed, “we want to help collect and remit” them.⁵³⁷ Airbnb states that it collects taxes where it “has made agreements with governments to collect and remit local taxes on behalf of hosts,”⁵³⁸ and has done so with various cities, such as Portland (Oregon), San Francisco, and San Jose.⁵³⁹ Airbnb’s representative claimed that the company has repeatedly sought legislation enabling it to collect and transmit hotel taxes on behalf of hosts in New York City, but that these efforts failed due to hotel industry opposition.⁵⁴⁰

Hotel industry participants agreed that hosts were paying taxes in some jurisdictions, but emphasized that taxes should be paid in all jurisdictions.⁵⁴¹ Several hotel industry commenters specifically contradicted Airbnb’s repeated claim that it has tried to obtain legislation to enable it to collect taxes only to be thwarted by hotel lobbyists, arguing that Airbnb offers to collect taxes only if the municipality agrees to change its regulations to ease restrictions on short-term rentals. One stated that Airbnb has “never made an unconditional offer to pay any lodging related taxes. Rather it seeks legislation that would alter New York’s zoning and real estate laws before making any such payments.”⁵⁴² Another commenter noted that agreements Airbnb has reached with Portland and San Francisco to collect hotel taxes from hosts included commitments by the cities to relax regulations that impinge on the ability of hosts to rent out their properties on a short-term basis.⁵⁴³

C. Zoning and Preservation of Residential Neighborhoods

Municipalities often adopt restrictions on the short-term leasing of units in residential neighborhoods as a means of promoting the quality of residential neighborhoods.⁵⁴⁴ One type of restriction sets a minimum term for leases of residential units, such as 30 days (with possible exceptions,

⁵³⁷ Workshop Tr. at 135 (David Hantman) (“We don’t always think that the tax is owed, because someone doing this a week a year is not a hotel.”).

⁵³⁸ *How Does Occupancy Tax Collection and Remittance by Airbnb Work?*, AIRBNB, <https://www.airbnb.com/help/article/1036/how-does-occupancy-tax-collection-and-remittance-by-airbnb-work>.

⁵³⁹ Workshop Tr. at 135 (David Hantman). Airbnb publishes online a list of jurisdictions in which it collects taxes. *See In What Areas is Occupancy Tax Collection and Remittance by Airbnb Available?*, AIRBNB, <https://www.airbnb.com/help/article/653/in-what-areas-is-occupancy-tax-collection-and-remittance-by-airbnb-available>.

⁵⁴⁰ Workshop Tr. (David Hantman) at 135-36. *See also id.* at 137 (“you are actually choosing not to let us collect and remit tax in New York”); *id.* at 119 (“Look, in New York, for three years, the hotel industry, the lobbyists said, it’s not fair because they’re not paying taxes So we said, fine, we’ll pay taxes. And they said, don’t let them pay taxes.”).

⁵⁴¹ *See, e.g.*, Workshop Tr. at 136 (Vanessa Sindors).

⁵⁴² Am. Hotel & Lodging Ass’n Comment at 1; *see also* Hotel Ass’n of N.Y.C. Second Comment at 3 (“Airbnb is not trying to pay taxes; rather, it is trying to get the legislature to legalize its extensive illegal operations in New York in exchange for its payment of some of the taxes that hotels are subject to.”) (citing news articles).

⁵⁴³ Samaan, *supra* note 468, at 30-33.

⁵⁴⁴ *See id.* at 21 (“Zoning codes fulfill this purpose by maintaining a separation between major land use categories (residential, agricultural, industrial, commercial) and by allowing only specified types of use in each major category.”). For example, the purpose of New York State’s restriction on short-term leasing has been described as “protect[ing] guests, ensur[ing] the proper fire and safety codes, protect[ing] permanent residents who ‘must endure the inconvenience of hotel occupancy in their buildings,’” and “preserv[ing] the supply of affordable permanent housing.” NYAG REPORT, *supra* note 466, at 18 (quoting New York State Assembly Memorandum in Support of Legislation, A10008, 233rd Leg. (N.Y. 2010)).

for example, if the lessor is the primary resident and is present during the stay).⁵⁴⁵ Where they exist, such provisions could substantially inhibit the leasing of residences on Airbnb, for example, by precluding hosts from engaging in short-term rentals of their primary residences (if they are not present) or from turning a residential unit into a full-time short-term rental unit.⁵⁴⁶ These restrictions generally do not apply to hotels, which are devoted solely to short-term rentals and typically built in non-residential areas.⁵⁴⁷

Airbnb expressed concern regarding the attempted enforcement of these zoning laws and other restrictions, which it described as having been in place for many years, “but only now are governments trying to figure out whether to apply them to roomers and boarders who are there for a week.”⁵⁴⁸ Airbnb’s representative argued that such regulations should not apply to hosts that provide lodging only “once in a while,”⁵⁴⁹ and found the dispute “frustrating” because he believed that there was basic agreement on this point.⁵⁵⁰ One commenter described Airbnb’s position as maintaining that these restrictions on residential leasing are “outdated” and “ill-suited to regulate the new, tech-driven ‘sharing economy.’”⁵⁵¹

In contrast, several Workshop participants argued that restrictions on short-term rentals were necessary to prevent harmful effects from short-term leasing in residential neighborhoods. Several commenters pointed to the adverse impact such rentals can have on the quality of life of neighbors, particularly in apartment buildings, due to increased noise, parties, and comings and goings by strangers.⁵⁵² Some have argued that such problems can be addressed by giving condominium boards or

⁵⁴⁵ For example, the New York State Multiple Dwelling Law prohibits “rent[ing] out an apartment in a ‘Class A’ multiple dwelling for less than 30 days, unless a ‘permanent resident’ is present during the rental period.” NYAG REPORT, *supra* note 466, at 18. *See also* Hotel Ass’n of N.Y.C. First Comment at 4-5. For an account of the debate over such restrictions in New York State, *see* SUNDARARAJAN, *supra* note 12, at 131-35. Santa Monica, on the other hand, passed legislation allowing rentals, but required the resident to obtain a license, pay a tax, and remain in the unit during the rental. Workshop Tr. at 137 (Vanessa Sindors).

⁵⁴⁶ *See* Deanna Ting, *Measuring the Impact of New York’s New Short-Term Rental Law on Airbnb*, SKIFT (Jul. 18, 2016, 6:45 AM), <https://skift.com/2016/07/18/measuring-the-impact-of-new-yorks-new-short-term-rental-law-on-airbnb/> (“New York’s short-term rental laws, which were last updated in 2010, basically prohibit most apartments (buildings with three or more units) in New York City from being rented out for less than 30 days.”); *see also* Hotel Ass’n of N.Y.C. First Comment at 5 (“These rentals of apartments by tourists for short-term stays are illegal, *regardless of where they occur in the City*, because . . . apartment buildings cannot be used for transient purposes.”). New York legislators enacted legislation to enhance enforcement of such restrictions by imposing heavy fines on hosts using Airbnb to rent a whole apartment for fewer than 30 days, and Airbnb responded with a lawsuit. Katie Benner, *Airbnb Sues Over New Law Regulating New York Rentals*, N.Y. TIMES (Oct. 21, 2016), http://www.nytimes.com/2016/10/22/technology/new-york-passes-law-airbnb.html?_r=0.

⁵⁴⁷ *See* Workshop Tr. at 136-37 (Vanessa Sindors).

⁵⁴⁸ *Id.* at 133-35 (David Hantman). One commenter argued that a Santa Monica ordinance restricting short-term rentals and home sharing violated the Takings Clause of the Constitution, the Sherman Act, and the Robinson-Patman Act, and suggested that Federal investigations and legislation may be necessary. *See* Sylvester Comment.

⁵⁴⁹ Workshop Tr. at 134 (David Hantman).

⁵⁵⁰ *Id.* at 137.

⁵⁵¹ Samaan, *supra* note 468, at 13.

⁵⁵² *See, e.g.*, New York State Senator Krueger Comment at 3 (“Neighborhoods also face serious quality of life and safety problems, ranging from overcrowded buildings and noise disturbances to the more serious burglaries and assaults by strangers who may never have gained access to the building were it not for the illegal hotel activity.”); Unger, *supra* note 464, at 8 (“Cities have traditionally protected neighbors and the traveling public by regulating short-term rentals” to protect

homeowners associations sufficient authority to address those issues.⁵⁵³ Different buildings could adopt “Airbnb-friendly” or “Airbnb-free” policies, enabling renters or buyers to choose residences based on their preferences.⁵⁵⁴

A second concern, expressed in a number of comments, was that Airbnb may be “incentivizing the large-scale conversion of residential units into tourist accommodations,” reducing the stock of affordable residential housing in cities.⁵⁵⁵ Other commenters described the resulting impact on affordable housing, with one explaining that Airbnb rentals reduce the stock of long-term rental housing.⁵⁵⁶ One state senator from New York City declared that “[t]he growth of illegal hotels is rapidly becoming one of the biggest obstacles in the struggle to protect and expand New York City’s stock of affordable housing,” and attached numerous public statements of other individuals and groups expressing similar concerns.⁵⁵⁷

Airbnb’s representative denied that Airbnb had any “significant impact” on the availability of affordable housing, explaining that “a lot of market forces are at work”⁵⁵⁸ and noting that Airbnb’s “commissioned studies” confirmed this view.⁵⁵⁹ He also argued that hosting may enable a resident to earn money to meet monthly rent or mortgage payments, and “by definition . . . that’s actually good for affordability.”⁵⁶⁰ While this applies to hosting in one’s primary residence, some hotel industry participants argued that many Airbnb hosts use their units as short-term rentals rather than residences, which could decrease the supply of residential housing.⁵⁶¹

residents’ quality of life, guests safety, local revenue sources, and housing supply.); *see generally* Oversight: Short Term Rentals: Stimulating the Economy or Destabilizing Neighborhoods?: Hearing Before the N.Y.C. Council Comm. on Hous. & Bldgs. (Jan. 20, 2015), *attached to* New York State Senator Krueger Comment (compilation of hearing testimony) (including numerous statements regarding the detrimental impact of Airbnb short-term rentals on New York City neighborhoods). *See also* Shelly Kreiczler-Levy, *Consumption Property in the Sharing Economy*, 43 PEPP. L. REV. 61, 103 (2015) (“Frequent short-term rentals may influence the noise, cleanliness, and density of population, and a constant flow of strangers that come and go may affect the atmosphere of the neighborhood . . .”).

⁵⁵³ *See* Cohen & Sundararajan, *supra* note 327, at 130; *see generally* Barry A. Ross, *Short-Term Rentals and Community Associations*, ORANGE COUNTY LAW. (Jan. 2016), <http://www.rossrealestatelaw.com/images/Short-Term-Rentals.pdf>; *but cf.* Hotel Ass’n of N.Y.C. First Comment at 6 (alleging that Airbnb solicits listing and promotes rentals with the knowledge that the resulting rental breaches “no sublet” clauses common in New York City).

⁵⁵⁴ Cohen & Sundararajan, *supra* note 327, at 131; *see also* John J. Horton, *The Tragedy of Your Upstairs Neighbors: Is the Airbnb Negative Externality Internalized?* (Dec. 16, 2015) (unpublished manuscript), <http://john-joseph-horton.com/papers/airbnb.pdf>.

⁵⁵⁵ Samaan, *supra* note 468, at 2.

⁵⁵⁶ Unger, *supra* note 464, at 8; Hudson Area Lodging Comment at 2 (“Hudson’s residents are facing a lack of affordable housing due to the new profit potential of real estate [that] websites like Airbnb ha[ve] created.”).

⁵⁵⁷ New York State Senator Krueger Comment at 1-2; *see also* Oversight: Short Term Rentals: Stimulating the Economy or Destabilizing Neighborhoods?, *supra* note 552.

⁵⁵⁸ Workshop Tr. at 138 (David Hantman).

⁵⁵⁹ *Id.* Mr. Hantman added that Airbnb’s founders are very concerned about affordability because they started their business by renting room in their apartment in order to pay their rent. *Id.*

⁵⁶⁰ *Id.* at 138-39.

⁵⁶¹ *See supra* notes 462-465.

As noted above, Airbnb has negotiated arrangements with some cities that include some easing of restrictions affecting short-term rental of residential units, together with some other provisions such as registration of hosts and collection of taxes.⁵⁶² However, one commenter stated that in some cities, there is little evidence that hosts have complied with registration or licensing requirements, and that such failures could complicate efforts to enforce other regulatory provisions.⁵⁶³ One such city, San Francisco, has recently sought to strengthen its registration requirement by fining the company \$1,000 a day for every unregistered host on its service, with officials explaining that only 20% of hosts had registered and Airbnb had refused to take action against the others.⁵⁶⁴

D. Service to the Disabled or Disadvantaged

Federal law and local regulations set standards for providing taxi service to people with disabilities, such as those passengers needing wheelchairs.⁵⁶⁵ Some commenters stated that Uber does not meet these standards, and claims it is not subject to them.⁵⁶⁶ However, one former taxi regulator explained that access for people with disabilities was “not just an Uber issue,” but one for taxis as well.⁵⁶⁷ Uber’s representative agreed, and reported that Uber has pilot programs in several cities to provide wheelchair accessible services.⁵⁶⁸ PUC Commissioner Sandoval explained that the California PUC addressed the problem by requiring that TNCs meet disability access standards and non-discrimination provisions.⁵⁶⁹

Taxis also are generally obligated to serve all areas of a city in which they operate,⁵⁷⁰ and commenters argued that such service obligations should be imposed equally on TNCs.⁵⁷¹ In response, Uber’s representative pointed to newly adopted state and local legislation that, among other things,

⁵⁶² Samaan, *supra* note 468, at 30. See also *In What Areas is Occupancy Tax Collection and Remittance by Airbnb Available?*, *supra* note 539. Other commenters claimed that Airbnb could promote enforcement of permitting or licensing requirements by having hosts indicate compliance by entering in permit or license numbers. See Fla. Bed & Breakfast Inns Comment at 3; Unger, *supra* note 464, at 9.

⁵⁶³ Samaan, *supra* note 468, at 30-35.

⁵⁶⁴ See Katie Benner, *Airbnb in Disputes with New York and San Francisco*, N.Y. TIMES (June 28, 2016), <http://www.nytimes.com/2016/06/29/technology/airbnb-sues-san-francisco-over-a-law-it-had-helped-pass.html>.

⁵⁶⁵ MATTHEW DAUS & JASMINE K. LE VEAUX, WINDELS MARX LANE & MITTENDORF, LLP, THE DISRUPTIVE TRANSPORTATION TECHNOLOGY MOVEMENT: A LITIGATION PRIMER & ROADMAP 37 (2014), *attached to* Windels Marx Lane & Mittendorf Comment. See also U.S. Dept. of Commerce Issue Brief, *supra* note 13, at 17-18.

⁵⁶⁶ See, e.g., Nat’l Employment Law Project Comment at 1-2; Partnership for Working Families Comment at 1.

⁵⁶⁷ Workshop Tr. at 139-40 (Matthew Daus).

⁵⁶⁸ See *id.* at 141 (Ashwini Chhabra). Mr. Chhabra also pointed out that the technology employed by Uber enables other groups of disabled people – the deaf and visually impaired – to obtain service more easily, by entering and receiving text or voice communications. *Id.*

⁵⁶⁹ *Id.* at 96-97 (Catherine J.K. Sandoval). However, one commenter noted that Uber had been fined for failing to provide data on accessibility of its vehicles as required by California authorities. Nat’l Employment Law Project Comment at 1-2.

⁵⁷⁰ Taxicab, Limousine & Paratransit Ass’n First Comment at 5 (“Most communities, for public safety and other reasons, want the public transportation service providers (taxicab/TNC/app) to ensure service is available 24-hours per day in all areas of the community.”); N.Y.C. Taxi & Limousine Comm’n Comment at 4 (“As a key component of New York City’s transportation infrastructure, it is vital that for-hire service be available for all passengers” and “in all parts of the city.”).

⁵⁷¹ See, e.g., Taxicab, Limousine & Paratransit Ass’n First Comment at 5.

prohibit TNCs from discriminating in the provision of service.⁵⁷² Moreover, he argued that TNC drivers do a better job than taxis in “serving underserved areas,” since the driver receives a request and accepts a fare without knowing the destination (although the driver necessarily knows the point of pickup).⁵⁷³

Hotel commenters stated that, unlike hotels, Airbnb and its hosts “operate outside” laws ensuring access for the disabled,⁵⁷⁴ and “create a massive market of transient trade that does not have to, and does not, obey the policy of th[ose] law[s].”⁵⁷⁵ Panelists at the Workshop, however, did not focus on this issue in their discussions.

V. Conclusion

This Chapter addresses the issues the sharing economy poses for regulators in the for-hire transportation and short-term lodging sectors and confirms the central importance of consumer protection and safety in these sectors. It demonstrates the difficulties these issues pose and the need for reliable data to address them. In addition, several participants suggested that platforms and suppliers may lack incentives to provide mechanisms or intervene to minimize potential negative externalities resulting from sharing economy operations. Traditional taxi interests argue that the same regulations and restrictions applied to taxi companies and drivers should apply to TNCs and TNC drivers.

TNCs have indicated a willingness to accept regulations covering some of the same basic concerns that underlie regulation of traditional taxis and relate to common functions they serve. However, they point to the need to tailor regulations taking into account the additional features platforms offer and the particular conditions surrounding their provision of services.

Airbnb argued that hosts are generally individual residents who allow a guest to stay in their homes once in a while and should not be subject to the same regulations imposed on professional hotels and bed-and-breakfasts. Hotel industry representatives claimed that many hosts are providing short-term lodging on a professional basis, raising safety concerns, interfering with residents in the quiet enjoyment of their homes, and undermining affordable housing policies. Regarding tax collection, participants agreed that when cities and states clearly intend taxes to apply to sharing economy transactions, hosts should pay them, but disputes remain regarding the adequacy of Airbnb’s efforts to facilitate payments.

⁵⁷² See Workshop Tr. at 103-04 (Ashwini Chhabra).

⁵⁷³ *Id.* at 147; Uber Comment at 3 (noting that Uber provides service “with no discrimination based on location”).

⁵⁷⁴ Hotel Ass’n of N.Y.C. First Comment at 1, 6-7 (They “operate outside the purview of the federal or state laws banning unlawful . . . discrimination against the disabled and their rights to transient lodging.”). See also Nat’l Employment Law Project Comment at 2 (Uber has claimed in court filings that it is not subject to the Americans with Disabilities Act.).

⁵⁷⁵ Hotel Ass’n of N.Y.C. First Comment at 7.

Appendix A: Public Comments Cited in the Report

The Federal Trade Commission issued a request for comments,¹ and received over 2,000 public comments (available on the website).² To assist readers of this report, below is an alphabetical list of the 45 comments that are cited in the report, with links to each of the comments and related attachments, if any.

Comment Name	Link to Comment
Airbnb Comment	Comment
Am. Hotel & Lodging Ass'n Comment	Comment
Application Developers All. Comment	Comment
CALinnovates Comment	Comment
Catalan Competition Auth. Comment	Comment Attachment
Comput. & Commc'ns Indus. Ass'n Comment	Comment
Consumer Elec. Ass'n Comment	Comment
Credit Union Nat'l Ass'n Comment	Comment
Fla. Bed & Breakfast Inns Comment	Comment
Free State Found. Comment	Comment
Future of Privacy Forum Comment	Comment
Ga. Credit Union Affiliates Comment	Comment
Hotel Ass'n of N.Y.C. First Comment	Comment
Hotel Ass'n of N.Y.C. Second Comment	Comment
Hudson Area Lodging Comment	Comment
Info. Tech. & Innovation Found. Comment	Comment
Internet Ass'n Comment	Comment
Intuit Comment	Comment
Jobs with Justice Comment	Comment
Koplow Comment	Comment
New York State Senator Krueger Comment	Comment Attachment 1 Attachment 2

¹ The request was contained in the April 17 Workshop Announcement. *See* Fed. Trade Comm'n, Workshop Announcement, The "Sharing" Economy: Issues Facing Platforms, Participants, and Regulators (Apr. 17, 2015), <https://www.ftc.gov/system/files/attachments/press-releases/ftc-examine-competition-consumer-protection-economic-issues-raised-sharing-economy-june-workshop/150416economyworkshop.pdf>. The Commission set deadlines of May 26, 2015 (for comments to be given consideration in preparation for the Workshop) and August 4, 2015 (for all other comments). *Id.* at 7. All names and affiliations were self-reported by the commenters.

² List of Public Comments regarding Sharing Economy Workshop, FED. TRADE COMM'N, <https://www.ftc.gov/policy/public-comments/initiative-607>.

Lyft Comment	Comment Attachment
Matchen Comment	Comment
Mercatus Ctr. Comment	Comment
Mothers Against Drunk Driving Comment	Comment
Nat'l Employment Law Project Comment	Comment
Nat'l Limousine Ass'n Comment	Comment
N.Y.C. Taxi & Limousine Comm'n Comment	Comment
Partnership for Working Families Comment	Comment
Pa. Ass'n of Bed & Breakfast Inns Comment	Comment
Prof'l Ass'n of Innkeepers Int'l Comment	Comment Attachment
Property Casualty Insurers Ass'n of Am. Comment	Comment
R Street Inst. Comment	Comment Attachment 1 Attachment 2
Raval Comment	Comment
Relay Rides Comment	Comment
Sybil Rosen Comment	Comment Attachment
Russo Comment	Comment Attachment
Sylvester Comment	Comment Attachment 1 Attachment 2
Taxicab, Limousine & Paratransit Ass'n First Comment	Comment
Taxicab, Limousine & Paratransit Ass'n Second Comment	Comment
TechFreedom & Int'l Ctr. for Law & Econ. Comment	Comment
TechNet Comment	Comment
Travel Tech. Ass'n Comment	Comment
Uber Comment	Comment
Unger First Comment	Comment Attachment
Van Alstyne Comment	Comment Attachment
Wallsten (Tech. Policy Inst.) Comment	Comment
Windels Marx Lane & Mittendorf Comment	Comment Attachment

Appendix B: Overview of the Public Comments

In announcing the Workshop, the Commission invited public comment on a variety of topics concerning the sharing economy.¹ In response, approximately 2,000 members of the public submitted comments to the Commission.² A large portion of these comments consisted of a few paragraphs written by individuals relating their experiences with sharing economy activity. Many were supplying services over platforms, predominantly as Airbnb hosts or TNC drivers. Others were customers receiving services over those platforms.

A substantial number of comments came from individuals who did not transact over sharing economy platforms, but engaged in livelihoods affected by economic activity over sharing economy platforms. Some of these were traditional suppliers who compete with sharing economy suppliers, such as taxi drivers and innkeepers. In addition, a substantial number of commenters were people affected by sharing economy activity, such as residents in neighborhoods impacted by short-term rentals by Airbnb hosts. Lastly, some comments came from those who did not have any clear connection with sharing economy activity.

The public comments expressed a wide variety of views, and no brief statistical summary can accurately reflect their breadth. Based on a review of all the comments, staff categorized the comments based on the type of commenter, views expressed regarding the sharing economy, and views expressed on regulation of the sharing economy.³ While this process could produce only approximate figures, following is a brief report of the results of that review.⁴

Overall, the comments were overwhelmingly positive regarding the sharing economy – about 90 percent of commenters made positive statements about the sharing economy. This included about 1,500 positive comments about Airbnb, about 250 positive comments about Uber, and over 150 positive comments about other sharing economy platforms (with some overlap due to mentions of multiple platforms).

¹ The Commission published the request for comments on April 17, 2015, with a due date of May 26, 2015 for comments to be considered for the June 2015 Workshop, and a final due date of August 4, 2015. Fed. Trade Comm'n, Workshop Announcement, The "Sharing" Economy: Issues Facing Platforms, Participants, and Regulators (Apr. 17, 2015), <https://www.ftc.gov/system/files/attachments/press-releases/ftc-examine-competition-consumer-protection-economic-issues-raised-sharing-economy-june-workshop/150416economyworkshop.pdf>.

² List of Public Comments regarding Sharing Economy Workshop, FED. TRADE COMM'N, <https://www.ftc.gov/policy/public-comments/initiative-607>.

³ These classifications were made based on limited information, and the results should therefore be viewed as approximate. In addition, staff made certain adjustments in the process, for example, combining multiple submissions from the same commenter.

⁴ The individuals whose comments were reviewed represent a small fraction of those participating in the sharing economy, including the approximately two million hosts registered on Airbnb, the approximately 162,000 drivers registered on Uber, and the many people who use these platforms to obtain accommodations and transportation services, as well as others affected by the sharing economy. *See supra* Introduction at text accompanying notes 33-35.

Many of the commenters briefly discussed their experiences participating in the sharing economy. Suppliers often emphasized the importance of the income they earned to their ability to meet basic financial obligations or pursue opportunities. In particular, a number of comments came from Airbnb hosts who described renting their residences, often staying with their guests, and the importance of the additional income this activity provided. Some suppliers expressed satisfaction in their ability to provide desired services, and appreciation of the flexible working arrangements that the sharing economy afforded. Consumers pointed to their ability to obtain services at reduced costs, particularly when renting short-term lodgings. Some also noted that the sharing economy offers greater convenience in obtaining service, for example, where taxicab service is poor.

Over 100 comments presented negative views of the sharing economy. Very few of these criticisms came from participants in sharing economy transactions. About 20 percent of these were submitted by platform suppliers who expressed dissatisfaction over issues such as the lack of defined worker rights or the operation of the rating system. Almost no customers expressed negative views regarding their sharing economy experiences.

The bulk of negative statements regarding the sharing economy were contained in comments submitted by those not directly involved in the sharing economy. Around ten percent of the commenters criticizing the sharing economy were competitors of sharing economy suppliers, such as bed-and-breakfasts competing with Airbnb hosts or taxis competing with TNC drivers. These competitors often voiced concerns regarding the failure of sharing economy suppliers to meet costly regulatory requirements. Approximately half of the negative statements about the sharing economy came from third parties who reported that sharing economy activity affected them adversely. One topic of concern mentioned by this group was the impact of Airbnb hosting on the availability of affordable housing and the preservation of safe, quiet residential neighborhoods. The remaining comments registering disapproval of sharing economy platforms were from members of the public who lacked a clear connection with the sharing economy activity.

Finally, around one-quarter of the approximately 2,000 commenters expressed some views on the general issue of regulation of the sharing economy. Of these, about two-thirds of these commenters argued against regulating the sharing economy, or favored the imposition of lighter regulations than those currently applicable. Around one-third of these comments argued in favor of greater regulation of the sharing economy, with some noting that this should include greater enforcement activity. Of those comments advocating more regulation, approximately one-third came from sharing economy suppliers, one-third came from third parties impacted by the sharing economy, and ten percent came from competitors. Very few came from consumers.

Appendix C: Workshop Agenda

The "Sharing" Economy: Issues Facing Platforms, Participants, and Regulators, June 9, 2015

8:30 AM – Welcome

- **William F. Adkinson, Jr.**, Attorney Advisor, Office of Policy Planning, Federal Trade Commission¹

8:45AM – Opening Presentation

- **Maureen Ohlhausen**, Commissioner, Federal Trade Commission
- Introduction by **Marina Lao**, Director, Office of Policy Planning, Federal Trade Commission

9:00 AM – Introduction to the Morning Panels: Framing Presentation

- **Liran Einav**, Professor, Department of Economics, Stanford University

9:15 AM – Panel 1: Sharing Economy Platforms: Market Design and Market Structure

Panel Participants:

- **Liran Einav**, Professor, Department of Economics, Stanford University
- **Chiara Farronato**, Assistant Professor of Business of Administration, Harvard Business School (Fall, 2015)
- **Joshua Gans**, Professor of Strategic Management, Rotman School of Management, University of Toronto
- **Glen Weyl**, Senior Researcher, Microsoft Research; on leave, Department of Economics, University of Chicago

Panel Moderator:

- **Nathan Wilson**, Economist, Bureau of Economics, Federal Trade Commission

11:00 AM – Panel 2: Mechanisms for Trust in the Sharing Economy

Panel Participants:

- **Chrysanthos Dellarocas**, Professor, Information Systems, School of Management, Boston University
- **Andrey Fradkin**, Postdoctoral Fellow, National Bureau of Economic Research
- **Ginger Jin**, Professor, Department of Economics, University of Maryland
- **Chris Nosko**, Assistant Professor of Marketing, Booth School of Business, University of Chicago
- **Steven Salter**, VP, Standards and Services, Council of Better Business Bureaus

Panel Moderators:

- **Andrew Stivers**, Deputy Director, Bureau of Economics, Federal Trade Commission
- **Cecelia Waldeck**, Attorney, Bureau of Competition, Federal Trade Commission

12:15 PM – Platform Power, Reputation, and Regulation: Policy Framing Presentation

¹ Positions and titles listed are those held by participants as of the date of the Workshop.

- **Arun Sundararajan**, Professor, Information, Operations and Management Sciences, Stern School of Business, New York University

12:30 PM – Lunch

1:35 PM – Keynote Presentation

- **Catherine J.K. Sandoval**, Commissioner, California Public Utilities Commission
- Introduction by **Marina Lao**, Director, Office of Policy Planning, Federal Trade Commission

2:00 PM – Panel 3: The Interplay between Competition, Consumer Protection, and Regulation: Business and Regulatory Views

Panel Participants:

- **Matthew Daus**, Partner, Windels, Marx, Lane & Mittendorf, LLP
- **David Hantman**, Head of Global Public Policy, Airbnb
- **Ashwini Chhabra**, Head of Policy Development, Uber Technologies
- **Brooks Rainwater**, Director, City Solutions and Applied Research Center, National League of Cities
- **Vanessa Sindors**, Senior Vice President and Head of Government Affairs, American Hotel and Lodging Association

Panel Moderators:

- **Julie Goshorn**, Attorney, Office of Policy and Coordination, Bureau of Competition, Federal Trade Commission
- **William F. Adkinson, Jr.**, Attorney Advisor, Office of Policy Planning, Federal Trade Commission

3:45 PM – Panel 4: The Interplay between Competition, Consumer Protection, and Regulation: Policy Perspectives

Panel Participants:

- **Lee Peeler**, President and CEO, Advertising Self-Regulatory Council, Executive Vice President, National Advertising Self-Regulation, Council of Better Business Bureaus
- **Sofia Ranchordás**, Resident Fellow, Information Society Project, Yale Law School; Assistant Professor, Administrative Law, Tilburg University
- **Maurice Stucke**, Associate Professor, University of Tennessee College of Law
- **Arun Sundararajan**, Professor, Information, Operations and Management Sciences, Stern School of Business, New York University
- **Adam Thierer**, Senior Research Fellow, Mercatus Center, George Mason University

Panel Moderators:

- **Marina Lao**, Director, Office of Policy Planning, Federal Trade Commission
- **Megan Cox**, Attorney, Division of Privacy and Identity Protection, Bureau of Consumer Protection, Federal Trade Commission

5:15 PM – Closing

- **Julie Goshorn**, Attorney, Office of Policy and Coordination, Bureau of Competition, Federal Trade Commission



Antitrust Guidelines for the Licensing of Intellectual Property

Issued by the
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1 Intellectual Property Protection and the Antitrust Laws

1.0 These Guidelines state the antitrust enforcement policy of the U.S. Department of Justice and the Federal Trade Commission (individually, “the Agency,” and collectively, “the Agencies”) with respect to the licensing of intellectual property protected by patent, copyright, and trade secret law, and of know-how.¹ By stating their general policy, the Agencies hope to assist those who need to predict whether the Agencies will challenge a practice as anticompetitive. However, these Guidelines cannot remove judgment and discretion in antitrust law enforcement. The Agencies will evaluate each case in light of its own facts and apply these Guidelines reasonably and flexibly.²

In the United States, patents confer rights to exclude others from making, using, or selling in the United States the invention claimed by the patent for a set period of time.³ To gain patent protection, an invention (which may be a product, process, machine, or composition of matter) must be novel,⁴ nonobvious,⁵ useful,⁶ and sufficiently disclosed.⁷ Copyright protection applies to original works of authorship fixed in a tangible medium of expression.⁸ Copyright protection applies only to the expression, not the underlying ideas.⁹ Unlike a patent, which protects an invention not only from copying but also from subsequent independent creation by others, a

¹ These Guidelines replace the “Antitrust Guidelines for the Licensing of Intellectual Property” issued on April 6, 1995, by the U.S. Department of Justice and the Federal Trade Commission. They do not cover the antitrust treatment of trademarks. Although the same general antitrust principles that apply to other forms of intellectual property apply to trademarks as well, these Guidelines deal with technology transfer and innovation-related issues that typically arise with respect to patents, copyrights, trade secrets, and know-how agreements, rather than with product-differentiation issues that typically arise with respect to trademarks.

² As is the case with all guidelines, users should rely on qualified counsel to assist them in evaluating the antitrust risk associated with any contemplated transaction or activity. No set of guidelines can possibly indicate how the Agencies will assess the particular facts of every case. Parties who wish to know the Agencies’ specific enforcement intentions with respect to any particular transaction in which they are involved should consider seeking a Department of Justice business review letter pursuant to 28 C.F.R. § 50.6 or a Federal Trade Commission Advisory Opinion pursuant to 16 C.F.R. §§ 1.1-1.4.

³ See, e.g., 35 U.S.C. § 154(a)(2), (c)(1) (2012); *id.* § 173.

⁴ See *id.* § 102.

⁵ See *id.* § 103.

⁶ See *id.* § 101.

⁷ See *id.* § 112.

⁸ See 17 U.S.C. § 102 (2012). Copyright protection lasts for a set period of time. See *id.* § 302(a), (c). The principles stated in these Guidelines also apply to protection of mask works fixed in a semiconductor chip product (*see id.* §§ 901-914), which is analogous to copyright protection for works of authorship.

⁹ See *id.* § 102(b). Copyright protection extends to literary works, musical works, dramatic works, pantomimes and choreographic works, pictorial, graphic and sculptural works, motion pictures and other audiovisual works, sound recordings, and architectural works. *Id.* § 102(a).

copyright does not preclude others from independently creating similar expression. Trade secret protection applies to information whose economic value depends on its not being generally known.¹⁰ Trade secret protection is conditioned upon efforts to maintain secrecy and has no fixed term. As with copyright protection, trade secret protection does not preclude independent creation by others.

The intellectual property laws and the antitrust laws share the common purpose of promoting innovation and enhancing consumer welfare.¹¹ The intellectual property laws provide incentives for innovation and its dissemination and commercialization by establishing enforceable property rights for the creators of new and useful products, more efficient processes, and original works of expression. In the absence of intellectual property rights, imitators could more rapidly exploit the efforts of innovators and investors without providing compensation. Rapid imitation would reduce the commercial value of innovation and erode incentives to invest, ultimately to the detriment of consumers. The antitrust laws promote innovation and consumer welfare by prohibiting certain actions that may harm competition with respect to either existing or new ways of serving consumers.

2 General Principles

2.0 These Guidelines embody three general principles: (a) for the purpose of antitrust analysis, the Agencies apply the same analysis to conduct involving intellectual property as to conduct involving other forms of property, taking into account the specific characteristics of a particular property right; (b) the Agencies do not presume that intellectual property creates market power in the antitrust context; and (c) the Agencies recognize that intellectual property licensing allows firms to combine complementary factors of production and is generally procompetitive.

¹⁰ Federal law creates a private cause of action for the misappropriation of trade secrets. Defend Trade Secrets Act of 2016, Pub. L. No. 114-153, § 2(a), 130 Stat. 376, 376-80 (codified at 18 U.S.C. § 1836(b)). Trade secret protection also derives from state law. *See generally* *Kewanee Oil Co. v. Bicron Corp.*, 416 U.S. 470 (1974); *see also* Defend Trade Secrets Act § 2(f) (“Nothing in the amendments made by this section shall be construed . . . to preempt any other provision of law.”).

¹¹ “[T]he aims and objectives of patent and antitrust laws may seem, at first glance, wholly at odds. However, the two bodies of law are actually complementary, as both are aimed at encouraging innovation, industry and competition.” *Atari Games Corp. v. Nintendo of Am., Inc.*, 897 F.2d 1572, 1576 (Fed. Cir. 1990); *see also* *Intergraph Corp. v. Intel Corp.*, 195 F.3d 1346, 1362 (Fed. Cir. 1999) (“The patent and antitrust laws are complementary, the patent system serving to encourage invention and the bringing of new products to market by adjusting investment-based risk, and the antitrust laws serving to foster industrial competition.”).

2.1 Standard Antitrust Analysis Applies to Intellectual Property

The Agencies apply the same general antitrust principles to conduct involving intellectual property that they apply to conduct involving any other form of property. That is not to say that intellectual property is in all respects the same as any other form of property. Intellectual property has important characteristics, such as ease of misappropriation, that distinguish it from many other forms of property. These characteristics can be taken into account by standard antitrust analysis, however, and do not require the application of fundamentally different principles.¹²

Although there are clear and important differences in the purpose, extent, and duration of protection provided under the intellectual property regimes of patent, copyright, and trade secret, the governing antitrust principles are the same. Antitrust analysis takes differences among these forms of intellectual property into account in evaluating the specific market circumstances in which transactions occur, just as it does with other particular market circumstances.

Intellectual property law bestows on the owners of intellectual property certain rights to exclude others. These rights help the owners to profit from the use of their property. An intellectual property owner's rights to exclude are similar to the rights enjoyed by owners of other forms of private property. The antitrust laws generally do not impose liability upon a firm for a unilateral refusal to assist its competitors, in part because doing so may undermine incentives for investment and innovation.¹³ As with other forms of private property, certain types of conduct with respect to intellectual property may have anticompetitive effects against which the antitrust laws can and do protect. The exercise of intellectual property rights is thus neither particularly free from scrutiny under the antitrust laws, nor particularly suspect under them.

¹² As with other forms of property, the power to exclude others from the use of intellectual property may vary substantially, depending on the nature of the property and its status under federal or state law. The greater or lesser legal power of an owner to exclude others is also taken into account by standard antitrust analysis, as explained in this section of the Guidelines.

¹³ *Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 407-08 (2004); *United States v. Colgate & Co.*, 250 U.S. 300, 307 (1919); U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N, ANTITRUST ENFORCEMENT AND INTELLECTUAL PROPERTY RIGHTS: PROMOTING INNOVATION AND COMPETITION 27-28 (2007), <https://www.justice.gov/sites/default/files/atr/legacy/2007/07/11/222655.pdf> [hereinafter 2007 ANTITRUST-IP REPORT].

The Agencies recognize that the licensing of intellectual property is often global. Consideration of whether the U.S. antitrust laws apply to such intellectual property-related conduct and whether international comity or the involvement of a foreign government counsels against investigation or enforcement may be necessary.¹⁴ When the Agencies determine that a sufficient nexus to the United States exists to apply the antitrust laws and that considerations of international comity and foreign government involvement do not preclude investigation or enforcement, the principles of antitrust analysis described in these Guidelines apply equally to all licensing arrangements.

2.2 Intellectual Property and Market Power

Market power is the ability profitably to maintain prices above, or output below, competitive levels for a significant period of time.¹⁵ The Agencies will not presume that a patent, copyright, or trade secret necessarily confers market power upon its owner. Although the intellectual property right confers the power to exclude with respect to the specific product, process, or work in question, there will often be sufficient actual or potential close substitutes for such product, process, or work to prevent the exercise of market power.¹⁶ If an intellectual property right does confer market power, that market power does not by itself offend the antitrust laws. As with any other asset that enables its owner to obtain significant supracompetitive profits, market power (or even a monopoly) that is solely “a consequence of a superior product, business acumen, or historic accident” does not violate the antitrust laws.¹⁷ Nor does such market power impose on the intellectual property owner an obligation to license the use of that property to others. As in other antitrust contexts, however, an intellectual property owner could illegally acquire or maintain market power. Furthermore, even if it lawfully acquired or

¹⁴ For further guidance on these considerations, see the Department of Justice and Federal Trade Commission Antitrust Guidelines for International Enforcement and Cooperation (2017).

¹⁵ Market power can be exercised in other economic dimensions, such as quality, service, and the development of new or improved goods and processes. It is assumed in this definition that all competitive dimensions are held constant except the ones in which market power is being exercised; that a seller is able to charge higher prices for a higher-quality product does not alone indicate market power. The definition in the text is stated in terms of a seller with market power. A buyer could also exercise market power (e.g., by maintaining the price below the competitive level, thereby depressing output).

¹⁶ *Ill. Tool Works Inc. v. Indep. Ink, Inc.*, 547 U.S. 28, 45-46 (2006) (“Congress, the antitrust enforcement agencies, and most economists have all reached the conclusion that a patent does not necessarily confer market power upon the patentee. Today, we reach the same conclusion.”); see also *Mediacom Commc’ns Corp. v. Sinclair Broad. Grp.*, 460 F. Supp. 2d 1012, 1027-28 (S.D. Iowa 2006) (applying *Independent Ink* to copyright).

¹⁷ *United States v. Grinnell Corp.*, 384 U.S. 563, 570-71 (1966); see also *United States v. Aluminum Co. of Am.*, 148 F.2d 416, 430 (2d Cir. 1945) (holding that the Sherman Act is not violated by the attainment of market power solely through “superior skill, foresight and industry”).

maintained that power, the owner could still engage in anticompetitive conduct in connection with such property.

2.3 Procompetitive Benefits of Licensing

Intellectual property typically is one component among many in a production process and derives value from its combination with complementary factors. Complementary factors of production include manufacturing and distribution facilities, workforces, and other items of intellectual property. The owner of intellectual property has to arrange for its combination with other necessary factors to realize its commercial value. Often, the owner finds it most efficient to contract with others for these factors, to sell rights to the intellectual property, or to enter into a joint venture arrangement for the development of the intellectual property, rather than supplying these complementary factors itself.

Licensing, cross-licensing, or otherwise transferring intellectual property (hereinafter “licensing”) can facilitate integration of the licensed property with complementary factors of production. This integration can lead to more efficient exploitation of the intellectual property, benefiting consumers through the reduction of costs and the introduction of new products. Such arrangements increase the value of intellectual property to consumers and owners. Licensing can allow an innovator to capture returns from its investment in making and developing an invention through royalty payments from those that practice its invention, thus providing an incentive to invest in innovative efforts.¹⁸

Sometimes the use of one item of intellectual property requires access to another. An item of intellectual property “blocks” another when the second cannot be practiced without using the first. For example, a patent on a machine may block an improved version of that machine. Licensing may promote the development of such technologies that are otherwise in a blocking relationship.

Field-of-use, territorial, and other limitations on intellectual property licenses may serve procompetitive ends by allowing the licensor to exploit its property as efficiently and effectively as possible. These various forms of exclusivity can be used to give a licensee an incentive to invest in the commercialization and distribution of products embodying the licensed intellectual

¹⁸ FED. TRADE COMM’N, THE EVOLVING IP MARKETPLACE: ALIGNING PATENT NOTICE AND REMEDIES WITH COMPETITION 40 (2011), <https://www.ftc.gov/reports/evolving-ip-marketplace-aligning-patent-notice-remedies-competition>.

property and to develop additional applications for the licensed property. The restrictions may do so, for example, by protecting the licensee against free riding on the licensee's investments by other licensees or by the licensor. They may also increase the licensor's incentive to license, for example, by protecting the licensor from competition in the licensor's own technology in a market niche that it prefers to keep to itself. These benefits of licensing restrictions apply to patent, copyright, and trade secret licenses, and to know-how agreements.

Example 1¹⁹

Situation: ComputerCo develops a new, copyrighted software program for inventory management. The program has wide application in the health field. ComputerCo licenses the program in an arrangement that imposes both field of use and territorial limitations. Some of ComputerCo's licenses permit use only in hospitals; others permit use only in group medical practices. ComputerCo charges different royalties for the different uses. All of ComputerCo's licenses permit use only in specified portions of the United States and in specified foreign countries.²⁰ The licenses contain no provisions that would prevent or discourage licensees from developing, using, or selling any other program, or from competing in any other good or service other than in the use of the licensed program. None of the licensees is an actual or potential competitor of ComputerCo in the sale of inventory management programs.

Discussion: The licenses at issue appear to facilitate the combination of ComputerCo's copyrighted software with the licensee health care providers' complementary factors of production and may offer potential procompetitive benefits. The key competitive issue raised by the licensing arrangement is whether it includes any provisions that are likely to harm competition among entities that would have been actual or potential competitors in the absence of the arrangement. Such harm could occur if, for example, the licenses anticompetitively foreclose access to competing technologies (in this case, most likely competing computer programs), prevent licensees from developing their own competing technologies (again, in this case, most likely computer programs), or facilitate market allocation

¹⁹ The examples in these Guidelines are hypothetical and do not represent judgments about, or analysis of, any actual market circumstances of the named industries.

²⁰ These Guidelines do not address the possible application of the antitrust laws of other countries to restraints such as territorial restrictions in international licensing arrangements.

or price-fixing for any product or service supplied by the licensees.²¹ If the license agreements contained any such provision, the Agency evaluating the arrangement would analyze its likely competitive effects as described in parts 3-5 of these Guidelines.

In this hypothetical, there are no such provisions and thus the licensing arrangement does not appear likely to harm competition among entities that would have been actual or potential competitors if ComputerCo had chosen not to license the software program. The arrangement is merely a subdivision of the licensor's intellectual property among different fields of use and territories. The Agency therefore would be unlikely to object to this arrangement.²² The Agency's conclusion as to likely competitive effects could differ if, for example, the license barred licensees from using any other inventory management program.

3 Antitrust Concerns and Modes of Analysis

3.1 Nature of the Concerns

While intellectual property licensing arrangements are typically welfare-enhancing and procompetitive, antitrust concerns may nonetheless arise. For example, a licensing arrangement could include restraints that adversely affect competition in goods markets by dividing the markets among firms that would have competed using different technologies.²³ An arrangement that effectively merges the activities of two actual or potential competitors in research and development in the relevant field might harm competition for development of new goods and services.²⁴ An acquisition of intellectual property may lessen competition in a relevant antitrust market.²⁵ The Agencies will focus on the actual or likely effects of an arrangement, not on its formal terms.

The Agencies ordinarily will not require the owner of intellectual property to create competition in its own technology.²⁶ However, antitrust concerns may arise when a licensing arrangement

²¹ See section 3.1.

²² The antitrust analysis of the facts in this hypothetical would not differ, regardless of whether the technology was protected by patent, copyright, or trade secret.

²³ See, e.g., Example 6.

²⁴ See section 3.2.3.

²⁵ See section 5.7.

²⁶ Moreover, as noted in section 2.2 above, "market power [does not] impose on the intellectual property owner an obligation to license the use of that property to others." The Agencies may, however, impose licensing requirements to remedy anticompetitive harm or, in the case of a merger, to prevent the substantial lessening of

harms competition among entities that would have been actual or potential competitors²⁷ in a relevant market in the absence of the license (entities in a “horizontal relationship”). A restraint in a licensing arrangement may harm such competition, for example, if it facilitates market division or price-fixing. In addition, license restrictions with respect to one market may harm such competition in another market by anticompetitively foreclosing access to, or significantly raising the price of, an important input,²⁸ or by facilitating coordination to increase price or reduce output. When it appears that such competition may be adversely affected, the Agencies will follow the analysis set forth below.²⁹

3.2 Markets Affected by Licensing Arrangements

Licensing arrangements raise concerns under the antitrust laws if they are likely to affect adversely the prices, quantities, qualities, or varieties of goods and services³⁰ either currently or potentially available. If an arrangement appears likely to have anticompetitive effects, the Agencies normally will identify one or more relevant markets in which the effects are likely to occur. The Agencies will typically analyze the competitive effects of licensing arrangements within the relevant markets for the goods affected by the arrangements. In other cases, however, the Agencies may analyze the effects within a market for technology or a market for research and development.

3.2.1 Goods Markets

A number of different goods markets may be relevant to evaluating the effects of a licensing arrangement. A restraint in a licensing arrangement may have competitive effects in markets for

competition. Any licensing remedy assessment will be specific to the facts of the particular case at issue and tailored to address the competitive harm.

²⁷ In the context of intellectual property licensing, the type and extent of evidence needed to determine whether a firm is a potential competitor will vary with the circumstances. A firm will be treated as a potential competitor if the Agency finds that it is reasonably probable that the firm would have become a competitor in the absence of the licensing arrangement. In some contexts, however, the elimination of a would-be competitor is subject to condemnation by antitrust law even though the firm’s prospects may be uncertain. *See, e.g.,* FTC v. Actavis, Inc., 133 S. Ct. 2223, 2236 (2013) (holding that a large unexplained payment by a branded drug monopolist to a prospective generic drug manufacturer that “likely seeks to prevent the risk of competition . . . constitutes the relevant anticompetitive harm”); *United States v. Microsoft Corp.*, 253 F.3d 34, 79 (D.C. Cir. 2001) (en banc) (per curiam) (“[I]t would be inimical to the purpose of the Sherman Act to allow monopolists free reign to squash nascent, albeit unproven, competitors at will . . .”).

²⁸ As used herein, “input” includes outlets for distribution and sales, as well as factors of production. *See, e.g.,* sections 4.1.1 and 5.3-5.5 for further discussion of conditions under which foreclosing access to, or raising the price of, an input may harm competition in a relevant market.

²⁹ *See generally* sections 3.4; 4.2.

³⁰ Hereinafter, the term “goods” also includes services.

final or intermediate goods made using the intellectual property, or it may have effects upstream, in markets for goods that are used as inputs, along with the intellectual property, to the production of other goods. In general, for goods markets affected by a licensing arrangement, the Agencies will approach the delineation of relevant market and the measurement of market share as in sections 4 and 5 of the U.S. Department of Justice and Federal Trade Commission Horizontal Merger Guidelines.³¹

3.2.2 Technology Markets

Technology markets consist of the intellectual property that is licensed (the “licensed technology”) and its close substitutes—that is, the technologies or goods that are close enough substitutes to constrain significantly the exercise of market power with respect to the intellectual property that is licensed.³² When rights to intellectual property are marketed separately from the products in which they are used,³³ the Agencies may analyze the competitive effects of a licensing arrangement in a technology market.³⁴

Example 2

Situation: Firms Alpha and Beta independently develop different patented process technologies to manufacture the same off-patent drug for the treatment of a particular disease. Before the firms use their technologies internally or license them to third parties, they announce plans jointly to manufacture the drug, and to assign their manufacturing processes to the new manufacturing venture. Many firms are capable of using and have the incentive to use the

³¹ U.S. DEP’T OF JUSTICE & FED. TRADE COMM’N, HORIZONTAL MERGER GUIDELINES (2010), <https://www.justice.gov/atr/file/810276/download> [hereinafter 2010 Horizontal Merger Guidelines]. As stated in section 5.2 of the 2010 Horizontal Merger Guidelines, “in most contexts, the Agencies measure each firm’s market share based on its actual or projected revenues in the relevant market.” However, market shares may also be measured through unit sales, capacity, or reserves when these approaches are more reflective of the competitive significance of suppliers than revenues.

³² For example, the owner of a process for producing a particular good may be constrained in its conduct with respect to that process not only by other processes for making that good, but also by other goods that compete with the downstream good and by the processes used to produce those other goods.

³³ Intellectual property is often licensed, sold, or transferred as an integral part of a marketed good. An example is a patented product marketed with an implied license permitting its use. In such circumstances, there is no need for a separate analysis of technology markets to capture relevant competitive effects.

³⁴ Courts have defined technology markets in a number of cases. *See, e.g.,* Broadcom Corp. v. Qualcomm Inc., 501 F.3d 297, 315 (3d Cir. 2007); Apple Inc. v. Samsung Elecs. Co., No. 11-CV-01846, 2012 U.S. Dist. LEXIS 67102, at *19-23 (N.D. Cal. May 14, 2012); Hynix Semiconductor Inc. v. Rambus Inc., 2008-1 Trade Cas. (CCH) ¶ 76,047, 2008 WL 73689, at *2-8 (N.D. Cal. Jan. 5, 2008); *In re* Papst Licensing, GmbH Patent Litig., No. Civ.A.99-3118, 2000 WL 1145725, at *6-7 (E.D. La. Aug. 11, 2000).

licensed technologies to manufacture and distribute the drug; thus, the market for drug manufacturing and distribution is competitive.

Discussion: To evaluate the competitive effects and delineate a relevant market, the Agencies will identify a technology's close substitutes. The Agencies will, if the data permit, identify a group of technologies and goods over which a hypothetical monopolist of those technologies and goods likely would exercise market power—for example, by imposing a small but significant and nontransitory price increase.³⁵ The Agencies recognize that technology often is licensed in ways that are not readily quantifiable in monetary terms.³⁶ In such circumstances, the Agencies will delineate the relevant market by identifying other technologies and goods that are reasonable substitutes for the licensed technology.

In assessing the competitive significance of current and potential participants in a technology market, the Agencies will take into account all relevant evidence. When market share data are available and accurately reflect the competitive significance of market participants, the Agencies will include market share data in this assessment. The Agencies also will seek evidence of buyers' and market participants' assessments of the competitive significance of technology market participants. Such evidence is particularly important when market share data are unavailable, or do not accurately represent the competitive significance of market participants. When market share data or other indicia of market power are not available, and it appears that competing technologies are comparably efficient,³⁷ the Agencies will assign each technology the same market share.

In this example, the structural effect of the joint venture in the relevant goods market for the manufacture and distribution of the drug is unlikely to be significant, because many firms in addition to the joint venture compete in that market.³⁸ The joint venture might increase the

³⁵ This is conceptually analogous to the analytical approach to goods markets under section 4.1.1 of the 2010 Horizontal Merger Guidelines, *supra* note 31. Of course, market power also can be exercised in other dimensions, such as quality, and these dimensions also may be relevant to the definition and analysis of technology markets.

³⁶ For example, technology may be licensed royalty-free in exchange for the right to use other technology, or it may be licensed as part of a package license.

³⁷ The Agencies will regard two technologies as "comparably efficient" if they can be used to produce close substitutes at comparable costs.

³⁸ See Example 3 for a discussion of the Agencies' approach to joint venture analysis.

prices of the drug produced using Alpha's or Beta's technology by reducing competition in the relevant market for technology to manufacture the drug.³⁹

The Agency would delineate a technology market in which to evaluate likely competitive effects of the proposed joint venture. The Agency would identify other technologies that can be used to make the drug and evaluate the levels of effectiveness and cost per dose relative to that of the technologies owned by Alpha and Beta. In addition, the Agency would consider the extent to which competition from other drugs that are substitutes for the drug produced using Alpha's or Beta's technology would limit the ability of a hypothetical monopolist that owned both Alpha's and Beta's technology to raise its price for the license.

3.2.3 Research and Development Markets

If a licensing arrangement may adversely affect competition to develop new or improved goods or processes, the Agencies may analyze such an impact as a competitive effect in a separate research and development market. A licensing arrangement may have competitive effects on research and development that cannot be adequately addressed through the analysis of goods or technology markets. For example, the arrangement may affect innovation that is related to research to identify a commercializable product or to the development of particular goods or services.⁴⁰ Alternatively, the arrangement may affect the development of new or improved goods or processes in geographic markets where there is no actual or potential competition in the relevant goods.⁴¹

A research and development market consists of the assets comprising research and development related to the identification of a commercializable product, or directed to particular new or improved goods or processes, and the close substitutes for that research and development. When research and development is directed to particular new or improved goods or processes, the close substitutes may include research and development efforts, technologies,

³⁹ See, e.g., *Summit Tech., Inc.*, 127 F.T.C. 208 (1999).

⁴⁰ For example, the FTC has identified and referred to research and development markets in the following matters: *Complaint, Amgen Inc.*, 134 F.T.C. 333, 337-39 (2002) (identifying a research and development market for inhibitors of cytokines that promote the inflammation of human tissue); *Wright Med. Tech., Inc., Proposed Consent Agreement with Analysis to Aid Public Comment*, 60 Fed. Reg. 460, 463 (Jan. 4, 1995) (identifying a research and development market for orthopedic implants for use in human hands); *Am. Home Prods. Corp., Proposed Consent Agreement with Analysis to Aid Public Comment*, 59 Fed. Reg. 60,807, 60,815 (Nov. 28, 1994) (identifying a research and development market for, among other things, rotavirus vaccines).

⁴¹ See *Complaint, United States v. Gen. Motors Corp.*, Civ. No. 93-530 (D. Del. Nov. 16, 1993).

and goods⁴² that significantly constrain the exercise of market power with respect to the relevant research and development, for example by limiting the ability and incentive of a hypothetical monopolist to reduce the pace of research and development. The Agencies will delineate a research and development market only when the capabilities to engage in the relevant research and development can be associated with specialized assets or characteristics of specific firms.

In assessing the competitive significance of current and potential participants in a research and development market, the Agencies will take into account all relevant evidence. When market share data are available and accurately reflect the competitive significance of market participants, the Agencies will include market share data in this assessment. The Agencies also will seek evidence of buyers' and market participants' assessments of the competitive significance of research and development market participants. Such evidence is particularly important when market share data are unavailable or do not accurately represent the competitive significance of market participants. The Agencies may base the market shares of participants in a research and development market on their shares of identifiable assets or characteristics upon which innovation depends, for example, on shares of research and development expenditures, or on shares of a related product. When entities have comparable capabilities and incentives to pursue research and development that is a close substitute for the research and development activities of the parties to a licensing arrangement, the Agencies may assign equal market shares to such entities.

Example 3

Situation: Three of the largest producers of a plastic used in disposable bottles plan to engage in joint research and development to produce a new type of plastic that is rapidly biodegradable. The joint venture will grant to its partners (but to no one else) licenses to all patent rights and use of know-how. The Agency is evaluating the likely competitive effects of the proposed joint venture.

⁴² For example, the licensor of intellectual property relating to research and development may be constrained in its conduct not only by competing research and development efforts but also by other existing goods that would compete with the goods under development.

Discussion: The Agency would analyze the proposed research and development joint venture using an analysis similar to that applied to other joint ventures.⁴³

In this case, the Agency would assess whether the joint venture is likely to have anticompetitive effects. The Agency would seek to identify any other entities that would be actual or potential competitors with the joint venture in a relevant market. This would include those firms that have the capability and incentive to undertake research and development closely substitutable for the research and development proposed to be undertaken by the joint venture, taking into account such firms' existing technologies and technologies under development, R&D facilities, and other relevant assets and business circumstances. Firms possessing such capabilities and incentives would be included in a research and development market even if they are not competitors in relevant markets for related goods, such as the plastics currently produced by the parties to the joint venture, although competitors in existing goods markets may often also compete in related research and development markets.

The Agency would consider the degree of concentration in the relevant research and development market and the market shares of the parties to the joint venture. If, in addition to the parties to the joint venture (taken collectively), there are at least four other independently controlled entities that possess comparable capabilities and incentives to undertake research and development of biodegradable plastics, or other products that would be close substitutes for such new plastics, the joint venture ordinarily would be unlikely to adversely affect competition in the relevant research and development market.⁴⁴ If there are fewer than four other independently controlled entities with similar capabilities and incentives, the Agency would consider whether the joint venture would give the parties to the joint venture an incentive and ability collectively to reduce investment in, or otherwise to retard the pace or scope of, research and development efforts. If the joint venture creates a significant risk of anticompetitive effects in the research and development market, the Agency would proceed to

⁴³ See generally U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N, ANTITRUST GUIDELINES FOR COLLABORATIONS AMONG COMPETITORS (2000), <http://www.ftc.gov/os/2000/04/ftcdojguidelines.pdf>; *id.* at 1, n.2 (The Intellectual Property Guidelines "outline the Agencies' enforcement policy with respect to intellectual property licensing agreements among competitors, among other things."). Also, this type of transaction may qualify for treatment under the National Cooperative Research Act of 1984 and the National Cooperative Production Amendments of 1993 (codified as amended at 15 U.S.C.A. §§ 4301-4305) (applying a reasonableness standard to the conduct of "any person in making or performing a contract to carry out a joint venture").

⁴⁴ *Cf.* section 4.3.

consider efficiency justifications for the venture, such as the potential for combining complementary R&D assets in such a way as to make successful innovation more likely, or to bring it about sooner, or to achieve cost reductions in research and development.

The Agency would also assess the likelihood that the joint venture would adversely affect competition in other relevant markets, including markets for products produced by the parties to the joint venture. The risk of such adverse competitive effects would be increased to the extent that, for example, the joint venture facilitates the exchange among the parties of competitively sensitive information relating to goods markets in which the parties currently compete or facilitates the coordination of competitive activities in such markets. The Agency would examine whether the joint venture imposes collateral restraints that might significantly restrict competition among the joint venturers in goods markets, and would examine whether such collateral restraints were reasonably necessary to achieve any efficiencies that are likely to be attained by the venture.

3.3 Horizontal and Vertical Relationships

As with other property arrangements, antitrust analysis of intellectual property licensing arrangements examines whether the relationship among the parties to the arrangement is primarily horizontal or vertical in nature, or whether it has substantial aspects of both. A licensing arrangement has a vertical component when it affects activities that are in a complementary relationship, as is typically the case in a licensing arrangement. For example, the licensor's primary line of business may be in research and development, and the licensees, as manufacturers, may be buying the rights to use technology developed by the licensor. Alternatively, the licensor may be a component manufacturer owning intellectual property rights in a product that the licensee manufactures by combining the component with other inputs, or the licensor may manufacture the product, and the licensees may operate primarily in distribution and marketing.

In addition to this vertical component, a licensing arrangement may also have a horizontal component. For analytical purposes, the Agencies ordinarily will treat a relationship between a licensor and its licensees, or between licensees, as having a horizontal component when they would have been actual or potential competitors in a relevant market in the absence of the license, even if a vertical relationship also exists.

The existence of a horizontal relationship between a licensor and its licensees does not, in itself, indicate that the arrangement is anticompetitive. Identification of such relationships is merely an aid in determining whether there may be anticompetitive effects arising from a licensing arrangement. Such a relationship need not give rise to an anticompetitive effect, nor does a purely vertical relationship assure that there are no anticompetitive effects.

The following examples illustrate different competitive relationships among a licensor and its licensees.

Example 4

Situation: AgCo, a manufacturer of farm equipment, develops a new, patented emission control technology for its tractor engines and licenses it to FarmCo, another farm equipment manufacturer. AgCo's emission control technology is far superior to the technology currently owned and used by FarmCo, so much so that FarmCo's technology does not significantly constrain the prices that AgCo could charge for its technology. AgCo's emission control patent has a broad scope. FarmCo does not contest the validity or enforceability of AgCo's patent, and acknowledges that any improved emissions control technology it could develop in the foreseeable future would infringe AgCo's patent.

Discussion: Because FarmCo's emission control technology does not significantly constrain AgCo's competitive conduct with respect to its emission control technology, AgCo's and FarmCo's emission control technologies are not close substitutes for each other. FarmCo is a consumer of AgCo's technology and is not an actual competitor of AgCo in the relevant market for superior emission control technology of the kind licensed by AgCo. Furthermore, FarmCo is not a potential competitor of AgCo in that relevant market because FarmCo cannot develop an improved emission control technology without infringing AgCo's patent. This means that the relationship between AgCo and FarmCo with regard to the supply and use of superior emissions control technology is vertical. Assuming that AgCo and FarmCo are actual or potential competitors in sales of farm equipment products, their relationship is horizontal in the relevant markets for farm equipment.

Example 5

Situation: FarmCo develops a new valve technology for its engines and enters into a cross-licensing arrangement with AgCo, whereby AgCo licenses its emission control technology to FarmCo and FarmCo licenses its valve technology to AgCo. AgCo already owns an alternative valve technology that can be used to achieve engine performance similar to that using FarmCo's valve technology and at a comparable cost to consumers. Before adopting FarmCo's technology, AgCo was using its own valve technology in its production of engines and was licensing (and continues to license) that technology for use by others. As in Example 4, FarmCo does not own or control an emission control technology that is a close substitute for the technology licensed from AgCo. Furthermore, as in Example 4, FarmCo cannot develop an improved emission control technology that would be a close substitute for AgCo's technology, without infringing AgCo's patent.

Discussion: FarmCo is a consumer and not a competitor of AgCo's superior emission control technology. As in Example 4, their relationship is vertical with regard to this technology. The relationship between AgCo and FarmCo in the relevant market that includes engine valve technology is vertical in part and horizontal in part. It is vertical in part because AgCo and FarmCo stand in a complementary relationship, in which AgCo is a consumer of a technology supplied by FarmCo. However, the relationship between AgCo and FarmCo in the relevant market that includes engine valve technology is also horizontal in part, because FarmCo and AgCo are actual competitors in the licensing of valve technology that can be used to achieve similar engine performance at a comparable cost. Whether the firms license their valve technologies to others is not important for the conclusion that the firms have a horizontal relationship in this relevant market. Even if AgCo's use of its valve technology were solely captive to its own production, the fact that the two valve technologies are substitutable at comparable cost means that the two firms have a horizontal relationship.

As in Example 4, the relationship between AgCo and FarmCo is also horizontal in the relevant markets for farm equipment.

3.4 Framework for Evaluating Licensing Restraints

In the vast majority of cases, restraints in intellectual property licensing arrangements are evaluated under the rule of reason. The Agencies' general approach in analyzing a licensing

restraint under the rule of reason is to inquire whether the restraint is likely to have anticompetitive effects and, if so, whether the restraint is reasonably necessary to achieve procompetitive benefits that outweigh those anticompetitive effects.⁴⁵

In some cases, however, courts have concluded that a restraint's "nature and necessary effect are so plainly anticompetitive" that it should be treated as unlawful per se, without an elaborate inquiry into the restraint's likely competitive effect.⁴⁶ Among the restraints that have been held per se unlawful are naked price-fixing, output restraints, and market division among horizontal competitors, as well as certain group boycotts.

To determine whether a particular restraint in a licensing arrangement is given per se or rule of reason treatment, the Agencies will assess whether the restraint in question can be expected to contribute to an efficiency-enhancing integration of economic activity.⁴⁷ In general, licensing arrangements promote such integration because they facilitate the combination of the licensor's intellectual property with complementary factors of production owned by the licensee. A restraint in a licensing arrangement may further such integration by, for example, aligning the incentives of the licensor and the licensees to promote the development and marketing of the licensed technology, or by substantially reducing transactions costs. If there is no efficiency-enhancing integration of economic activity and if the type of restraint is one that has been accorded per se treatment, the Agencies will challenge the restraint under the per se rule. Otherwise, the Agencies will apply a rule of reason analysis.

Application of the rule of reason requires an inquiry into the likely competitive effects of the conduct in question.⁴⁸ However, as the Supreme Court has noted, "[t]here is always something of a sliding scale in appraising reasonableness," and as such, "the quality of proof required should vary with the circumstances";⁴⁹ what is required "is an enquiry meet for the case,

⁴⁵ See, e.g., *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877 (2007); *FTC v. Ind. Fed'n of Dentists*, 476 U.S. 447 (1986); *NCAA v. Bd. of Regents of the Univ. of Okla.*, 468 U.S. 85 (1984); *Broad. Music, Inc. v. Columbia Broad. Sys., Inc.*, 441 U.S. 1 (1979); 7 PHILLIP E. AREEDA & HERBERT HOVENKAMP, *ANTITRUST LAW* § 1502 (3d ed. 2010); see also part 4.

⁴⁶ *FTC v. Super. Ct. Trial Lawyers Ass'n*, 493 U.S. 411, 433 (1990); *Nat'l Soc. of Prof'l Eng'rs v. United States*, 435 U.S. 679, 692 (1978).

⁴⁷ See *Broad. Music*, 441 U.S. at 16-24.

⁴⁸ See sections 4.1-4.3.

⁴⁹ *FTC v. Actavis, Inc.*, 133 S. Ct. 2223, 2237-38 (2013) (alteration in original) (quoting *Cal. Dental Ass'n v. FTC*, 526 U.S. 756, 780 (1999)).

looking to the circumstances, details, and logic of a restraint.”⁵⁰ If the Agencies conclude that a restraint has no likely anticompetitive effects, they will treat it as reasonable, without an elaborate analysis of market power or the justifications for the restraint. Similarly, if a restraint facially appears to be of a kind that would always or almost always tend to reduce output or increase prices, and the restraint is not reasonably related to efficiencies, the Agencies will likely challenge the restraint without an elaborate analysis of particular industry circumstances.⁵¹

Example 6

Situation: Gamma, which manufactures Product X using its patented process, offers a license for its process technology to every other manufacturer of Product X, each of which competes worldwide with Gamma in the manufacture and sale of X. The process technology does not represent an economic improvement over the available existing technologies. Indeed, although most manufacturers accept licenses from Gamma, none of the licensees actually uses the licensed technology. The licenses provide that each manufacturer has an exclusive right to sell Product X manufactured using the licensed technology in a designated geographic area and that no manufacturer may sell Product X, however manufactured, outside the designated territory.

Discussion: The manufacturers of Product X are in a horizontal relationship in the goods market for Product X. Any manufacturers of Product X that control technologies that are substitutable at comparable cost for Gamma’s process are also horizontal competitors of Gamma in the relevant technology market. The licensees of Gamma’s process technology are formally in a vertical relationship with Gamma, although that is not significant in this example because they do not actually use Gamma’s technology.

The licensing arrangement restricts competition in the relevant goods market among manufacturers of Product X by requiring each manufacturer to limit its sales to an exclusive territory. Thus, competition among entities that would be actual competitors in the absence of the licensing arrangement is restricted. Based on the facts set forth above, the licensing

⁵⁰ *Cal. Dental*, 526 U.S. at 781.

⁵¹ See *FTC v. Ind. Fed’n of Dentists*, 476 U.S. 447, 459-62 (1986); *NCAA v. Bd. of Regents of the Univ. of Okla.*, 468 U.S. 85, 109-10 (1984); see also *Cal. Dental*, 526 U.S. at 779 (“Although we have said that a challenge to a ‘naked restraint on price and output’ need not be supported by ‘a detailed market analysis’ in order to ‘requir[e] some competitive justification,’ it does not follow that every case attacking a less obviously anticompetitive restraint . . . is a candidate for plenary market examination.” (alteration in original) (citation omitted) (quoting *NCAA*, 468 U.S. at 110)).

arrangement does not involve a useful transfer of technology, and thus it is unlikely that the restraint on sales outside the designated territories contributes to an efficiency-enhancing integration of economic activity. Consequently, the evaluating Agency would be likely to challenge the arrangement under the per se rule as a horizontal territorial market allocation scheme and to view the intellectual property aspects of the arrangement as a sham intended to cloak its true nature.

If the licensing arrangement could be expected to contribute to an efficiency-enhancing integration of economic activity, as might be the case if the licensed technology were an advance over existing processes and used by the licensees, the Agency would analyze the arrangement under the rule of reason applying the analytical framework described in this section.

In this example, the competitive implications do not generally depend on whether the licensed technology is protected by patent, is a trade secret or other know-how, or is a computer program protected by copyright; nor do the competitive implications generally depend on whether the allocation of markets is territorial, as in this example, or functional, based on fields of use.

4 General Principles Concerning the Agencies' Evaluation of Licensing Arrangements under the Rule of Reason

4.1 Analysis of Anticompetitive Effects

The existence of anticompetitive effects resulting from a restraint in a licensing arrangement will be evaluated on the basis of the analysis described in this section.

4.1.1 Market Structure, Coordination, and Foreclosure

When a licensing arrangement affects parties in a horizontal relationship, a restraint in that arrangement may increase the risk of coordinated pricing, output restrictions, or the acquisition or maintenance of market power. Harm to competition also may occur if the arrangement poses a significant risk of retarding or restricting the development of new or improved goods or processes. The potential for competitive harm depends in part on the degree of concentration in,

the difficulty of entry into, and the responsiveness of supply and demand to changes in price in the relevant markets.⁵²

When the licensor and licensees are in a vertical relationship, the Agencies will analyze whether the licensing arrangement may harm competition among entities in a horizontal relationship at either the level of the licensor or the licensees, or possibly in another relevant market. Harm to competition from a restraint may occur if it anticompetitively forecloses access to, or increases competitors' costs of obtaining, important inputs, or facilitates coordination to raise price or restrict output. The risk of anticompetitively foreclosing access or increasing competitors' costs is related to the proportion of the markets affected by the licensing restraint; other characteristics of the relevant markets, such as concentration, difficulty of entry, and the responsiveness of supply and demand to changes in price in the relevant markets; and the duration of the restraint. A licensing arrangement does not foreclose competition merely because some or all of the potential licensees in an industry choose to use the licensed technology to the exclusion of other technologies. Exclusive use may be an efficient consequence of the licensed technology having the lowest cost or highest value.

Harm to competition from a restraint in a vertical licensing arrangement also may occur if a licensing restraint facilitates coordination among entities in a horizontal relationship to raise prices or reduce output in a relevant market. For example, if owners of competing technologies impose similar restraints on their licensees, the licensors may find it easier to coordinate their pricing. Similarly, licensees that are competitors may find it easier to coordinate their pricing if they are subject to common restraints in licenses with a common licensor or competing licensors. The risk of anticompetitive coordination is increased when the relevant markets are concentrated and difficult to enter. The use of similar restraints may be common and procompetitive in an industry, however, because they contribute to efficient exploitation of the licensed property.

4.1.2 Licensing Arrangements Involving Exclusivity

A licensing arrangement may involve exclusivity in two distinct respects. First, the licensor may grant an exclusive license, or one or more partially exclusive licenses (such as territorial or field-of-use licenses), which limit the ability of the licensor to license others and possibly also to use

⁵² Cf. 2010 Horizontal Merger Guidelines, *supra* note 31, §§ 5, 9.

the technology itself. Generally, such exclusive licenses may raise antitrust concerns only if there is a horizontal relationship among licensors, or among licensees, or between the licensor and its licensee(s). Examples of arrangements involving exclusive licensing that may give rise to antitrust concerns include cross-licensing by competitors that collectively possess market power, grantbacks, and acquisitions of intellectual property rights.⁵³

A non-exclusive license of intellectual property that does not contain any restraints on the competitive conduct of the licensor or the licensee generally does not present antitrust concerns. That principle holds true even if the parties to the license are in a horizontal relationship, because the non-exclusive license normally does not diminish competition that would occur in its absence.

A second form of exclusivity, exclusive dealing, arises when a license prevents or restrains the licensee from licensing, selling, distributing, or using competing technologies.⁵⁴ Exclusivity may be achieved by an explicit exclusive dealing term in the license or by other provisions such as compensation terms or other economic incentives. Such restraints may anticompetitively foreclose access to, or increase competitors' costs of obtaining, important inputs, or facilitate coordination to raise price or reduce output. But they also may have procompetitive effects. For example, a licensing arrangement that prevents the licensee from dealing in other technologies may encourage the licensee to develop and market the licensed technology or specialized applications of that technology.⁵⁵ The Agencies will take into account such procompetitive effects in evaluating the reasonableness of the arrangement.⁵⁶

The antitrust principles that apply to a licensor's grant of various forms of exclusivity to and among its licensees are similar to those that apply to comparable vertical restraints outside the licensing context, such as exclusive territories and exclusive dealing. However, the fact that intellectual property may in some cases be misappropriated more easily than other forms of property may justify the use of some restrictions that might be anticompetitive in other contexts.

As noted earlier, the Agencies will focus on the actual practice and its effects, not on the formal terms of the arrangement. A license denominated as non-exclusive (either in the sense of

⁵³ See sections 5.5, 5.6, and 5.7.

⁵⁴ See section 5.4.

⁵⁵ See, e.g., Example 7.

⁵⁶ See section 4.2.

exclusive licensing or in the sense of exclusive dealing) may nonetheless give rise to the same concerns posed by formal exclusivity. A non-exclusive license may have the effect of exclusive licensing if it is structured so that the licensor is unlikely to license others or to practice the technology itself. A license that does not explicitly require exclusive dealing may have the effect of exclusive dealing if it is structured to increase significantly a licensee's cost when it uses competing technologies. However, a licensing arrangement will not automatically raise these concerns merely because a party chooses to deal with a single licensor or licensee, or confines its activity to a single field of use or location, or because only a single licensee has chosen to take a license.

Example 7

Situation: NewCo, the inventor and manufacturer of a new flat panel display technology, lacking the capability to bring a flat panel display product to market, grants BigCo an exclusive license to sell a product embodying NewCo's technology. BigCo does not currently sell, and is not developing (or likely to develop), a product that would compete with the product embodying the new technology and does not control rights to another display technology. Several firms offer competing displays, BigCo accounts for only a small proportion of the outlets for distribution of display products, and entry into the manufacture and distribution of display products is relatively easy. Demand for the new technology is uncertain and successful market penetration will require considerable promotional effort. The license contains an exclusive dealing restriction preventing BigCo from selling products that compete with the product embodying the licensed technology.

Discussion: This example illustrates both types of exclusivity in a licensing arrangement. The license is exclusive in that it limits the ability of the licensor to grant other licenses. In addition, the license has an exclusive dealing component in that it restricts the licensee from selling competing products.

The inventor of the display technology and its licensee are in a vertical relationship and are not actual or potential competitors in the manufacture or sale of display products or in the sale or development of technology. Hence, the grant of an exclusive license does not affect competition between the licensor and the licensee. The exclusive license may promote competition in the manufacturing and sale of display products by encouraging BigCo to develop and promote the

new product in the face of uncertain demand by rewarding BigCo for its efforts if they lead to large sales. Although the license bars the licensee from selling competing products, this exclusive dealing aspect is unlikely in this example to harm competition by anticompetitively foreclosing access, raising competitors' costs of inputs, or facilitating anticompetitive pricing because the relevant product market is unconcentrated, the exclusive dealing restraint affects only a small proportion of the outlets for distribution of display products, and entry is easy. On these facts, the evaluating Agency would be unlikely to challenge the arrangement.

4.2 Efficiencies and Justifications

If the Agencies conclude, upon an evaluation of the market factors described in section 4.1, that a restraint in a licensing arrangement is unlikely to have an anticompetitive effect, they will not challenge the restraint. If the Agencies conclude that the restraint has, or is likely to have, an anticompetitive effect, they will consider whether the restraint is reasonably necessary to achieve procompetitive efficiencies. If the restraint is reasonably necessary, the Agencies will balance the procompetitive efficiencies and the anticompetitive effects to determine the probable net effect on competition in each relevant market.

The Agencies' comparison of anticompetitive harms and procompetitive efficiencies is necessarily a qualitative one. The risk of anticompetitive effects in a particular case may be insignificant compared to the expected efficiencies, or vice versa. As the expected anticompetitive effects in a particular licensing arrangement increase, the Agencies will require evidence establishing a greater level of expected efficiencies.

The existence of practical and significantly less restrictive alternatives is relevant to a determination of whether a restraint is reasonably necessary. If it is clear that the parties could have achieved similar efficiencies by means that are significantly less restrictive, then the Agencies will not give weight to the parties' efficiency claim. In making this assessment, however, the Agencies will not engage in a search for a theoretically least restrictive alternative that is not realistic in the practical prospective business situation faced by the parties.

When a restraint has, or is likely to have, an anticompetitive effect, the duration of that restraint can be an important factor in determining whether it is reasonably necessary to achieve the putative procompetitive efficiency. The effective duration of a restraint may depend on a number of factors, including the option of the affected party to terminate the arrangement

unilaterally and the presence of contract terms (e.g., unpaid balances on minimum purchase commitments) that encourage the licensee to renew a license arrangement. Consistent with their approach to less restrictive alternative analysis generally, the Agencies will not attempt to draw fine distinctions regarding duration; rather, their focus will be on situations in which the duration clearly exceeds the period needed to achieve the procompetitive efficiency.

The evaluation of procompetitive efficiencies, of the reasonable necessity of a restraint to achieve them, and of the duration of the restraint, may depend on the market context. A restraint that may be justified by the needs of a new entrant, for example, may not have a procompetitive efficiency justification in different market circumstances.⁵⁷

4.3 Antitrust “Safety Zone”

Because licensing arrangements often promote innovation and enhance competition, the Agencies believe that an antitrust “safety zone” is useful in order to provide some degree of certainty and thus to encourage such activity.⁵⁸ Absent extraordinary circumstances, the Agencies will not challenge a restraint in an intellectual property licensing arrangement if (1) the restraint is not facially anticompetitive⁵⁹ and (2) the licensor and its licensees collectively account for no more than twenty percent of each relevant market significantly affected by the restraint. This “safety zone” does not apply to those transfers of intellectual property rights to which a merger analysis is applied.⁶⁰

Whether a restraint falls within the safety zone will be determined by reference only to goods markets unless the analysis of goods markets alone would inadequately address the effects of the licensing arrangement on competition among technologies or in research and development.

If an examination of the effects on competition among technologies or in research and development is required, and if market share data are unavailable or do not accurately represent competitive significance, the following safety zone criteria will apply. Absent extraordinary circumstances, the Agencies will not challenge a restraint in an intellectual property licensing arrangement that may affect competition in a technology market if (1) the

⁵⁷ Cf. *United States v. Jerrold Elecs. Corp.*, 187 F. Supp. 545 (E.D. Pa. 1960), *aff'd per curiam*, 365 U.S. 567 (1961).

⁵⁸ The antitrust “safety zone” does not apply to restraints that are not in a licensing arrangement, or to restraints that are in a licensing arrangement but are unrelated to the use of the licensed intellectual property.

⁵⁹ “Facially anticompetitive” refers to restraints that normally warrant *per se* treatment, as well as other restraints of a kind that would always or almost always tend to reduce output or increase prices. See section 3.4.

⁶⁰ See section 5.7.

restraint is not facially anticompetitive and (2) there are four or more independently controlled technologies in addition to the technologies controlled by the parties to the licensing arrangement that may be substitutable for the licensed technology at a comparable cost to the user. Regarding potential effects in a research and development market, the Agencies, absent extraordinary circumstances, will not challenge a restraint in an intellectual property licensing arrangement if (1) the restraint is not facially anticompetitive and (2) four or more independently controlled entities in addition to the parties to the licensing arrangement possess the required specialized assets or characteristics and the incentive to engage in research and development that is a close substitute of the research and development activities of the parties to the licensing agreement.⁶¹ In evaluating close substitutes, the Agencies may consider numerous factors including the following: the nature, scope and magnitude of the R&D efforts of the other independently controlled entities; their access to financial support, intellectual property, skilled personnel or other specialized assets; their timing; and their ability, either acting alone or through others, to successfully commercialize innovations.

The Agencies emphasize that licensing arrangements are not anticompetitive merely because they do not fall within the scope of the safety zone. Indeed, it is likely that the great majority of licenses falling outside the safety zone are lawful and procompetitive. The safety zone is designed to provide owners of intellectual property with a degree of certainty in those situations in which anticompetitive effects are so unlikely that the arrangements may be presumed not to be anticompetitive without an inquiry into particular industry circumstances. It is not intended to suggest that parties should conform to the safety zone or to discourage parties falling outside the safety zone from adopting restrictions in their license arrangements that are reasonably necessary to achieve an efficiency-enhancing integration of economic activity. The Agencies will analyze arrangements falling outside the safety zone based on the considerations outlined in parts 3-5.

The status of a licensing arrangement with respect to the safety zone may change over time. A determination by the Agencies that a restraint in a licensing arrangement qualifies for inclusion

⁶¹ This is consistent with congressional intent in enacting the National Cooperative Research Act. See H.R. REP. NO. 98-1044, at 10 (1984) (Conf. Rep.), *reprinted in* 1984 U.S.C.C.A.N. 3131, 3134-35.

in the safety zone is based on the factual circumstances prevailing at the time of the conduct at issue.⁶²

5 Application of General Principles

5.0 This section illustrates the application of the general principles discussed above to particular licensing restraints and to arrangements that involve the cross-licensing, pooling, or acquisition of intellectual property. The restraints and arrangements identified are typical of those that are likely to receive antitrust scrutiny; however, they are not intended as an exhaustive list of practices that could raise competition concerns.

5.1 Horizontal Restraints

The existence of a restraint in a licensing arrangement that affects parties in a horizontal relationship (a “horizontal restraint”) does not necessarily cause the arrangement to be anticompetitive. As in the case of joint ventures among horizontal competitors, licensing arrangements among such competitors may promote rather than hinder competition if they result in integrative efficiencies. Such efficiencies may arise, for example, from the realization of economies of scale and the integration of complementary research and development, production, and marketing capabilities.

Following the general principles outlined in section 3.4, the Agencies will often evaluate horizontal restraints under the rule of reason. Additionally, some restraints may merit per se treatment, including price-fixing, allocation of markets or customers, agreements to reduce output, and certain group boycotts.

Example 8

Situation: Two of the leading manufacturers of a consumer electronic product hold patents that cover alternative circuit designs for the product. The manufacturers assign their patents to a separate corporation wholly owned by the two firms. That corporation licenses the right to use the circuit designs to other consumer product manufacturers and establishes the license royalties. None of the patents is blocking; that is, each of the patents can be used without infringing a patent owned by the other firm. The different circuit designs are substitutable in

⁶² The conduct at issue may be the transaction giving rise to the restraint or the subsequent implementation of the restraint.

that each permits the manufacture at comparable cost to consumers of products that consumers consider to be interchangeable.

Discussion: In this example, the manufacturers are horizontal competitors in the goods market for the consumer product and in the related technology markets. The competitive issue with regard to a joint assignment of patent rights is whether the assignment has an adverse impact on competition in technology and goods markets that is not outweighed by procompetitive efficiencies, such as benefits in the use or dissemination of the technology. Each of the patent owners has a right to exclude others from using its patent. That right does not extend, however, to the agreement to assign rights jointly. To the extent that the patent rights cover technologies that are close substitutes, the joint determination of royalties likely would result in higher royalties and higher goods prices than would result if the owners licensed or used their technologies independently. In the absence of evidence establishing efficiency-enhancing integration from the joint assignment of patent rights, the Agency may conclude that the joint marketing of competing patent rights constitutes horizontal price-fixing and could be challenged as a per se unlawful horizontal restraint of trade. If the joint marketing arrangement results in an efficiency-enhancing integration, the Agency would evaluate the arrangement under the rule of reason. However, the Agency may conclude that the anticompetitive effects are sufficiently apparent, and the claimed integrative efficiencies are sufficiently weak or not reasonably related to the restraints to warrant challenge of the arrangement without an elaborate analysis of particular industry circumstances.⁶³

5.2 Price Maintenance

Minimum Resale Price Maintenance (RPM) typically refers to a vertical pricing arrangement in which a manufacturer requires its resellers to agree to sell the manufacturer's products at or above a specified minimum price. An analogous arrangement can occur in the intellectual property context when a licensor conditions a license on the resale price of the product incorporating the licensed technology.

As with RPM agreements that apply to outright sales of goods, the Agencies will apply a rule of reason analysis to price maintenance in intellectual property licensing agreements.⁶⁴ The

⁶³ See section 3.4.

⁶⁴ In *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*, 551 U.S. 877 (2007), the Supreme Court overruled its nearly century-old opinion in *Dr. Miles Medical Co. v. John D. Park & Sons Co.*, 220 U.S. 373 (1911), which held RPM

Agencies will analyze vertical price restrictions in licensing agreements on a case-by-case basis, evaluating the competitive benefits and harms from such agreements.⁶⁵ Agreements constituting a horizontal cartel will be considered per se illegal.⁶⁶

5.3 Tying Arrangements

A “tying,” “tie-in,” or “tied sale” arrangement has been defined as “an agreement by a party to sell one product . . . on the condition that the buyer also purchases a different (or tied) product, or at least agrees that he will not purchase that [tied] product from any other supplier.”⁶⁷

Conditioning the ability of a licensee to license one or more items of intellectual property on the licensee’s purchase of another item of intellectual property or a good or a service has been held in some cases to constitute illegal tying.⁶⁸ Although tying arrangements may result in anticompetitive effects, such arrangements can also result in significant efficiencies and procompetitive benefits. In the exercise of their prosecutorial discretion, the Agencies will consider both the anticompetitive effects and the efficiencies attributable to a tie-in. The Agencies would be likely to challenge a tying arrangement if: (1) the seller has market power in the tying product,⁶⁹ (2) the arrangement has an adverse effect on competition in the relevant market for the tying product or the tied product, and (3) efficiency justifications for the

agreements per se illegal. The *Leegin* court concluded that such agreements should be evaluated under the rule of reason. *See also* *United States v. Gen. Elec. Co.*, 272 U.S. 476, 479, 490 (1926) (holding that an owner of a product patent may condition a license to manufacture the product on the fixing of the *first* sale price of the patented product that it also manufactures); *LucasArts Entm’t Co. v. Humongous Entm’t Co.*, 870 F. Supp. 285, 287-89 (N.D. Cal. 1993) (conditioning license to copyrighted software on price of product incorporating the software did not violate Sherman Act). In a case that preceded *Leegin*, *State Oil Co. v. Khan*, 522 U.S. 3 (1997), the Court ruled that *maximum* resale price maintenance should be evaluated under the rule of reason.

⁶⁵ Although most states follow federal law in interpreting analogous state antitrust states, some states continue to prohibit minimum resale price maintenance. *See, e.g.*, *Darush v. Revision LP*, No. CV 12-10296 GAF (AGRx), 2013 WL 1749539, at *6 (C.D. Cal. Apr. 10, 2013) (vertical RPM per se illegal under California’s Cartwright Act); MD. CODE ANN., COM. LAW § 11-204(b) (West 2016) (“[A] contract, combination, or conspiracy that establishes a minimum price below which a retailer, wholesaler, or distributor may not sell a commodity or service is an unreasonable restraint of trade or commerce.”).

⁶⁶ *See United States v. Apple, Inc.*, 791 F.3d 290, 324-25 (2d Cir. 2015) (explaining that “where the vertical organizer has not only committed to vertical agreements, but has also agreed to participate in the horizontal [price-fixing] conspiracy” among competitors, courts need not consider “whether the vertical agreements restrained trade because all participants agreed to the horizontal restraint, which is ‘and ought to be, *per se* unlawful.” (quoting *Leegin*, 551 U.S. at 893)).

⁶⁷ *Eastman Kodak Co. v. Image Tech. Servs., Inc.*, 504 U.S. 451, 462 (1992) (internal quotation marks omitted).

⁶⁸ *See, e.g.*, *United States v. Paramount Pictures, Inc.*, 334 U.S. 131, 156-58 (1948) (copyrights); *Int’l Salt Co. v. United States*, 332 U.S. 392 (1947) (patent and related product), *abrogated in part by* *Ill. Tool Works, Inc. v. Indep. Ink, Inc.*, 547 U.S. 28 (2006).

⁶⁹ *Cf.* 35 U.S.C. § 271(d) (2012) (requiring market power in patent misuse cases involving tying).

arrangement do not outweigh the anticompetitive effects.⁷⁰ The Agencies will not presume that a patent, copyright, or trade secret necessarily confers market power upon its owner.⁷¹

Package licensing—the licensing of multiple items of intellectual property in a single license or in a group of related licenses—may be a form of tying arrangement if the licensing of one intellectual property right is conditioned upon the acceptance of a license of another, separate intellectual property right. Package licensing can be efficiency enhancing under some circumstances. When multiple licenses are needed to use any single item of intellectual property, for example, a package license may promote such efficiencies. If a package license constitutes a tying arrangement, the Agencies will evaluate its competitive effects under the same principles they apply to other tying arrangements.

5.4 Exclusive Dealing

In the intellectual property context, exclusive dealing occurs when a license prevents the licensee from licensing, selling, distributing, or using competing technologies. Exclusive dealing arrangements are evaluated under the rule of reason.⁷² In determining whether an exclusive dealing arrangement is likely to reduce competition in a relevant market, the Agencies will take into account the extent to which the arrangement (1) promotes the exploitation and development of the licensor’s technology and (2) anticompetitively forecloses the exploitation and development of, or otherwise constrains competition among, competing technologies.

The likelihood that exclusive dealing may have anticompetitive effects is related, *inter alia*, to the degree of foreclosure in the relevant market, the duration of the exclusive dealing arrangement, and other characteristics of the input and output markets, such as concentration, difficulty of entry, and the responsiveness of supply and demand to changes in price in the relevant markets.⁷³ If the Agencies determine that a particular exclusive dealing arrangement may have an anticompetitive effect, they will evaluate the extent to which the restraint

⁷⁰ See, e.g., *United States v. Microsoft Corp.*, 253 F.3d 34, 95-96 (D.C. Cir. 2001) (en banc) (per curiam) (rejecting the application of a *per se* rule to “platform software”). As is true throughout these Guidelines, the factors listed are those that guide the Agencies’ internal analysis in exercising their prosecutorial discretion. They are not intended to circumscribe how the Agencies will conduct the litigation of cases that they decide to bring.

⁷¹ See *Ill. Tool Works*, 547 U.S. 28.

⁷² See *Tampa Elec. Co. v. Nashville Coal Co.*, 365 U.S. 320 (1961) (evaluating legality of exclusive dealing under sections 1 and 2 of the Sherman Act and section 3 of the Clayton Act); *Beltone Elecs. Corp.*, 100 F.T.C. 68 (1982) (evaluating legality of exclusive dealing under section 5 of the Federal Trade Commission Act).

⁷³ See sections 4.1.1 and 4.1.2.

encourages licensees to develop and market the licensed technology (or specialized applications of that technology), increases licensors' incentives to develop or refine the licensed technology, or otherwise increases competition and enhances output in a relevant market.⁷⁴

5.5 Cross-Licensing and Pooling Arrangements

Cross-licensing and pooling arrangements are agreements of two or more owners of different items of intellectual property to license one another or third parties. These arrangements may provide procompetitive benefits by integrating complementary technologies, reducing transaction costs, clearing blocking positions, and avoiding costly infringement litigation. By promoting the dissemination of technology, cross-licensing and pooling arrangements are often procompetitive.

Cross-licensing and pooling arrangements can have anticompetitive effects in certain circumstances. For example, collective price or output restraints in pooling arrangements, such as the joint marketing of pooled intellectual property rights with collective price setting or coordinated output restrictions, may be deemed unlawful if they do not contribute to an efficiency-enhancing integration of economic activity among the participants.⁷⁵ When cross-licensing or pooling arrangements are mechanisms to accomplish naked price-fixing or market division, they are subject to challenge under the per se rule.⁷⁶

Settlements involving the cross-licensing of intellectual property rights can be an efficient means to avoid litigation and, in general, courts favor such settlements. When such cross-licensing involves horizontal competitors, however, the Agencies will consider whether the effect of the settlement is to diminish competition among entities that would have been actual or potential competitors in a relevant market in the absence of the cross-license. In the absence of offsetting efficiencies, such settlements may be challenged as unlawful restraints of trade.⁷⁷

⁷⁴ See section 4.2; Example 7.

⁷⁵ Compare *NCAA v. Bd. of Regents of the Univ. of Okla.*, 468 U.S. 85, 114-20 (1984) (holding unlawful output restriction on college football broadcasting because it was not reasonably related to any purported justification), with *Broad. Music, Inc. v. Columbia Broad. Sys., Inc.*, 441 U.S. 1, 23-24 (1979) (finding blanket license for music copyrights not per se illegal because the cooperative price was necessary to the creation of a new product).

⁷⁶ See *United States v. New Wrinkle, Inc.*, 342 U.S. 371 (1952) (price-fixing through pooling).

⁷⁷ Cf. *United States v. Singer Mfg. Co.*, 374 U.S. 174 (1963) (finding antitrust conspiracy where cross-license agreement was part of broader combination to exclude competitors).

Pooling arrangements generally need not be open to all who would like to join. However, exclusion from cross-licensing and pooling arrangements among parties that collectively possess market power may, under some circumstances, harm competition.⁷⁸ In general, exclusion from a pooling or cross-licensing arrangement among competing technologies is unlikely to have anticompetitive effects unless (1) excluded firms cannot effectively compete in the relevant market for the good incorporating the licensed technologies and (2) the pool participants collectively possess market power in the relevant market. If these circumstances exist, the Agencies will evaluate whether the arrangement's limitations on participation are reasonably related to the efficient development and exploitation of the pooled technologies and will assess the net effect of those limitations in the relevant market.⁷⁹

Another possible anticompetitive effect of pooling arrangements may occur if the arrangement deters or discourages participants from engaging in research and development, thus retarding innovation. For example, a pooling arrangement that requires members to grant licenses to each other for current and future technology at minimal cost may reduce the incentives of its members to engage in research and development because members of the pool have to share their successful research and development and each of the members can free ride on the accomplishments of other pool members.⁸⁰ However, such an arrangement can have procompetitive benefits, for example, by exploiting economies of scale and integrating complementary capabilities of the pool members, (including the clearing of blocking positions), and is likely to cause competitive problems only when the arrangement includes a large fraction of the potential research and development in a research and development market.⁸¹

⁷⁸ Cf. *Nw. Wholesale Stationers, Inc. v. Pac. Stationery & Printing Co.*, 472 U.S. 284 (1985) (holding that exclusion of a competitor from a purchasing cooperative not per se unlawful absent a showing of market power).

⁷⁹ See section 4.2.

⁸⁰ See generally *United States v. Mfrs. Aircraft Ass'n*, 1976-1 Trade Cas. (CCH) ¶ 60,810 (S.D.N.Y. 1975); *United States v. Auto. Mfrs. Ass'n*, 307 F. Supp. 617 (C.D. Cal. 1969), *appeal dismissed sub nom.* *City of New York v. United States*, 397 U.S. 248 (1970), *modified sub nom.* *United States v. Motor Vehicle Mfrs. Ass'n*, 1982-83 Trade Cas. (CCH) ¶ 65,088 (C.D. Cal. 1982).

⁸¹ See section 3.2.3 and Example 3. See also 2007 ANTITRUST-IP REPORT, *supra* note 13, at 62-63; *Summit Tech., Inc.*, 127 F.T.C. 208, 209-10 (1999) (FTC challenge to patent pool that included competing technologies from only two firms with FDA approval for a certain form of laser eye surgery and established a set licensing fee for use of either pool member's equipment). DOJ has reviewed favorably several patent pools with safeguards in place to mitigate potential anticompetitive harms. See generally Letter from Thomas O. Barnett, Assistant Att'y Gen., Antitrust Div., U.S. Dep't of Justice, to William F. Dolan, Partner, Jones Day (Oct. 21, 2008), <https://www.justice.gov/sites/default/files/atr/legacy/2008/10/21/238429.pdf>; Letter from Joel I. Klein, Assistant Att'y Gen., Antitrust Div., U.S. Dep't of Justice, to Carey R. Ramos, Partner, Paul, Weiss, Rifkind, Wharton &

Example 9

Situation: As in Example 8, two of the leading manufacturers of a consumer electronic product hold patents that cover alternative circuit designs for the product. The manufacturers assign several of their patents to a separate corporation wholly owned by the two firms. That corporation licenses the right to use the circuit designs to other consumer product manufacturers and establishes the license royalties. In this example, however, the manufacturers assign to the separate corporation only patents that are blocking. None of the patents assigned to the corporation can be used without infringing a patent owned by the other firm.

Discussion: Unlike the previous example, the joint assignment of patent rights to the wholly owned corporation in this example does not adversely affect competition in the licensed technology among entities that would have been actual or potential competitors in the absence of the licensing arrangement. Moreover, the licensing arrangement is likely to have procompetitive benefits in the use of the technology. Because the manufacturers' patents are blocking, the manufacturers are not in a horizontal relationship with respect to those patents. None of the patents can be used without the right to a patent owned by the other firm, so the patents are not substitutable. As in Example 8, the firms are horizontal competitors in the relevant goods market. In the absence of collateral restraints that would likely raise price or reduce output in the relevant goods market or in any other relevant antitrust market and that are not reasonably related to an efficiency-enhancing integration of economic activity, the evaluating Agency would be unlikely to challenge this arrangement.

Garrison (June 10, 1999), <http://www.justice.gov/atr/public/busreview/2485.pdf> [hereinafter 6C DVD Business Review Letter]; Letter from Joel I. Klein, Assistant Att'y Gen., Antitrust Div., U.S. Dep't of Justice, to Garrard R. Beene, Partner, Sullivan & Cromwell (Dec. 16, 1998), <https://www.justice.gov/sites/default/files/atr/legacy/2006/04/27/2121.pdf> [hereinafter 3C DVD Business Review Letter]; Letter from Joel I. Klein, Assistant Att'y Gen., Antitrust Div., U.S. Dep't of Justice, to Garrard R. Beene, Partner, Sullivan & Cromwell (June 26, 1997), <http://www.justice.gov/atr/public/busreview/215742.pdf> [hereinafter MPEG-2 Business Review Letter]; see also Letter from Charles A. James, Assistant Att'y Gen., Antitrust Div., U.S. Dep't of Justice, to Ky P. Ewing, Partner, Vinson & Elkins L.L.P. (Nov. 12, 2002), <https://www.justice.gov/sites/default/files/atr/legacy/2006/04/27/200455.pdf>. The absence of the safeguards used in these pools will not necessarily make the pool anticompetitive; the Agencies will review the particular facts to determine whether the actual conduct has an anticompetitive effect.

5.6 Grantbacks

A grantback is an arrangement under which a licensee agrees to extend to the licensor of intellectual property the right to use the licensee's improvements to the licensed technology. Grantbacks can have procompetitive effects, especially if they are nonexclusive. Such arrangements provide a means for the licensee and the licensor to share risks and reward the licensor for making possible further innovation based on or informed by the licensed technology, and both of these benefits promote innovation in the first place and promote the subsequent licensing of the results of the innovation. Grantbacks may adversely affect competition, however, if they substantially reduce the licensee's incentives to engage in research and development and thereby limit rivalry.

A non-exclusive grantback allows the licensee to practice its technology and license it to others. Such a grantback provision may be necessary to ensure that the licensor is not prevented from effectively competing because it is denied access to improvements developed with the aid of its own technology. Compared with an exclusive grantback, a non-exclusive grantback, which leaves the licensee free to license improvements technology to others, is less likely to harm competition.⁸²

The Agencies will evaluate a grantback provision under the rule of reason, considering its likely effects in light of the overall structure of the licensing arrangement and conditions in the relevant markets.⁸³ An important factor in the Agencies' analysis of a grantback will be whether the licensor has market power in a relevant technology or research and development market. If the Agencies determine that a particular grantback provision is likely to reduce significantly licensees' incentives to invest in improving the licensed technology, the Agencies will consider the extent to which the grantback provision has offsetting procompetitive effects, such as (1) promoting dissemination of licensees' improvements to the licensed technology, (2) increasing the licensors' incentives to disseminate the licensed technology, or (3) otherwise increasing competition and output in a relevant technology or research and development

⁸² A number of the pooling arrangements that the Department of Justice has reviewed contained mechanisms to narrow the scope of grantbacks, making them more likely to be procompetitive. *See e.g.*, 6C DVD Business Review Letter, *supra* note 81, at 8-9, 14-16; 3C DVD Business Review Letter, *supra* note 81, at 8, 14; MPEG-2 Business Review Letter, *supra* note 81, at 13.

⁸³ *See generally* *Transparent-Wrap Mach. Corp. v. Stokes & Smith Co.*, 329 U.S. 637, 645-48 (1947) (holding that grantback provision in technology license is not per se unlawful).

market.⁸⁴ In addition, the Agencies will consider the extent to which grantback provisions in the relevant markets generally increase licensors' incentives to innovate in the first place.

5.7 Acquisition of Intellectual Property Rights

Certain transfers of intellectual property rights are most appropriately analyzed by applying the principles and standards used to analyze mergers, particularly those in the 2010 Horizontal Merger Guidelines. The Agencies will apply a merger analysis to an outright sale by an intellectual property owner of all of its rights to that intellectual property and to a transaction in which a person obtains through grant, sale, or other transfer an exclusive license for intellectual property (i.e., a license that precludes all other persons, including the licensor, from using the licensed intellectual property).⁸⁵ Such transactions may be assessed under section 7 of the Clayton Act, sections 1 and 2 of the Sherman Act, and section 5 of the Federal Trade Commission Act.⁸⁶

Example 10

Situation: Omega develops a new, patented pharmaceutical for the treatment of a particular disease. The only drug on the market approved for the treatment of this disease is sold by Delta. Omega's patented drug has almost completed regulatory approval by the Food and Drug Administration. Omega has invested considerable sums in product development and market testing, and initial results show that Omega's drug would be a significant competitor to Delta's. However, rather than enter the market as a direct competitor of Delta, Omega licenses to Delta the right to manufacture and sell Omega's patented drug. The license agreement with Delta is nominally nonexclusive. However, Omega has rejected all requests by other firms to obtain a license to manufacture and sell Omega's patented drug, despite offers by those firms of terms that are reasonable in relation to those in Delta's license.

Discussion: Although Omega's license to Delta is nominally nonexclusive, the circumstances indicate that it is exclusive in fact because Omega has rejected all reasonable offers by other

⁸⁴ See section 4.2.

⁸⁵ The Agencies may also apply a merger analysis to a transaction involving a license that does not fall within the traditional definition of an exclusive license but in substance transfers intellectual property rights and raises the same potential antitrust concern—i.e., the transaction's effect may be to substantially lessen competition in a relevant market. See, e.g., Example 10.

⁸⁶ The safety zone of section 4.3 does not apply to transfers of intellectual property such as those described in this section.

firms for licenses to manufacture and sell Omega's patented drug. The facts of this example indicate that Omega, or Omega's licensee, would be a potential competitor of Delta in the absence of the licensing arrangement, and thus the firms are in a horizontal relationship in the relevant goods market that includes drugs for the treatment of this particular disease. The evaluating Agency would apply a merger analysis to this transaction, since it involves an acquisition of a potential competitor.

6 Invalid or Unenforceable Intellectual Property Rights

The Agencies may challenge the enforcement of invalid intellectual property rights as antitrust violations. Enforcement or attempted enforcement of a patent obtained by fraud on the Patent and Trademark Office may violate section 2 of the Sherman Act or section 5 of the Federal Trade Commission Act, if all the elements otherwise necessary to establish a charge are proved.⁸⁷ Inequitable conduct before the Patent and Trademark Office will not be the basis of a section 2 claim unless the conduct also involves knowing and willful fraud and the other elements of a section 2 claim are present.⁸⁸ Actual or attempted enforcement of patents obtained by inequitable conduct that falls short of fraud under some circumstances may violate section 5 of

⁸⁷ *Walker Process Equip., Inc. v. Food Mach. & Chem. Corp.*, 382 U.S. 172, 176-77 (1965); *Am. Cyanamid Co., 72 F.T.C. 623, 684-85 (1967)*, *aff'd sub. nom. Charles Pfizer & Co. v. FTC*, 401 F.2d 574 (6th Cir. 1968); *see also Michael Anthony Jewelers, Inc. v. Peacock Jewelry, Inc.*, 795 F. Supp. 639, 647 (S.D.N.Y. 1992) (holding that the enforcement of copyrights obtained by fraud on the Copyright Office could similarly violate antitrust law).

⁸⁸ *Argus Chem. Corp. v. Fibre Glass-Evercoat, Inc.*, 812 F.2d 1381, 1384-85 (Fed. Cir. 1987); *see also Transweb, LLC v. 3M Innovative Prods. Co.*, 812 F.3d 1295, 1307 (Fed. Cir. 2016) (stating that "[a]fter *Therasense*, the showing required for proving inequitable conduct and the showing required for proving the fraud component of *Walker Process* liability may be nearly identical"); *Therasense, Inc. v. Becton, Dickinson & Co.*, 649 F.3d 1276, 1290-92 (Fed. Cir. 2011) (en banc) (raising the standard of proof for inequitable conduct to require "but for" materiality and specific intent to deceive except in cases of affirmative egregious conduct).

the Federal Trade Commission Act.⁸⁹ In addition, sham litigation to enforce intellectual property rights may also constitute an element of a violation of the Sherman Act.⁹⁰

⁸⁹ See *Am. Cyanamid Co.*, 72 F.T.C. at 684.

⁹⁰ See *Profl Real Estate Inv'rs, Inc. v. Columbia Pictures Indus., Inc.*, 508 U.S. 49, 60-63 (1993) (“First, the lawsuit must be objectively baseless in the sense that no reasonable litigant could realistically expect success on the merits Only if challenged litigation is objectively meritless may a court examine the litigant’s subjective motivation. Under this second part of our definition of sham, the court should focus on whether the baseless lawsuit conceals ‘an attempt to interfere *directly* with the business relationships of a competitor’. . . .” (quoting *E. R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 144 (1961))); see also *id.* at 58 (recognizing that “‘a pattern of baseless, repetitive claims’” may result in an antitrust violation (quoting *Cal. Motor Transp. Co. v. Trucking Unlimited*, 404 U.S. 508, 513 (1972))); *Handgards, Inc. v. Ethicon, Inc.*, 743 F.2d 1282, 1289 (9th Cir. 1984) (patents); *Handgards, Inc. v. Ethicon, Inc.*, 601 F.2d 986, 992-96 (9th Cir. 1979) (patents); *CVD, Inc. v. Raytheon Co.*, 769 F.2d 842, 850-51 (1st Cir. 1985) (trade secrets). The enforcement of invalid intellectual property rights discussed in this section is distinguishable from licensing agreements where royalties are to be paid after the term of a valid patent right expires. The latter agreements may have “demonstrable efficiencies” that can be taken into account in an effects-based analysis. 2007 ANTITRUST-IP REPORT, *supra* note 13, at 122; see also *Kimble v. Marvel Entm’t, LLC*, 135 S. Ct. 2401, 2408 (2015) (explaining that patent law bars “royalties for using an invention after it has moved into the public domain” but distinguishing “defer[red] payments for pre-expiration use of a patent into the post-expiration period”).

Delrahim, Makan EOP/WHO

From:Delrahim, Makan EOP/WHO
Sent:16 Feb 2017 19:19:04 +0000
To:Ohlhausen, Maureen
Subject:Re: FTC updates
Excellent on all counts.

Makan Delrahim
Deputy Counsel to the President
Office of the White House Counsel

On Feb. 16, 2017, at 1:38 PM, Ohlhausen, Maureen <mohlhausen@ftc.gov> wrote:

Dear Makan,

I wanted to be sure you saw the press release about Tad Lipsky coming on board as acting BCP director. It also describes the internal moves for my staff, including announcing Svetlana Gans as chief of staff.

<https://www.ftc.gov/news-events/press-releases/2017/02/ftc-acting-chairman-ohlhausen-announces-tad-lipsky-acting>

Hope all is well!

Best,

Maureen

ftc_chairwoman@ftc.gov

From:ftc_chairwoman@ftc.gov
Sent:8 Feb 2017 09:33:23 -0500
To:Anderson Borrelli, Bridget
Subject:Memo to Staff from Acting Chairman Ohlhausen



Office of the Chairman

UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
WASHINGTON, D.C. 20580

February 08, 2017

MEMORANDUM

FROM: Acting Chairman Maureen K. Ohlhausen
TO: Commission Staff and Commissioners
SUBJECT: Selection of Acting Director for Bureau of Consumer Protection

I am pleased to announce that I have selected [Tom Pahl as the Acting Director for BCP](#). Tom has served in a number of different roles at the FTC starting in 1990, including BCP management stints as Assistant Director in the Division of Advertising Practices and the Division of Financial Practices. He also advised top agency officials on consumer protection matters, including as an attorney advisor to Commissioner Mary Azcuenaga and to Commissioner Orson Swindle.

Tom will be re-joining the agency shortly to help lead BCP forward. I know you will join me and our senior leadership team in offering a warm welcome to Tom.

ftc_chairwoman@ftc.gov

From:ftc_chairwoman@ftc.gov
Sent:16 Feb 2017 12:12:54 -0500
To:Anderson Borrelli, Bridget
Subject:Memo to Staff from Acting Chairman Ohlhausen



Office of the Chairman

UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
WASHINGTON, D.C. 20580

February 16, 2017

MEMORANDUM

FROM: Acting Chairman Maureen K. Ohlhausen
TO: Commission Staff and Commissioners
SUBJECT: Staff Announcements

I am pleased to announce the appointment of key senior staff and other personnel changes.

Abbott "Tad" Lipsky, Jr. will serve as Acting Director of the Bureau of Competition. Tad joins us from Latham & Watkins LLP in DC. Tad has an extensive background in US and international antitrust and competition law and privacy. Prior to his time at Latham, he was chief antitrust lawyer for The Coca-Cola Company and deputy assistant attorney general under William F. Baxter. Tad joins us on March 6, 2017.

I want to thank Debbie Feinstein for her exceptional service to the agency. Under Debbie's leadership, the Commission successfully challenged mergers that would have harmed the competitive process and consumers, including prevailing on cases in the Third, Seventh, and Ninth Circuit Courts of Appeals, as well as the U.S. District Court for the District of Columbia. The Bureau also challenged anticompetitive conduct and achieved important settlements in a number of those cases. She leaves an important legacy in accomplishing our core competition mission, and I wish her continued success in her career.

Alan Devlin will join the Bureau of Competition as an Acting Deputy Bureau Director. Before serving as my Attorney Advisor handling antitrust issues, Alan worked at Latham & Watkins LLP in San Francisco, where he practiced antitrust and intellectual-property

law. Alan teaches antitrust as an Adjunct Professor at Georgetown University Law Center, and has written extensively on antitrust and intellectual property issues, among others. He holds degrees from University College Dublin, the University of Chicago, and Stanford Law School.

Svetlana Gans will serve as my Chief of Staff. Svetlana previously served as an attorney advisor focusing on consumer protection matters for my office. Svetlana came to the FTC in 2010, joining BCP's Division of Marketing Practices, where she handled a variety of litigation and non-litigation matters and served as Program Coordinator of the Magnuson-Moss Warranty Act rules and enforcement. Later, she joined BC's Mergers IV, investigating and litigating a variety of merger matters, including in the hospital and casino industries. Previously, Svetlana was in private practice focusing on antitrust and consumer protection.

James Frost rejoins my team on a detail as an attorney advisor handling antitrust matters from the Office of Policy and Coordination in the Bureau of Competition. James brings over twenty years of competition experience to my office, with a wealth of experience in mergers, conduct cases, and antitrust litigation.

Brian Shull joins my office on a detail as an attorney advisor handling consumer protection matters. Brian joins us from the Division of Financial Practices. During his four-year tenure in DFP, Brian has successfully litigated a number of cases involving mobile cramming, lead generation, and the education marketplace.

Finally, I am grateful that my current staff – attorney advisors Neil Chilson and Haidee Schwartz; executive assistant Bridget Anderson; staff assistant Melody Martinez; and honors paralegal Devon Bacon – will continue to serve in my office.

Please join me in welcoming the members of my office, both old and new. We all look forward to working with you.

Economic Liberty

Proposal: Building on the success of *Phoebe Putney & N.C. Dental*, create an occupational licensing task force to work with states to reduce unnecessary licensing and bring FTC cases where appropriate

Over the past several decades, occupational licensing requirements have grown tremendously. These restrictions cost the economy hundreds of billions of dollars annually, and disproportionately harm the lower income residents of our country. As one of the amicus briefs in the FTC's North Carolina Dental case said, "The explosion of licensing and the tangle of restrictions it has created should worry anyone who believes that fair competition is essential to national economic health."

Licensing has its place and can ensure minimally acceptable health and safety requirements. But in many cases, occupational licensing serves as a state-sponsored and -enforced prohibition on competition. This "crony capitalism" reduces market competition and allows incumbents to collect higher profits than they would in the absence of the licensing. Occupational licensing regimes create artificial barriers to entry for entrepreneurs seeking to grab the first rung of the economic ladder. This is particularly true for occupations that draw individuals who are just beginning a professional career.

The FTC has a long history of fighting to free markets from competition-limiting state regulatory burdens, using both competition advocacy and enforcement. The Commission's victories in *Phoebe Putney* and *N.C. Dental* present an important opportunity to work with states interested in reducing the burdens from unnecessary occupational licensing. In addition, we should continue to bring enforcement actions where appropriate.

For further discussion see Ohlhausen, *From Hammurabi to Hair Braiding: The Ongoing Struggle for Economic Liberty*, .
https://www.ftc.gov/system/files/documents/public_statements/946853/160428instituteofjustice.pdf.

Different FTC and DOJ preliminary injunction standards for merger challenges; use of FTC administrative litigation for unconsummated mergers

Proposal: Enact the SMARTER Act

The House and Senate have both expressed support for the SMARTER Act, which would clarify that the FTC and DOJ are subject to the same legal standard when seeking a preliminary injunction in a merger challenge. The Smarter Act also would prevent the FTC from challenging unconsummated mergers in administrative litigation. The Democrats on the Commission have staunchly opposed the SMARTER Act.

I support the SMARTER Act insofar as it subjects the FTC and DOJ to the same legal standards, and forum, in challenging unconsummated mergers. Sound enforcement requires, among other things, predictability and fairness. Given that the FTC and DOJ share antitrust jurisdiction, it is vital that liability not depend on the agency to which an investigation happens to be cleared. This could transform the FTC and DOJ's informal clearance procedures from a matter of administrative efficiency to a deciding factor for liability.

I also would hope to see the following in any bill that gets enacted: (1) independent litigating authority for the FTC; (2) further codification that the FTC may settle merger cases on its own—that is, without involving the DOJ and Tunney Act proceedings (the current status in most matters); and (3) as much clarity as possible regarding the limitation of the administrative litigation carve-out to only that contemplated in the legislation, which is unconsummated transactions.

For further discussion see Ohlhausen, *A SMARTER Section 5 and Principles of Navigation* https://www.ftc.gov/system/files/documents/public_statements/804511/150925smartersection5.pdf.

https://www.ftc.gov/system/files/documents/public_statements/section-5-ftc-act-principles-navigation/131018section5.pdf.

Disgorgement

Proposal: Review use of disgorgement on both BC & BCP sides with goal of new disgorgement policy statement

The Commission has increasingly sought disgorgement of all revenues as a remedy in both competition and consumer protection matters. This troubling departure from prior Commission practice has subjected companies to threats of huge payments for activity that was not clearly illegal when undertaken and for amounts that are disproportionate to any consumer harm. It has also caused the agency to neglect its role in using administrative litigation to develop complex areas of law.

In 2003, the FTC adopted on a unanimous, bipartisan basis a Policy Statement on Monetary Equitable Remedies in Competition Cases. The Policy Statement subsequently received a unanimous endorsement by the Antitrust Modernization Commission (AMC). The Policy Statement said that disgorgement is not a “routine remed[y,]” but rather appropriate only “in exceptional cases.” It set forth three principles to guide the FTC’s enforcement discretion, ordinarily it would seek monetary relief: 1) “only where the underlying violation is clear;” 2) when there is “a reasonable basis for calculating the amount of the remedial payment;” and 3) considering “the value of seeking monetary relief in light of any other remedies available in the matter, including private actions and criminal proceedings.” The clear-violation factor, in particular, has an important rationale because “the value of deterrence is reduced when the violator has no reasonable way of knowing in advance that its conduct is placing it in jeopardy of having to pay back all the potential gains.”

Over my dissent, the Commission withdrew the Policy Statement in 2012. Reversing course, it stated that, rather than being appropriate for only “exceptional cases,” “competition cases may often be appropriate candidates for monetary equitable relief.” Chairwoman Ramirez now routinely seeks disgorgement in competition cases, creating great uncertainty for business in complex circumstances. Because disgorgement is not available in administrative litigation, it also has caused the agency to neglect its role in developing antitrust law. For example, in recent conduct cases like *Endo* and *AbbVie*—where Part III offered compelling advantages—the FTC opted for federal court in pursuit of disgorgement. The irony is that the FTC’s pivot toward federal court in important antitrust matters comes at a time when the agency is fighting to preserve its administrative-litigation authority (see discussion of SMARTER Act).

For a fuller explanation, see Ohlhausen: *Dollars, Doctrine, and Damage Control: How Disgorgement Affects the FTC’s Antitrust Mission*
https://www.ftc.gov/system/files/documents/public_statements/945623/160420dollarsdoctrinespeech.pdf.

On the consumer protection side, the Commission previously sought disgorgement only against fraudulent actors, whose products provided no plausible benefits to consumers. During the Obama administration, however, the Commission has routinely demanded full repayment of revenues in non-fraud cases involving legitimate products that made some overstated claims. In practice, this means that a beneficial product that made 10 claims and lacked support for one of

those claims, no matter how minor, may face an FTC demand of full disgorgement of all revenues. It is important for the Commission to seek remedies carefully calibrated to prevent deception yet avoid deterring the supply of valuable products or information to consumers.

For further discussion see Ohlhausen/Wright statement in *Genesis Today*:

https://www.ftc.gov/system/files/documents/public_statements/620661/150126linddunstmko-jdw.pdf.

Privacy & Data Security

Proposal: Develop more economic expertise in privacy & data security by providing more resources for BE work in this area

Proposal: Review all data security matters, whether closed or pursued, to distill and publicize factors for what is reasonable security

The Commission has successfully made it clear to legitimate companies that they need to keep their privacy promises and take basic precautions to safeguard consumer data. Moving past these basic goals in its privacy and data security agenda raises more nuanced issues, such as whether notice and choice are still a feasible framework for privacy regulation in the Internet of Things and what level of precautions are reasonable for a given type of data. Economic expertise in privacy and data security is necessary to make the right policy choices in this area. Also, a review and description of what the Commission has found to be reasonable and unreasonable security practices would provide useful guidance to industry and the bar.

For further discussion see Ohlhausen, *Internet of Things Workshop Report*, Separate Statement of Commissioner Maureen K. Ohlhausen,

https://www.ftc.gov/system/files/documents/public_statements/620691/150127iotmkostmt.pdf

and

Separate Statement of Commissioner Maureen K. Ohlhausen, *Big Data: A Tool for Inclusion or Exclusion?*,

https://www.ftc.gov/system/files/documents/public_statements/904483/160106bigdatarptmkostmt.pdf.

Proposal: Work with Congress on a data security bill that uses a process based approach

The FTC has supported on a bipartisan basis Congressional action to address data security, such as the Data Security and Breach Notification Act of 2015. As data breach continues to plague U.S. business and consumers, we should engage with the new Congress to enact a data security law that is effective, flexible, and provides clear guidance to business. In particular, we should support a bill that establishes a process-based approach for data security rather than one that attempts to establish particular data security practices that are likely to become quickly outdated. A process-based approach would direct companies to follow certain industry-wide best practices, which will adapt over time based on changes in technology and threats.

Proposal: Focus enforcement on actual or likely-- rather than merely speculative--harm

Most privacy and data security matters involve actual or likely consumer harm arising from the unauthorized use or exposure of sensitive information, such as financial accounts, real time location data, or medical records. The Obama administration has on occasion brought cases where there was no consumer harm and future harm was highly unlikely, however. This type of “gotcha” enforcement wastes government and private resources and risks discouraging business from offering consumers greater privacy protections.

See Ohlhausen Dissenting Statement in Nomi,
https://www.ftc.gov/system/files/documents/public_statements/638361/150423nomiohlhausenstatement.pdf

and

Ohlhausen Dissenting Statement in Lifelock,
https://www.ftc.gov/system/files/documents/public_statements/896043/151217lifelockmko.pdf.

Proposal: Using BE expertise assess substantial injury in privacy & data security cases based on unfairness

The FTC's prohibition on unfairness establishes a baseline prohibition on data practices that the overwhelming majority of consumers would never knowingly approve. Above that baseline, consumers remain free to find providers that match their privacy and data security preferences, and the FTC's deception authority governs those arrangements. Establishing the baseline at the proper level is important. Too low, and we would not stop harmful practices that most consumers oppose. Too high, and we would prohibit services many consumers would prefer.

Our unfairness test's emphasis on real consumer harm and cost-benefit analysis helps ensure that the baseline is in the right place. FTC experience demonstrates that more onerous privacy regulation does not always benefit consumers. Yet because privacy preferences vary widely, regulation can impose significant costs on consumers. Consumers who wish to receive targeted advertising or to benefit from services funded by advertising are harmed by regulation that increases the difficulty of using information. As a result, if a regulation imposes defaults that do not match consumer preferences, it forces unnecessary costs on consumers without improving consumer outcomes. The burdens imposed by overly restrictive privacy regulation, such as broad opt-in requirements for non-sensitive data, may also slow innovation and growth, harming all consumers.

As the amount and sensitivity of data held by companies continues to increase, economic expertise is crucial in determining what is substantial injury in the context of data privacy and security. The FTC needs to assess substantial injury in the context of information to ensure that its application of unfairness continues to protect consumers appropriately while not burdening competition and innovation.

For more discussion, see Ohlhausen, *Reactions to the FCC's Proposed Privacy Regulations*,
https://www.ftc.gov/system/files/documents/public_statements/955183/160608kellydrye.pdf

and

Ohlhausen, *Privacy Regulation in the Internet Ecosystem*,
https://www.ftc.gov/system/files/documents/public_statements/941643/160323fsf1.pdf.

Advertising Regulation

Proposal: Clarify “substantial minority” of consumers means the average or typical buyer when determining a reasonable interpretation of an ad claim

To be deceptive an alleged interpretation of an advertisement must be reasonable: “The test is whether the consumer’s interpretation or reaction is reasonable.” The FTC’s long-standing Deception Statement explains that an advertisement interpretation is reasonable if it is held by the “average listener,” or the “typical buyer,” or the “general populace.” Unreasonable interpretations are not deceptive, as “[s]ome people, because of ignorance or incomprehension, may be misled by even a scrupulously honest claim.” The Deception Statement further explains in a footnote that an interpretation may be reasonable even though fewer than 50% of reasonable consumers hold that interpretation. This exception means that if the Commission has otherwise determined (through extrinsic evidence, for example) that a particular ad interpretation is reasonable, a defendant cannot rebut that conclusion by merely showing that only a minority of consumers hold that interpretation.

Under the Obama administration, however, the Commission has interpreted this footnote to mean that a claim interpretation is necessarily reasonable simply if held by a “significant minority” (as low as 10%) of consumers. Their position creates a “significant minority” exception that swallows the “average listener,” the “typical buyer,” and the “general populace” rule in the body of the Deception Statement. The Commission should clarify that a “substantial minority” of consumers means average or typical buyers when determining a reasonable interpretation of an ad claim.

For more discussion, see Ohlhausen Statement in ECM Biofilms, https://www.ftc.gov/system/files/documents/public_statements/819661/151019ecmbiofilmsmkopartialdissent.pdf.

Proposal: Reform advertising substantiation standards that require excessive scientific support for claims about safe products and limit unduly broad claims interpretation

The FTC’s approach to advertising enforcement has successfully removed many fraudulent claims from the marketplace while promoting the dissemination of useful information. However, in some recent cases the FTC has overreached in its advertising enforcement, unconstitutionally limiting free speech and harming consumers in the process.

The FTC’s advertising substantiation approach has allowed advertising to make reasonable claims even absent fully conclusive science. However, in recent cases, staff has increasingly taken the position that a claim can be reasonable only if supported by “settled” science and that only one side of a scientific debate can be reasonable. This inefficiently high standard harms consumers because it restricts the flow of useful information to consumers about emerging areas of science and ultimately discourages scientific research in disputed areas. Specifically, some recent cases have required advertisers to support future health- and disease-related claims, even for relatively safe products such as foods, with two randomized, controlled trials (“RCTs”). Even though the D.C. Circuit struck down the Commission’s attempt to impose two RCTs as a

remedy, the Commission still seeks to impose an unduly high substantiation requirement in some cases.

The Commission has imposed this inefficiently high standard in two ways. First, the FTC has directly imposed unduly strict standards in its settlements with companies, thereby chilling their free speech as well as the speech of similarly situated companies who would otherwise provide useful information to consumers. Second, the FTC has indirectly imposed too high a substantiation standard by interpreting advertisements to make much stronger claims than a reasonable consumer would take from the ad.

For further discussion see Ohlhausen, *FTC Overreach on Advertising Enforcement Threatens the Free Flow of Valuable Information*, *chapter in LIBERTY'S NEMESIS: THE UNCHECKED EXPANSION OF THE STATE*, Dean Reuter and John Yoo, eds. (2016).

Common Carrier Exemption

Proposal: Seek Congressional action to give the FTC authority over common carriers

The FTC Act exempts common carriers, including those subject to the Communications Act, from FTC enforcement. This carve-out originated in an era when telecommunications services were provided by highly-regulated monopolies. The FTC, on a bipartisan basis, has long called for the repeal of the common carrier exception.

As the telecommunications and Internet industries continue to converge, the common carrier exception is increasingly likely to frustrate the FTC's ability to stop deceptive and unfair acts and practices and unfair methods of competition. Most pressing is the Ninth Circuit's recent decision in the AT&T case, which may prohibit the FTC from enforcing Section 5 against non-common-carriage activities engaged in by an entity with merely the "status" of a common carrier, even if that is not its principal line of business. If common carriers are providing non-common carrier products or services, one outcome might be that neither the FCC nor the FTC would have jurisdiction to respond to practices that harm consumers. The FCC's controversial reclassification of broadband Internet access service as a common carriage service has intensified this problem.

For more discussion, see FTC Testimony before Senate Commerce Committee, https://www.ftc.gov/system/files/documents/public_statements/986433/commission_testimony_oversight_senate_09272016.pdf.

Proposal: Upon rescission of FCC Open Internet Order, restore FTC competition and consumer protect oversight over activities of broadband Internet access providers

When the FCC adopted its net neutrality rules, it chose to reclassify Broadband Internet Access Service as a Title II common carrier service. This affected the FTC's oversight of ISPs. Although the FTC has general jurisdiction, there are a few carve outs, including common carriers acting as common carriers. Thus, the FCC's reclassification affected the FTC's long-standing authority to protect consumers' privacy in their interactions with ISPs. The FTC has long applied to ISPs its expertise in privacy, advertising, and billing issues.

Reclassification also affected the Commission's competition oversight of ISPs, another area where the Commission has considerable expertise. In fact, under my direction, a unanimous, bipartisan commission issued a 2007 report on "Broadband Connectivity Competition Policy," which concluded that antitrust and consumer protection oversight were sufficient to address any anticompetitive behavior by ISPs.

For further discussion, see Ohlhausen, *Net Neutrality vs. Net Reality: Why an Evidence-Based Approach to Enforcement, And Not More Regulation, Could Protect Innovation on the Web*, https://www.ftc.gov/system/files/documents/public_statements/telecommunications-electronic-media-net-neutrality-vs.net-reality-why-evidence-based-approach-enforcement-not-more-regulation-could-protect-innovation-web/140204ohlhausennetneutrality.pdf

and

Ohlhausen, *The FCC's Knowledge Problem: How to Protect Consumers Online*, https://www.ftc.gov/system/files/documents/public_statements/818521/1509fccohlhausen.pdf.



UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
WASHINGTON, D.C. 20580

November 21, 2016

Mr. Craig Bannon

(b)(6)

Lansdale, PA (b)(6)

Dear Mr. Bannon,

This letter is to confirm our offer and your acceptance of the full time position of General Attorney (Trade Regulation), GS-0905-14, step 02, annual salary of \$112,517, with the Federal Trade Commission, Office of the General Counsel. The full performance level of this position is GS-15. Your appointment is in the excepted service and requires that you maintain an active bar membership and be duly licensed and authorized to practice as an attorney under the laws of a state, territory, or the District of Columbia.

This appointment will be effective on Sunday, February 19, 2017. On Monday, February 20, 2017 you should report to the Constitution Center, Federal Trade Commission SW quadrant lobby located at 400 7th Street, SW at 8:00 am for orientation. To verify your eligibility for Federal employment, you must bring two (2) forms of identification. Acceptable forms of identification are an unexpired U.S. passport or the combination of (1) an unexpired driver's license and social security card or (2) an unexpired driver's license and original or certified copy of birth certificate. A complete list of acceptable forms of identifications are available on page three of the attached I-9 form. **All attached forms should be completed to the extent possible and returned. Please wait until orientation in order to date and sign the forms.**

As a federal employee and an employee at the Federal Trade Commission, you are eligible to participate in the following benefits: Federal Employees Health Benefit Program, Federal Employees Group Life Insurance, Thrift Savings Plan, Transportation Subsidy, Federal Employees Retirement System, FSAFEDS, FTC Leave Bank, Leave Transfer Program, Employee Assistance Program, LifeCare, and Long Term Care. You will also accrue annual leave and sick leave each pay period.

Congratulations on your new appointment and welcome to the Federal Trade Commission! If you have any questions, please contact me at (202) 326-2303.

Sincerely,

Leemu S. Kufuor
Human Resources Specialist

Kufuor, Leemu S.

From:Kufuor, Leemu S.

Sent:21 Nov.2016 11:34:58 -0500

To:'Craig Bannon'

Cc:Pankey, Lorielle;Hunt, Julia;Hardy, Dominique S.;Butler, Keyonna

Subject:Final Offer Letter-Craig Bannon

Attachments:Craig Bannon-Final Offer Letter.pdf

Hello Mr. Bannon,

Congratulations on your new appointment with the Office of the General Counsel, here at the Federal Trade Commission. We are very excited to welcome you to the agency! Please see the attached final offer letter. Dominique Hardy (cc'd) will be working with you to send you your onboarding package via email.

Please let us know if you have any additional questions or if anything changes regarding when you'd be able to move to the area. Congratulations again!

Thanks,

Leemu

Leemu Kufuor

Human Resources Specialist

Human Capital Management Office | [Federal Trade Commission](#)

600 Pennsylvania Avenue, NW | Room H-723 | Washington, DC 20580 | P: 202-326-2303

(b)(6)

Lansdale, PA

(b)(6)

Craig Bannon

(b)(6)

LEGAL EXPERIENCE

Defense Logistics Agency, U.S. Department of Defense, Philadelphia, PA
Assistant Counsel, GS-0905-13, February 16, 2010 – Present

Ethics Law and Program Management (Feb. 2011 – Mar. 2015):

- Researched statutes, regulations, U.S. Office of Government Ethics Legal Advisories, and other authorities to analyze issues involving criminal conflict of interest laws, the Standards of Ethical Conduct for Employees of the Executive Branch, and related laws
- Drafted ethics opinions and verbally advised employees on financial conflicts of interest, representational service bans related to outside activities and post-government employment, the Procurement Integrity Act, gifts, fundraising, the Hatch Act, misuse of official position and government property, improper endorsements and preferential treatment of non-federal entities, appearances of impropriety, and other ethics issues
- Developed and presented annual ethics trainings, initial ethics orientations for new employees, and procurement integrity trainings for audiences ranging from a single member of the Senior Executive Service to groups of approximately 400 employees of various grades and ranks
- Reviewed financial disclosure reports (OGE Form 450) for over 700 confidential filers to check for financial conflicts of interest and other possible ethics violations, and drafted cautionary memoranda, disqualification memoranda, and/or took other necessary actions to resolve potential issues identified on the reports
- Assisted public financial disclosure filers with completing their OGE Forms 278
- Managed the financial disclosure filing program by implementing a web-based system to transition from paper filing, verifying that employees were appropriately designated as filers and that the filer list was up-to-date, and ensuring timely submission of reports
- Trained other attorneys on how to review financial disclosure reports and manage the financial disclosure program requirements

Fiscal Law (Aug. 2013 – Dec. 2014):

- Conducted legal research and drafted opinions advising on whether the Agency had authority to use appropriated funds for a variety of expenditures, such as food, clothing, gifts, awards, entertainment, honoraria, memberships in non-federal entities, licenses and certifications, reasonable accommodations, and other items
- Reviewed requests to attend or host conferences to provide advice and counsel on pertinent fiscal and ethics laws

Employment and Labor Law (Feb. 2010 – Dec. 2014):

- Advised managers on non-discrimination laws, merit system principles, and labor laws regarding hiring actions, disciplinary matters, reasonable accommodation requests, performance issues, and other personnel matters, and recommended viable solutions to achieve management objectives while mitigating litigation risks

- Successfully defended the Agency against complaints and appeals filed with the Equal Employment Opportunity Commission, the Merit Systems Protection Board, and the Federal Labor Relations Authority

Acquisition Law (Mar. 2015 – present):

- Provide advice and counsel to acquisition personnel on contract formation issues, including soliciting requirements, conducting negotiations, evaluating offers, and debriefing unsuccessful offerors, for multi-million dollar acquisitions
- Ensure proper and appropriate execution of contract modifications and assist contracting officers with resolving contractor claims filed under the Contract Disputes Act

EDUCATION

University of Baltimore School of Law, Baltimore, MD
Juris Doctor, May 2009

- GPA: 3.813 out of 4.0, Rank 4 of 305, *Summa Cum Laude*
- Activities: *U. Balt. Law Forum*, Asst. Recent Development Articles Editor (2008-2009)
Authored Published Article, *Paulino v. State*, 38.1 U. Balt. L.F. 87 (2007)

The Pennsylvania State University, State College, PA
Bachelor of Science, Business Logistics, December 2005
Bachelor of Arts, Political Science, December 2005

- GPA: 3.52 out of 4.0
- Activities: Business Logistics, Teaching Assistant (2004)
Student Government, Vice-President (2001-2002)

SPECIALIZED LEGAL TRAINING

United States Army Judge Advocate General's Legal Center & School, Charlottesville, VA
Fiscal Law Course, April 2015
Ethics Counselor Course, November 2013
Federal Contract Law Course, July 2010

United States Office of Government Ethics, Washington, D.C.
New Ethics Official Certificate Program, May 2011

United States Air Force Judge Advocate General's School, Montgomery, AL
Federal Labor & Employment Law Course, October 2010

AWARDS AND RECOGNITION

- Time-off Award, May 2014
- Quality Step Increase, May 2012
- Employee of the Month, February 2011

REFERENCES AVAILABLE UPON REQUEST

UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
WASHINGTON, D.C. 20580



November 17, 2016

Mr. Craig Bannon

(b)(6)

Lansdale, PA (b)(6)

Dear Mr. Bannon,

We are pleased to extend a tentative offer for employment with the Federal Trade Commission's Office of the General Counsel, as a General Attorney, GS-0905-14. The full performance level of this position is GS-15. This appointment will be effective upon a mutually acceptable date.

Our tentative offer is conditional and contingent upon successful completion, submission, and review of the pre-employment form OF-306 and an initial favorable security review. You should not make any life changes until you receive an official job offer from us.

You must complete the questionnaire for the OF-306 (Declaration for Federal Employment) and send it back to me by fax at (202) 326-2328 or via email at Lkufuor@ftc.gov. You can retrieve the form from https://www.opm.gov/forms/pdf_fill/of0306.pdf. Please complete all information, answering questions 1 through 16 and signing 17a.

If you have any questions regarding this tentative offer of employment and/or completion of this form or if you require accommodations in order to complete any step of the on-boarding process, please contact me.

Sincerely,

Leemu Kufuor
Human Resources Specialist



UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
WASHINGTON, D.C. 20580

December 6, 2016

Mr. Craig Bannon

(b)(6)

Lansdale, PA (b)(6)

Dear Mr. Bannon,

This letter is to confirm our offer and your acceptance of the full time position of General Attorney (Trade Regulation), GS-0905-14, step 02, annual salary of \$112,517, with the Federal Trade Commission, Office of the General Counsel. The full performance level of this position is GS-15. Your appointment is in the excepted service and requires that you maintain an active bar membership and be duly licensed and authorized to practice as an attorney under the laws of a state, territory, or the District of Columbia.

This appointment will be effective on Sunday, January 8, 2017. On Monday, January 9, 2017, you should report to the Constitution Center, Federal Trade Commission SW quadrant lobby located at 400 7th Street, SW at 8:00 am for orientation. To verify your eligibility for Federal employment, you must bring two (2) forms of identification. Acceptable forms of identification are an unexpired U.S. passport or the combination of (1) an unexpired driver's license and social security card or (2) an unexpired driver's license and original or certified copy of birth certificate. A complete list of acceptable forms of identifications are available on page three of the attached I-9 form. **All attached forms should be completed to the extent possible and returned. Please wait until orientation in order to date and sign the forms.**

As a federal employee and an employee at the Federal Trade Commission, you are eligible to participate in the following benefits: Federal Employees Health Benefit Program, Federal Employees Group Life Insurance, Thrift Savings Plan, Transportation Subsidy, Federal Employees Retirement System, FSAFEDS, FTC Leave Bank, Leave Transfer Program, Employee Assistance Program, LifeCare, and Long Term Care. You will also accrue annual leave and sick leave each pay period.

Congratulations on your new appointment and welcome to the Federal Trade Commission! If you have any questions, please contact me at (202) 326-2303.

Sincerely,

Leemu S. Kufuor
Human Resources Specialist

THIS IS AN ABSTRACT OF A DOCUMENT. YOU CAN OBTAIN THE HARD
COPY DOCUMENT THROUGH THE RECORDS PROCESSING SECTION

F015198 -- ABSTRACT OF DEPT OF JUSTICE V DONALD TRUMP

Industry Name:

The FTC and DOJ charge that defendant failed to comply with reporting requirements of the Hart-Scott-Rodino Act in purchasing stock in Holiday Corp and Bally Manufacturing Corp through an investment banking firm. Defendant eventually made the required filings, but not within the required time frame. Defendant agrees to settle the charges by paying a \$750,000 civil penalty. Attached: press release, complaint, motion for entry of judgment, final judgment in U.S. v RSR Corp, Certificate of service, stipulation, and final judgment. 04071234

Author name :

Document Type : 185

Matter Number : 8610148

related Doc No:

Doc Location : MICROFICHE

Conf Sta code : P

FOR IMMEDIATE RELEASE: April 5, 1988

**DONALD TRUMP AGREES TO SETTLE GOVERNMENT CHARGES
HE VIOLATED PREMERGER NOTIFICATION REQUIREMENTS**

The federal government charged in federal court today that Donald J. Trump failed to comply with premerger notification requirements when he acquired stock through the investment banking firm of Bear Stearns & Co. Trump agreed to settle the charges by paying a \$750,000 civil penalty.

The Federal Trade Commission had asked the Department of Justice to file the complaint. The complaint and settlement were filed today in the U.S. District Court for the District of Columbia.

This is the third case the government has brought concerning the use of an investment banking firm in a stock acquisition to avoid filing under the Hart-Scott-Rodino Act. In December 1986, Jeffrey Zuckerman, director of the FTC's Bureau of Competition, announced that the Commission staff was investigating several instances in which a client had arranged for an investment banking firm to purchase voting securities of a company on the client's behalf, but had failed to report the transactions in a timely manner as required by the HSR Act. At the FTC's request, the Justice Department has already filed similar complaints against Wickes Companies Inc. and First City Financial Corp. Ltd.

The complaint charges that, in two separate transactions, Trump acquired stock in Holiday Corp. and Bally Manufacturing Corp. through Bear Stearns in an amount well beyond the dollar threshold at which he should have filed premerger notifications with the FTC and DOJ. Trump eventually made the appropriate filings but not within the time frame established by the HSR Act.

Trump's business operations are based in New York City.

The Commission vote to recommend that the Department of Justice file the complaint and judgment was 4-1. In dissent, Commissioner Andrew J. Strenio, Jr., said that "although there is reason to believe that violations occurred here, the omission of any provision for injunctive relief is a fatal flaw."

This judgment is for settlement purposes only and does not constitute an admission by Trump that he violated the law.

Copies of the complaint and judgment are available from the FTC's Public Reference Branch, Room 130, 6th St. and Pennsylvania Ave. N.W., Washington, D.C. 20580; 202-326-2222; TTY 202-326-2502.

###

MEDIA CONTACT: Susan Ticknor, Office of Public Affairs,
202-326-2181

STAFF CONTACT: Jeffrey I. Zuckerman, Bureau of Competition,
202-326-2556

(FTC File No. 861 0148)
(Trump)

(Civil Action No. 88-0929)

DARRELL E. ISSA
6TH DISTRICT, CALIFORNIA

WASHINGTON OFFICE:
2041 RAYBURN HOUSE OFFICE BUILDING
WASHINGTON, DC 20515
(202) 225-3500
FAX: (202) 225-3303

DISTRICT OFFICE:
1800 THEODORE ROAD, SUITE 310
VISTA, CA 92081
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FAX: (760) 599-1178
www.issa.house.gov



Congress of the United States
House of Representatives
Washington, DC 20515-0549

COMMITTEE ON OVERSIGHT AND
GOVERNMENT REFORM
CHAIRMAN
COMMITTEE ON THE JUDICIARY
INTELLECTUAL PROPERTY
SUBCOMMITTEE
REGULATORY REFORM
SUBCOMMITTEE

CONSTITUENT ASSISTANCE FORM

RECEIVED
DEC 20 2016
BY:

Thank you for contacting my office for assistance. In order to obtain information on your behalf, I need to provide the agency with signed consent in compliance with the Privacy Act of 1974. Please complete the authorization form below and return it to my Vista district office as soon as possible. Should you have any questions, you may contact my Vista district office at 760-599-5000.

AUTHORIZATION

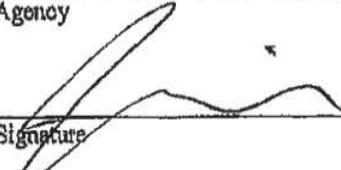
I hereby grant Congressman Darrell Issa and/or members of his staff, the authority to obtain the necessary information to complete this inquiry. This authorization is revocable upon my written notification to Congressman Darrell Issa or otherwise will remain in effect for one year from today's date.

(b)(6) (b)(6) (b)(6)
 Name (Please Print) Social Security Number Birthday

(b)(6) CARLSBAD CA (b)(6)
 Street Address Apt. # City State Zip Code

(b)(6) (b)(6)
 Home Phone Work Phone Email (b)(6)

FTC AAFE et al
Agency CSA, VA, WAC, A- Claim Number

 12/19/16
Signature Current Date

DARRELL E. ISSA
49TH DISTRICT, CALIFORNIA

WASHINGTON OFFICE:
2147 RAYBURN HOUSE OFFICE BUILDING
WASHINGTON, DC 20515
(202) 225-3900
FAX: (202) 225-3303

DISTRICT OFFICE:
1600 TRUSSARD ROAD, SUITE 310
VISTA, CA 92081
(760) 598-6000
FAX: (760) 598-1178
www.dais.house.gov



Congress of the United States
House of Representatives
Washington, DC 20515-0549

COMMITTEE ON OVERSIGHT AND
GOVERNMENT REFORM
CHAIRMAN

COMMITTEE ON THE JUDICIARY

INTELLECTUAL PROPERTY
SUBCOMMITTEE

REGULATORY REFORM
SUBCOMMITTEE

CONSTITUENT ASSISTANCE FORM

Please take a moment to answer the following questions:

Have you contacted my office previously regarding this matter?

Have you contacted the federal agency involved in this matter?

Have you filed an appeal to the decision?

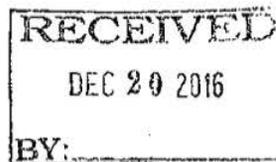
<input type="checkbox"/>	Yes	No	<input checked="" type="checkbox"/>
<input checked="" type="checkbox"/>	Yes	No	<input type="checkbox"/>
<input type="checkbox"/>	Yes	No	<input type="checkbox"/>

Please use the space to provide a summary of your problem along with any pertinent documentation. Should you have any questions, you may contact my Vista district office at 760-599-5000.

See attached letter.

December 19, 2016

Hon. Darrell Issa,
49th District, California
Congress of the United States
House of Representatives
1800 Thibodo Road, Suite 310
Vista, CA 92081



Re: Request for Constituent Services
Congressional Inquiry to Federal Trade Commission

Dear Congressman Issa,

My name is (b)(6) I am your constituent and a local business co-owner of (b)(6) a consumer goods company in Vista, California employing over 20 people. (b)(6) is the outgrowth of a family business started by my father (b)(6) (b)(6) almost 30 years ago. He started the company here in Carlsbad, where I was born and raised, and worked at it for most of his adult life until his retirement in 2014. We sell consumer goods like the Medicus Dual-Hinge Training Golf Club to both consumers and to other businesses for resale.

In September 2015, we received extensive civil investigative demands from the Federal Trade Commission (FTC). The FTC demanded all our sales information for the previous 5 years related to negative option offers, claiming we had made technical violations in the manner we presented our offers to consumers. There was no issue with the quality of our products.

We had no idea giving all of our customers free shipping on their purchases and not on returns technically violated FTC regulations. We cooperated with the FTC, provided responsive information to their demands. In deference to the FTC and as a gesture of our good faith, we promptly terminated subscription programs that the FTC had identified as noncompliant. Additionally, we immediately began a dialogue with FTC to correct and improve all of our advertising to follow best practices recommended by the FTC. With education and guidance from the FTC, we promptly corrected our materials. We believed we had satisfied FTC concerns, as we were in full compliance with all their requests.

However, in August 2016, the FTC presented a proposed federal complaint and voluntary compliance order, threatening litigation. In the initial documents, no monetary settlement amount was specified. The proposed Complaint not only named the corporate subsidiaries that had engaged in direct to consumer sales, but also named four individuals

(b)(6)

(b)(6)

joint and severally with the corporations. FTC then declared they would file suit, shut down the company and demanded that the corporation and individuals, joint and severally, pay four million eight hundred thousand dollars (\$4,800,000).

We retained counsel and have spent several months attempting to negotiate a resolution with the FTC. The FTC line attorneys have ignored evidence from our expert economist as to the scope of potential damage and constantly are making new and different excuses to ignore the economic evidence that shows damages significantly less than what FTC has demanded. The FTC seems intent on destroying our small business and the financial wellbeing of the four named defendants. As a result of FTC activity and its profound disruption on our business, we have already had to undergo a round of layoffs, and 2016 was a very bad year.

We are intent upon being a good corporate citizen and a successful business. We believe the FTC is acting unfairly in negotiations and their overly aggressive persecution of our individual owners and officers.

We've researched into similar FTC investigations, complaints and demands for voluntary compliance orders with other companies. Our research finds that we are being treated much more harshly. For example, Lumosity was alleged to have committed \$50,000,000 in violations, but FTC settled for \$4,000,000. Although the Lumosity voluntary compliance order states that its CEO and CFO were individually named in the Complaint, neither individual was subject to the monetary judgment. We see this over and over in FTC voluntary compliance order settlements. Yet here, the FTC seems intent upon treating our smaller business differently, putting us out of business, eliminating work for our employees, and to financially ruin the individuals named.

This entire process, which has lasted over a year now, has already consumed countless man hours, thousands of dollars in legal and expert fees, and forced us to lay off employees, some of whom had been with us for decades. We do not want to end our business and we have 20 remaining employees whom we seek to protect.

We need your help bringing this investigation to a fair resolution for everyone. While we understand the need to protect consumers in the market place, we don't believe consumers are best served by eliminating small businesses from the market place by overly onerous and technical regulations. We need your help with a Congressional inquiry to examine what is going on at FTC in reference to our situation.

I would like to meet with you in person to discuss our concerns at the earliest opportunity. The FTC is threatening to move forward with litigation although to date, no Commissioner has approved the complaint. You may reach me at (b)(6) or by email at (b)(6). Thank you for your time.

(b)(6)



UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
WASHINGTON, D.C. 20580

Office of the Secretary

January 19, 2017

The Honorable Darrell Issa
United States House of Representatives
1800 Thibodo Road, Suite 310
Vista, CA 32081

Re: FTC Reference No. 14016014

Dear Representative Issa:

Thank you for your letter to the Federal Trade Commission on behalf of your constituent, (b)(6) of Carlsbad. As you know, the Commission has been directed by Congress to act in the interest of all consumers to prevent deceptive or unfair acts or practices, pursuant to the Federal Trade Commission Act, 15 U.S.C. §§ 41-58. Under the FTC Act, a practice is *deceptive* if it is likely to mislead reasonable consumers and affect their purchasing decisions.¹ A practice is *unfair* if it causes or is likely to cause substantial consumer injury which consumers cannot reasonably avoid, and which is not outweighed by benefits to consumers or competition.²

Your correspondence has been forwarded to appropriate members of the Commission staff for review. I should note, however, that as a consequence of a number of statutory and regulatory prohibitions, including in particular the fact that Commission investigations are nonpublic, I am not able to provide any information regarding the existence or contours of or any facts relating to any Commission investigation.

Thank you again for your correspondence. Please let us know whenever we can be of service with respect to any other matter.

Sincerely,

A handwritten signature in blue ink that reads "Donald S. Clark".

Donald S. Clark
Secretary of the Commission

¹ See, e.g., *FTC v. Stefanchik*, 559 F.3d 924, 928 (9th Cir. 2009); *In the Matter of Telebrands Corp.*, 140 F.T.C. 278, 290 (2005), *aff'd*, 457 F.3d 354 (4th Cir. 2006); see also Federal Trade Commission Policy Statement on Deception, appended to *Cliffdale Assocs., Inc.*, 103 F.T.C. 110, 174-83 (1984).

² 15 U.S.C. § 45(n); see also Federal Trade Commission Policy Statement on Unfairness, appended to *Int'l. Harvester Co.*, 104 F.T.C. 949, 1070-76 (1984).

JAMES B. RENACCI
16TH DISTRICT, OHIO

COMMITTEE ON WAYS AND MEANS
SUBCOMMITTEE ON TAX POLICY
SUBCOMMITTEE ON SOCIAL SECURITY

COMMITTEE ON THE BUDGET

Congress of the United States
House of Representatives
Washington, DC 20515-3516

328 CANNON HOUSE OFFICE BUILDING
WASHINGTON, DC 20515
(202) 225-3876

1 PARK CENTER DRIVE, SUITE 302
WADSWORTH, OH 44281
(330) 334-0040

7335 RIDGE ROAD, SUITE 2
PARMA, OH 44129
(440) 882-6779

January 12, 2017

Jeanne Bumpus
Director, Office of Congressional Relations
Federal Trade Commission
600 Pennsylvania Avenue NW, Room 404
Washington, DC 20580-0002

Dear Director Bumpus:

I write today to refer to your attention the concerns of (b)(6). Please find enclosed with this cover a copy of the Privacy act release form and accompanying narrative which (b)(6) sent to my attention.

It is my understanding the Federal Trade Commission has been examining the company of which (b)(6) is co-owner (b)(6) since September 2015. As you can see from (b)(6)'s narrative, the investigation by FTC has been a time and resource-consuming process with no apparent end in sight. (b)(6) has attempted to learn FTC's intentions with respect to his company, but his efforts to date have not met with success. Frustrated (b)(6) has requested my assistance.

I respectfully refer the concerns of (b)(6) to your attention. Please review his case. In your reply, kindly indicate the status of FTC's investigation. Further, please describe when (b)(6) may reasonably expect to hear from FTC regarding the matter.

Thank you for your attention and assistance. Kindly direct any correspondence in reply to my Ohio district office located in Wadsworth, Ohio. I will look forward to hearing from you.

Sincerely,



Jim Renacci
Member of Congress

JR/dd



CONGRESSMAN JIM RENACCI

Representing the 16th District of Ohio

Privacy Act Release Form

I give permission to Congressman Jim Renacci and his staff to make any and all necessary inquiries on my behalf to your agency, per the Privacy Act of 1974. I hereby authorize you to release all relevant records and information pertaining to my case to Congressman Renacci and his staff.

Name: (b)(6) Date of Birth: (b)(6)

Address: (b)(6) Apt./Suite: _____

City: Medina State: Ohio Zip Code: (b)(6)

Home Phone: (b)(6) Work Phone: (b)(6)

Cell Phone: (b)(6) Fax Number: _____

Social Security Number: _____ Case Number (If applicable): _____

Employer ID Number (If applicable): _____

If you are interested in receiving Congressman Renacci's e-newsletter, please check here.

Email Address: (b)(6)

Please explain the nature of the problem or issue you are experiencing and attach any correspondence which supports your statement or which relates to your case (if necessary, use additional paper). If the information from your case needs to be released to a third party (i.e. parent, spouse, or guardian), please list that third party's name and contact information below.

Please see attached.

Signature: (b)(6) Date: 12 / 22 / 2016

For IRS Cases Only Please Complete This Additional Information:

Type of Tax (e.g., 1040, 1120, etc.): _____ Year (s) of Tax: _____

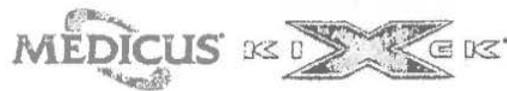
Under the Authority of the Internal Revenue Code 6103(c), I, the undersigned, authorize Congressman Jim Renacci or his staff to investigate and receive information pertaining to the matter described above.

Please return the completed form and any other relevant information to:

Congressman Jim Renacci
 1 Park Center Drive, Suite 302
 Wadsworth, Ohio 44281
 Fax: 330-334-0061
 Phone: 330-334-0040

or

Congressman Jim Renacci
 7335 Ridge Road, Suite 2
 Parma, Ohio 44129
 Fax: 440-882-6560
 Phone: 440-882-6779



December 6, 2016

David Dobo
Constituent Service Representative/Internship Coordinator
Congressman Jim Renacci (16th-OH)
1 Park Center Drive Suite 302
Wadsworth, Ohio 44281

Re: Request for Constituent Services
Congressional Inquiry to Federal Trade Commission

Dear Congressman Renacci,

My name is (b)(6). I am a business co-owner of (b)(6) a consumer goods company in Vista, California employing over 20 people. (b)(6) was a family business started when I invented the (b)(6) in 1998. We started the company here in Brunswick, Ohio along with a number of other companies. In the 4th quarter of 2013, I sold one of our companies, (b)(6) to (b)(6) which is still located in Brunswick, Ohio. As part of the purchase agreement, I was required to move the golf business out of the building, which was shared with Precision Supply. I also signed a two year contract to work for Blackhawk as a (b)(6). For many years Medicus had outsourced its direct-to-consumer sales and marketing to a company owned by (b)(6) and located in Vista, California. Brian had many times discussed us working closer together and after confirming with Brian that there were no outstanding lawsuits or issues with the companies BBB rating, I decided in 2014 to merge our companies together. I felt long term this could build a stronger organization, but knew that for the first two years I would have very little to do with operating the business because of my contract with BlackHawk.

In September 2015, we received extensive civil investigative demands from the Federal Trade Commission (FTC). The FTC demanded all our sales information for the previous 5 years related to negative option offers, of which I was only with the company less than 2 years, claiming we had made technical violations in the manner we presented our offers to consumers. There was no issue with the quality of our products. My partner had no idea that our marketing materials was improper, but he cooperated with the FTC, provided responsive information to their demands. This process took several months' time and took human resources away from growing the business as we were in the process of expanding within the golf marketplace.

In deference to the FTC and as a gesture of our good faith, he promptly terminated subscription programs that the FTC had identified as noncompliant. Additionally, he immediately began a dialogue with FTC to correct and improve all of our advertising to follow best practices recommended by the FTC. With education and guidance from the FTC, he corrected our materials. We believed we had satisfied FTC concerns, as we were in full compliance with all their requests.

However, in August 2016, the FTC presented a proposed federal complaint and voluntary compliance order, threatening litigation. In the initial documents, no monetary settlement amount was specified. The proposed Complaint not only named the corporate subsidiaries that had engaged in direct to consumer sales, but also named four individuals (b)(6)

(b)(6)

FTC then declared they would file suit, shut down the company and demanded that the corporation and individuals, joint and severally, pay four million eight hundred thousand dollars (\$4,800,000).

We have retained counsel and spent several months now attempting to negotiate a resolution with the FTC. We hired economists to review the data. We have made a substantial settlement offer of close to a seven hundred and fifty thousand dollars. Yet, the staff attorneys assigned to our case, continually reject our evidence and make assertions that the reductions we identify are wrong and adhere to an unnecessary punitive calculation method for damages that includes all of the revenues for the company for direct-to-consumer sales during the five-year period. They are attempting to pit owners against each other and destroy the company. They are indifferent to our financial limits and our desire to preserve the company.

We have looked at other published voluntary compliance orders entered by other companies, which have been published by the FTC on its website and observed that the FTC routinely compromises its alleged claims in settlement at substantial discount. Lumosity was alleged to have committed \$50,000,000 in violations, but FTC settled for \$2,000,000. Although the Lumosity voluntary compliance order states that its CEO and CFO were individually named in the Complaint, neither individual was subject to the monetary judgment. We see this over and over in FTC voluntary compliance order settlements. Yet here, the FTC seems intent upon putting us out of business entirely and to financially ruin the individuals named.

This entire process, which has lasted over a year now, has already consumed countless man hours, thousands of dollars in legal and expert fees, and forced us to lay off employees, some of whom had been with us for decades. We do not want to end our business and we have 20 remaining employees whom we seek to protect. We need your help with a Congressional inquiry to examine what is going on at FTC in reference to our situation.

I would like to meet with you in person to discuss my concerns at the earliest opportunity. The FTC is threatening to move forward with litigation although to date, no Commissioner has approved the complaint. You may reach me at (b)(6) or by email at (b)(6). Thank you for your time.

Very truly yours,

(b)(6)



UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
WASHINGTON, D.C. 20580

Office of the Secretary

February 23, 2017

The Honorable Jim Renacci
U.S. House of Representatives
1 Park Center Drive, Suite 302
Wadsworth, OH 44281

RE: FTC Ref. No. 14016132

Dear Representative Renacci:

Thank you for your letter to the Federal Trade Commission on behalf of your constituent, (b)(6) of Medina. As you know, the Commission has been directed by Congress to act in the interest of all consumers to prevent deceptive or unfair acts or practices, pursuant to the Federal Trade Commission Act, 15 U.S.C. §§ 41-58. Under the FTC Act, a practice is *deceptive* if it is likely to mislead reasonable consumers and affect their purchasing decisions.¹ A practice is *unfair* if it causes or is likely to cause substantial consumer injury which consumers cannot reasonably avoid, and which is not outweighed by benefits to consumers or competition.²

Your correspondence has been forwarded to appropriate members of the Commission staff for review. I should note, however, that as a consequence of a number of statutory and regulatory prohibitions, including in particular the fact that Commission investigations are nonpublic, I am not able to provide any information regarding the existence or contours of or any facts relating to any Commission investigation.

Thank you again for your correspondence. Please let us know whenever we can be of service with respect to any other matter.

Sincerely,

A handwritten signature in blue ink that reads "Donald S. Clark".

Donald S. Clark
Secretary of the Commission

¹ See, e.g., *FTC v. Stefanchik*, 559 F.3d 924, 928 (9th Cir. 2009); *In the Matter of Telebrands Corp.*, 140 F.T.C. 278, 290 (2005), *aff'd*, 457 F.3d 354 (4th Cir. 2006); see also Federal Trade Commission Policy Statement on Deception, appended to *Cliffdale Assocs., Inc.*, 103 F.T.C. 110, 174-83 (1984).

² 15 U.S.C. § 45(n); see also Federal Trade Commission Policy Statement on Unfairness, appended to *Int'l. Harvester Co.*, 104 F.T.C. 949, 1070-76 (1984).



Please print and mail this form so that Senator Booker can assist you. Pursuant to the Privacy Act of 1974, the Booker Office cannot assist individuals without their written consent.

Privacy Act Consent Form

To begin processing your case, please complete all of the following information:

1 Federal agency with which you need help: Federal Trade Commission
 Please briefly explain the problem or information desired*:
The North American Irish Dance Teachers Association is being investigated by the F.T.C. I would like some information on the case and the disposition because it impacts me personally
 * Please send relevant documents and additional pages of explanation as attachments to this form.

2 Circle: Mr. Mrs. Miss Ms.
 First Name: (b)(6) Address: (b)(6)
 Last Name: (b)(6) City: RIDGEFIELD PARK
 Date of Birth: 2 State: NJ Zip: (b)(6)
 Social Security Number: [REDACTED] Email: (b)(6)
 Phone: [REDACTED]
 Immigration* Military*
 Alien Registration #: _____ Branch of Service: _____
 Priority Date: _____ Rank: _____
 Form #: _____ VA File Number: _____
 Date filed: _____ VA Office or Med Center: _____
 USCIS Receipt #: _____ Other*
 Embassy Case #: _____ EEO/EEOC Charge #: _____
 *If Applicable. Lender name: _____

3 I hereby (b)(6) any and all of my records related to the problem (b)(6)
 Signature: (b)(6) Date: 12.21.16

Please list any other Congressional offices that you have contacted about this issue:
NONE

4 Print and mail your completed form to Senator Cory Booker's New Jersey Headquarters office:
 ATTN: Casework Department:
 United States Senator Cory Booker
 Gateway One, Suite 2300
 Newark, NJ 07102
 Call: 1-877-630-8777



UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
WASHINGTON, D.C. 20580

February 24, 2017

The Honorable Cory Booker
United States Senate
Gateway One, Suite 2300
Newark, New Jersey 07102

Re: FTC Reference No. 14016113

Dear Senator Booker:

Thank you for your recent letter to the Federal Trade Commission on behalf of your constituent, (b)(6) of Ridgefield, New Jersey. (b)(6) has requested information about any Commission investigation of the Irish Dance Teachers Association of North America.

While statutory and regulatory restrictions prevent our disclosure of the existence or contours of any nonpublic Commission investigation, the agency's online antitrust guide provides information about antitrust standards and is available on the Commission website at the following link: <https://www.ftc.gov/tips-advice/competition-guidance/guide-antitrust-laws>. Congress has empowered the Commission to prevent unfair methods of competition that violate Section 5 of the Federal Trade Commission Act,¹ such as anticompetitive agreements among competitors to increase prices or restrict output and exclusionary or predatory practices that harm consumers. Congress also has empowered the Commission to prevent mergers, acquisitions, and certain other practices that may substantially lessen competition or tend to create a monopoly, in violation of the Clayton Act.² The Commission is dedicated to protecting competition and consumers and will take appropriate action against any act or practice in the marketplace that violates any statute we enforce.

Thank you again for contacting the Commission. More generally, please let us know whenever we can be of service with respect to any other matter.

Sincerely,

A handwritten signature in blue ink that reads "Donald S. Clark".

Donald S. Clark
Secretary of the Commission

¹ 15 U.S.C. § 45.

² 15 U.S.C. §§ 12 *et seq.*

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United States Senate

COMMITTEE ON COMMERCE, SCIENCE,
AND TRANSPORTATION

WASHINGTON, DC 20510-6125

WEBSITE: <http://commerce.senate.gov>

NICK ROSSL, STAFF DIRECTOR
KIM LIPSKY, DEMOCRATIC STAFF DIRECTOR

January 13, 2017

The Honorable Edith Ramirez
Chairwoman
Federal Trade Commission
600 Pennsylvania Ave., NW
Washington, DC 20530

Dear Chairwoman Ramirez:

Yesterday, the Environmental Protection Agency (EPA) announced that Fiat Chrysler Automobiles (FCA) installed, but failed to disclose, eight types of Auxiliary Emission Control Devices (AECDs) in approximately 104,000 Jeep Grand Cherokees and Dodge Ram 1500 trucks with 3.0-liter diesel engines. According to the EPA, FCA's failure to disclose this software, which allegedly increase nitrogen oxides (NOx) emissions, is in violation of the Clean Air Act.

The allegations against FCA have a similar ring to deceptive actions taken by Volkswagen, which intentionally installed "defeat devices" in millions of vehicles worldwide to reduce tailpipe pollutants during official emissions testing. Unlike Volkswagen's admission, FCA vociferously denies EPA's allegations and asserts that the company has done nothing wrong.

In September 2015, I wrote a letter to you urging the Federal Trade Commission (FTC) to investigate Volkswagen's deceptive marketing practices of its diesel-engine vehicles. In that letter, I noted that while "the Environmental Protection Agency (EPA) and the Department of Justice (DOJ) are both exploring civil and criminal actions against Volkswagen, respectively, the Federal Trade Commission (FTC) also has an appropriate role in investigating the company's actions." In June 2016, the FTC announced a settlement with Volkswagen in which the automaker agreed to spend over \$10 billion to compensate affected consumers.

Once again, I urge the commission to play an active role in the ongoing investigation of FCA and to act accordingly on behalf of American consumers.

The Honorable Edith Ramirez
January 13, 2017
Page 2

As I noted in my September 2015 letter and as reflected in your settlement with Volkswagen, “[t]he commission can seek consumer redress for Volkswagen’s deception, and it can also seek a full panoply of equitable remedies that would force Volkswagen to take actions to specifically address consumer harm.” If the EPA’s allegations against FCA are true, the company may be in violation of the federal law prohibiting “unfair or deceptive acts or practices.” If so, the commission would be able to seek consumer redress similar to the Volkswagen settlement. Attached are examples of FCA’s marketing materials for certain “EcoDiesel” vehicles, which, among others, claim to be “clean by nature,” for consumers who “Love the planet,” and to have “low emissions.”

As the nation’s premier and independent consumer protection agency, the FTC can once again be an additional cop on the beat that uniquely looks out for average Americans who may have been harmed by deceptive corporate practices. As it did in the Volkswagen scandal, I urge the commission to appropriately exercise all of its authority on behalf of American consumers.

Sincerely,



BILL NELSON
Ranking Member

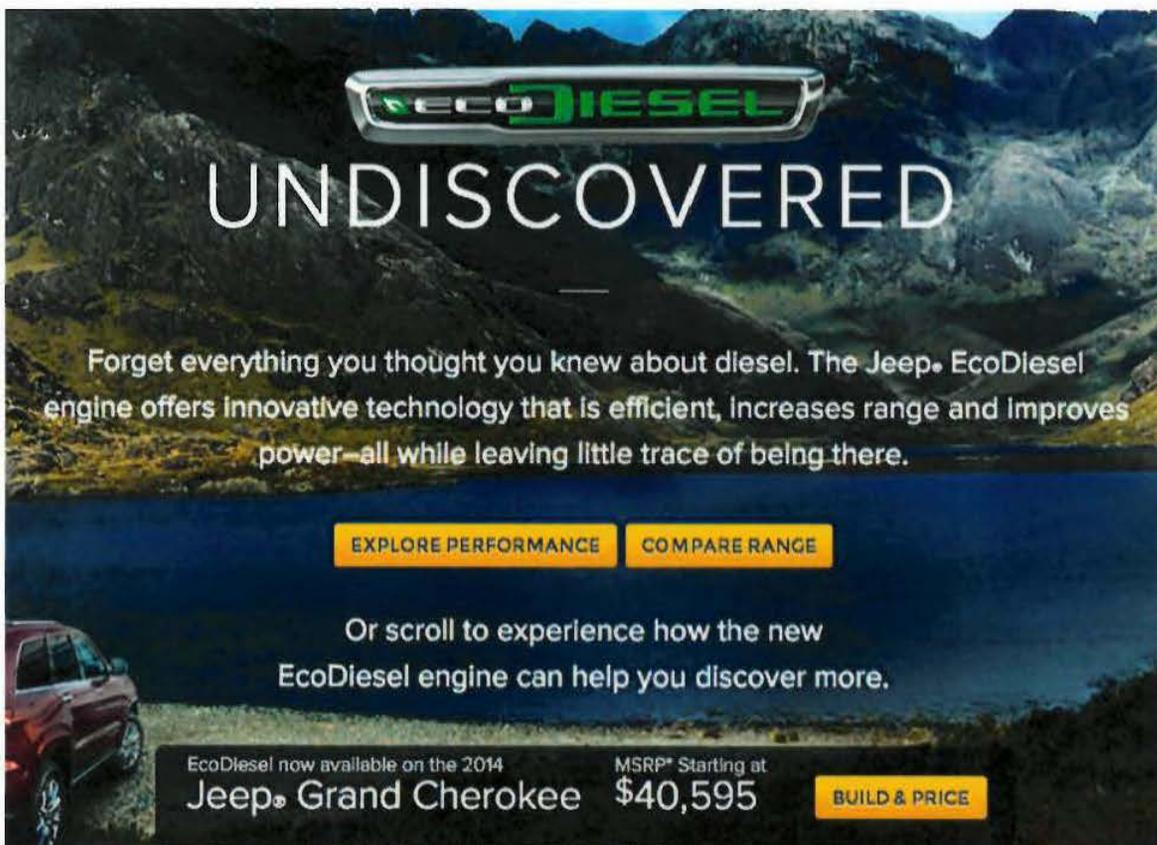
cc: The Honorable John Thune, Chairman

Examples of FCA Marketing Claims

VIDEOS

- **“It’s the greenest Jeep we’ve ever done. It’s got the lowest CO2. So it’s bringing a lot to the table with its green message and the capability and the fuel economy all at the same time.”** (Jim Morrison, the Head of Jeep Brand Product Marketing, Chrysler Group LLC)
2014 Jeep Grand Cherokee - 3.0L EcoDiesel Engine | Jeep®
<https://www.youtube.com/watch?v=b3h-nQGufFI>
- **“This is our strong, efficient, clean, very quiet new eco 3.0 liter V6 diesel”** (Mike Manley, President and CEO — Jeep Brand)
2014 Jeep® Grand Cherokee Revealed at NAIAS
https://www.youtube.com/watch?v=qOOGjE_Gk9I

WEBSITES

A promotional banner for the Jeep EcoDiesel engine. The background is a scenic landscape with mountains and a lake. At the top center is the 'ECO DIESEL' logo in a metallic, 3D-style font. Below the logo, the word 'UNDISCOVERED' is written in large, white, sans-serif capital letters. Underneath that, a paragraph of text reads: 'Forget everything you thought you knew about diesel. The Jeep® EcoDiesel engine offers innovative technology that is efficient, increases range and improves power—all while leaving little trace of being there.' Below this text are two yellow buttons with black text: 'EXPLORE PERFORMANCE' and 'COMPARE RANGE'. Further down, another line of text says: 'Or scroll to experience how the new EcoDiesel engine can help you discover more.' At the bottom left, there is a partial view of a red Jeep Grand Cherokee. At the bottom right, there is a black box containing the text: 'EcoDiesel now available on the 2014 Jeep® Grand Cherokee MSRP* Starting at \$40,595' and a yellow button with black text: 'BUILD & PRICE'.

<http://www.jeep.com/en/jeep-capabilities/eco-diesel-calculator/>

Jeep GRAND CHEROKEE Gallery Interior Exterior Capability Safety & Security Awards Specs [FIND A DEALER](#) [BUILD A PRICE](#)

Capable and **efficient**



3.0L EcoDiesel V6 Engine

The available 3.0L EcoDiesel V6 engine is a refined powertrain that provides optimum efficiency and reduced CO₂ emissions without sacrificing awe-inspiring performance. Combined with the advanced eight-speed automatic transmission, the 2016 Jeep[®] Grand Cherokee delivers Best-in-Class Highway Fuel Economy[®].

30 HWY MPG¹⁷

UP TO **730** HWY MILE RANGE

3.0L Pentastar[™] V6 Engine
240 hp/260 lb-ft of torque

3.0L EcoDiesel V6 Engine
240 hp/420 lb-ft of torque

5.7L V8 Engine
307 hp/405 lb-ft of torque

Discover the potential of EcoDiesel

Forget everything you thought you knew about diesel. The Jeep[®] EcoDiesel engine offers innovative technology that is efficient, increases range and improves power—all while leaving little trace of being there.

[LEARN MORE](#) ▶

<http://www.jeep.com/en/2016/grand-cherokee/capability/>

ECODIESEL DISCOVERED



Precision Injection

The 3.0L EcoDiesel V6 engine's MultiJet® II injectors manage up to eight highly precise injections per combustion event. Its 29,000-psi pressure is unmatched by any solenoid-based system and contributes to quieter performance, as well as optimal fuel efficiency and emissions reduction.

<http://www.jeep.com/en/jeep-capabilities/eco-diesel-calculator/>

BROCHURES

- 2016 Grand Cherokee:

=====

*REFINED PERFORMANCE.
POWERFUL LUXURY.*

=====



3.0L ECODIESEL V6 ENGINE: Best-in-class¹ fuel economy treats your fuel budget with respect, while reduced CO₂ emissions display reverence for the environment. The EcoDiesel exceeds the low-emissions requirements in all 50 states. Best-in-class¹ fuel economy arrives with an estimated 22 city/30 hwy mpg, and a best-in-class⁴ driving range of more than 730 highway miles per tank. That's because, compared to gasoline, a gallon of diesel fuel converts to a greater amount of usable energy. And with its command of 240 hp and a hefty 420 lb-ft of torque, the EcoDiesel provides a surge of towing strength that can haul up to 7,400 lb when properly equipped. Available.*



“3.0L ECODIESEL V6 ENGINE: Best-in-class fuel economy treats your fuel budget with respect, while reduced CO₂ emissions display reverence for the environment. The EcoDiesel exceeds the low-emissions requirements in all 50 states.”

- 2015 Grand Cherokee:



“Love the planet along with great fuel economy? Then the Jeep® Brand’s Diesel engine will ring true. It lets you adhere to your principles and get extra points for embracing innovative technology.”

“CLEAN - A marvel of modern engineering, with a block made of compacted graphite iron and aluminum twin cam heads, the engine delivers quiet, clean-diesel technology with low CO2 emissions that exceed requirements in all 50 states.”

- 2014 Grand Cherokee

INTRODUCING THE
ECO DIESEL
 3.0L V6 ENGINE

BEST-IN-CLASS:
30 MPG
FUEL ECONOMY*

730-MILE
DRIVING RANGE*

420 LB-FT
OF TORQUE*

7,400-LB
MAXIMUM TOWING*



WHEN YOU TELL THEM YOUR GRAND CHEROKEE TRAVELED 730 HIGHWAY MILES WITHOUT REFUELING ONCE, YOU'LL PROBABLY HAVE TO TELL THEM TWICE.

They're not kidding! The story of our Cherokee's available 3.0L EcoDiesel V6 engine delivers best-in-class economies that beat your fuel budget with respect, while its reduced CO₂ emissions meets requirements for the environment. Thanks to the EcoDiesel's multi-stage combustion, the four-cylinder configuration is a 30-state, best-in-class fuel economy* series with an estimated 22 city/30 hwy mpg* and a driving range of over 730 highway miles per tank. That's because, compared to gasoline, a gallon of diesel fuel converts to a greater amount of usable energy. So you can leave Detroit, MI, with a full tank, and arrive in New York City without ever stopping to refuel. And with its estimated 240 hp and a hefty 420 lb-ft of torque, the EcoDiesel provides a surge of towing strength that can haul up to 7,400 lb when properly equipped. It's so good, they're still reporting every chance you get.

“Proudly, the EcoDiesel meets and even exceeds the low emissions requirements in all 50 states.”

- > IMPROVED STANDARD 3.6L V6 ENGINE BOASTS 25 HIGHWAY MPG*
- > NEW 8-SPEED AUTOMATIC TRANSMISSION GLIDES THROUGH GEARS
- > NEW ECO MODE ADJUSTS SYSTEMS TO OPTIMIZE EFFICIENCY **ECO ON**
- > NEW STEERING WHEEL-MOUNTED PADDLE SHIFTERS OFFER MANUAL SHIFT CONTROL

EFFICIENT, CLEAN, AND POWERFUL

Grand Cherokee's available, new 3.0L EcoDiesel V6 engine delivers exceptional economies and reduced CO₂ emissions. Commanding 240 hp and 420 lb-ft of torque, the EcoDiesel V6 engine provides a surge of towing strength that can haul up to 7,400 lb when properly equipped. The new standard 8-speed automatic transmission aids fuel efficiency across all powertrains, including the hearty 3.6L V6 and beefy 5.7L V8 engines. It also boasts quicker acceleration, smoother shifting, and a lower crawl ratio when equipped with a two-speed transfer case, enhancing Grand Cherokee's already legendary off-road prowess.

*Always wear your seat belt. ©2014 Chrysler Group LLC. All rights reserved. EPA estimates only. Actual mileage may vary. See dealer for details.

- 2015 Dodge Ram 1500

CLEAN BY NATURE—WITH BEST-IN-CLASS^[4] 28 MPG HIGHWAY*:

Minimal CO₂ levels. Biodiesel (B20)-capable. Impressive fuel efficiency. The 6-cylinder EcoDiesel in a 2015 Ram 1500 handles it all with fluent ability.

DEFINITIVE DRIVING RANGE: *Combine the available EcoDiesel V6 with the TorqueFlite 8-speed, and you're getting the most from every tank of fuel.*

CLEAN BY DESIGN, WITH DUAL FILTRATION: *Smart from the get-go, this dual-filtration technology offers greater protection against contamination, reduces injector corrosion and enhances durability.*

ENGINEERING THAT CAN TAKE THE HEAT: *Conventional diesels use old-style metallic glow plugs. Our high-temperature ceramic glow plugs are faster-acting and withstand higher degrees for enhanced performance and lifespan.*

BUILT FOR LIFE: *Compact Graphite Iron. Oil squirters for each piston. Here, durability features go on and on; with its indomitable design, so will this engine.*

“Clean by nature – with best-in-class 28 MPG highway”

“Clean by design, with dual filtration”



THE CHAIRMAN

FEDERAL TRADE COMMISSION
WASHINGTON, D.C. 20580

February 15, 2017

The Honorable Donald S. Beyer Jr.
U.S. House of Representatives
Washington, DC 20515

Dear Representative Beyer:

Thank you for your January 9, 2017, letter asking the FTC to act on the petition by the Humane Society of the United States that the FTC investigate alleged violations of the Fur Products Labelling Act and the FTC Act by a number of retailers, including some currently under order with the FTC for previous violations of these laws.

As you know, the Commission acts in the interest of consumers to prevent deceptive or unfair acts or practices, pursuant to the Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45. An act or practice is deceptive if it is likely to mislead consumers acting reasonably under the circumstances and if it is material – that is, likely to affect a consumer’s purchase or use decision.¹ An act or practice is unfair if it causes or is likely to cause substantial consumer injury that consumers cannot reasonably avoid, and that is not outweighed by benefits to consumers or competition.²

The Fur Products Labeling Act, 15 U.S.C. § 69, and the rules and regulations under the Act, 16 C.F.R. Part 301, require that garments made entirely or partly of fur have a label disclosing: (1) the animal name from the Fur Products Name Guide; (2) the name or Registered Identification Number (RN) of the manufacturer, importer or other seller, marketer or distributor of the fur; and (3) the country of origin for imported fur products, including the country of origin for imported furs made into fur products in the U.S.

The Commission shares your concern that consumers are misled when products are marketed as containing “faux fur” when, in fact, those product contains real fur. As you know,

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Thank you for writing to the Commission. If you have any other questions, please feel free to contact me or have your staff contact Jeanne Bumpus, the Director of our Office of Congressional Relations, at (202) 326-2946.

Sincerely,



Maureen K. Ohlhausen
Acting Chairman

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THE CHAIRMAN

FEDERAL TRADE COMMISSION
WASHINGTON, D.C. 20580

February 15, 2017

The Honorable Earl Blumenauer
U.S. House of Representatives
Washington, DC 20515

Dear Representative Blumenauer:

Thank you for your January 9, 2017, letter asking the FTC to act on the petition by the Humane Society of the United States that the FTC investigate alleged violations of the Fur Products Labelling Act and the FTC Act by a number of retailers, including some currently under order with the FTC for previous violations of these laws.

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Maureen K. Ohlhausen
Acting Chairman

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THE CHAIRMAN

FEDERAL TRADE COMMISSION
WASHINGTON, D.C. 20580

February 15, 2017

The Honorable Tony Cardenas
U.S. House of Representatives
Washington, D.C. 20515

Dear Representative Cardenas:

Thank you for your January 9, 2017, letter asking the FTC to act on the petition by the Humane Society of the United States that the FTC investigate alleged violations of the Fur Products Labelling Act and the FTC Act by a number of retailers, including some currently under order with the FTC for previous violations of these laws.

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Maureen K. Ohlhausen
Acting Chairman

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THE CHAIRMAN

FEDERAL TRADE COMMISSION
WASHINGTON, D.C. 20580

February 15, 2017

The Honorable Steve Cohen
U.S. House of Representatives
Washington, DC 20515

Dear Representative Cohen:

Thank you for your January 9, 2017, letter asking the FTC to act on the petition by the Humane Society of the United States that the FTC investigate alleged violations of the Fur Products Labelling Act and the FTC Act by a number of retailers, including some currently under order with the FTC for previous violations of these laws.

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Acting Chairman

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THE CHAIRMAN

FEDERAL TRADE COMMISSION
WASHINGTON, D.C. 20580

February 15, 2017

The Honorable Eliot L. Engel
U.S. House of Representatives
Washington, D.C. 20515

Dear Representative Engel:

Thank you for your January 9, 2017, letter asking the FTC to act on the petition by the Humane Society of the United States that the FTC investigate alleged violations of the Fur Products Labelling Act and the FTC Act by a number of retailers, including some currently under order with the FTC for previous violations of these laws.

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Maureen K. Ohlhausen
Acting Chairman

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THE CHAIRMAN

FEDERAL TRADE COMMISSION
WASHINGTON, D.C. 20580

February 15, 2017

The Honorable Anna G. Eshoo
U.S. House of Representatives
Washington, DC 20515

Dear Representative Eshoo:

Thank you for your January 9, 2017, letter asking the FTC to act on the petition by the Humane Society of the United States that the FTC investigate alleged violations of the Fur Products Labelling Act and the FTC Act by a number of retailers, including some currently under order with the FTC for previous violations of these laws.

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Maureen K. Ohlhausen
Acting Chairman

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THE CHAIRMAN

FEDERAL TRADE COMMISSION

WASHINGTON, D.C. 20580

February 15, 2017

The Honorable Leonard Lance
U.S. House of Representatives
Washington, DC 20515

Dear Representative Lance:

Thank you for your January 9, 2017, letter asking the FTC to act on the petition by the Humane Society of the United States that the FTC investigate alleged violations of the Fur Products Labelling Act and the FTC Act by a number of retailers, including some currently under order with the FTC for previous violations of these laws.

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Maureen K. Ohlhausen
Acting Chairman

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THE CHAIRMAN

FEDERAL TRADE COMMISSION
WASHINGTON, D.C. 20580

February 15, 2017

The Honorable Nita Lowey
U.S. House of Representatives
Washington, DC 20515

Dear Representative Lowey:

Thank you for your January 9, 2017, letter asking the FTC to act on the petition by the Humane Society of the United States that the FTC investigate alleged violations of the Fur Products Labelling Act and the FTC Act by a number of retailers, including some currently under order with the FTC for previous violations of these laws.

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THE CHAIRMAN

FEDERAL TRADE COMMISSION
WASHINGTON, D.C. 20580

February 15, 2017

The Honorable Jerry McNerney
U.S. House of Representatives
Washington, DC 20515

Dear Representative McNerney:

Thank you for your January 9, 2017, letter asking the FTC to act on the petition by the Humane Society of the United States that the FTC investigate alleged violations of the Fur Products Labelling Act and the FTC Act by a number of retailers, including some currently under order with the FTC for previous violations of these laws.

As you know, the Commission acts in the interest of consumers to prevent deceptive or unfair acts or practices, pursuant to the Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45. An act or practice is deceptive if it is likely to mislead consumers acting reasonably under the circumstances and if it is material – that is, likely to affect a consumer’s purchase or use decision.¹ An act or practice is unfair if it causes or is likely to cause substantial consumer injury that consumers cannot reasonably avoid, and that is not outweighed by benefits to consumers or competition.²

The Fur Products Labeling Act, 15 U.S.C. § 69, and the rules and regulations under the Act, 16 C.F.R. Part 301, require that garments made entirely or partly of fur have a label disclosing: (1) the animal name from the Fur Products Name Guide; (2) the name or Registered Identification Number (RN) of the manufacturer, importer or other seller, marketer or distributor of the fur; and (3) the country of origin for imported fur products, including the country of origin for imported furs made into fur products in the U.S.

The Commission shares your concern that consumers are misled when products are marketed as containing “faux fur” when, in fact, those product contains real fur. As you know,

¹ See, e.g., *FTC v. Stefanchik*, 559 F.3d 924, 928 (9th Cir. 2009); *Telebrands Corp.*, 140 F.T.C. 278, 290 (2005), *aff’d*, 457 F.3d 354 (4th Cir. 2006); see also Federal Trade Commission Policy Statement on Deception, appended to *Cliffdale Assocs., Inc.*, 103 F.T.C. 110, 174-83 (1984).

² 15 U.S.C. § 45(n); see also Federal Trade Commission Policy Statement on Unfairness, appended to *Int’l Harvester Co.*, 104 F.T.C. 949, 1070-76 (1984).

the Commission has taken action against retailers that make these false claims³, and has recently released consumer education on this subject.⁴

A number of statutory and regulatory provisions prevent me from disclosing the existence or details of nonpublic Commission reviews. However, in determining whether to take enforcement action in any particular situation, the Commission may consider a number of factors, including the type of violation alleged; the nature and amount of consumer injury at issue and the number of consumers affected; and the likelihood of preventing future unlawful conduct and securing redress or other relief. I can assure you that the Commission will seriously consider the important issues you raise to determine whether enforcement or other action is appropriate.

Thank you for writing to the Commission. If you have any other questions, please feel free to contact me or have your staff contact Jeanne Bumpus, the Director of our Office of Congressional Relations, at (202) 326-2946.

Sincerely,

A handwritten signature in black ink, appearing to read "Maureen K. Ohlhausen". The signature is fluid and cursive, with a long horizontal stroke at the end.

Maureen K. Ohlhausen
Acting Chairman

³ See "Retailers Agree to Settle Charges They Marketed real Fur Products as Fake Fur", available at <https://www.ftc.gov/news-events/press-releases/2013/03/retailers-agree-settle-ftc-charges-they-marketed-real-fur>.

⁴ See "When Fake Fur is Real, (Dec 21, 2016), <https://www.consumer.ftc.gov/blog/when-fake-fur-real>



THE CHAIRMAN

FEDERAL TRADE COMMISSION
WASHINGTON, D.C. 20580

February 15, 2017

The Honorable Mike Quigley
U.S. House of Representatives
Washington, DC 20515

Dear Representative Quigley:

Thank you for your January 9, 2017, letter asking the FTC to act on the petition by the Humane Society of the United States that the FTC investigate alleged violations of the Fur Products Labeling Act and the FTC Act by a number of retailers, including some currently under order with the FTC for previous violations of these laws.

As you know, the Commission acts in the interest of consumers to prevent deceptive or unfair acts or practices, pursuant to the Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45. An act or practice is deceptive if it is likely to mislead consumers acting reasonably under the circumstances and if it is material – that is, likely to affect a consumer’s purchase or use decision.¹ An act or practice is unfair if it causes or is likely to cause substantial consumer injury that consumers cannot reasonably avoid, and that is not outweighed by benefits to consumers or competition.²

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The Commission shares your concern that consumers are misled when products are marketed as containing “faux fur” when, in fact, those product contains real fur. As you know,

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² 15 U.S.C. § 45(n); see also Federal Trade Commission Policy Statement on Unfairness, appended to *Int’l Harvester Co.*, 104 F.T.C. 949, 1070-76 (1984).

the Commission has taken action against retailers that make these false claims³, and has recently released consumer education on this subject.⁴

A number of statutory and regulatory provisions prevent me from disclosing the existence or details of nonpublic Commission reviews. However, in determining whether to take enforcement action in any particular situation, the Commission may consider a number of factors, including the type of violation alleged; the nature and amount of consumer injury at issue and the number of consumers affected; and the likelihood of preventing future unlawful conduct and securing redress or other relief. I can assure you that the Commission will seriously consider the important issues you raise to determine whether enforcement or other action is appropriate.

Thank you for writing to the Commission. If you have any other questions, please feel free to contact me or have your staff contact Jeanne Bumpus, the Director of our Office of Congressional Relations, at (202) 326-2946.

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Maureen K. Ohlhausen
Acting Chairman

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THE CHAIRMAN

FEDERAL TRADE COMMISSION
WASHINGTON, D.C. 20580

February 15, 2017

The Honorable Paul Tonko
U.S. House of Representatives
Washington, D.C. 20515

Dear Representative Tonko:

Thank you for your January 9, 2017, letter asking the FTC to act on the petition by the Humane Society of the United States that the FTC investigate alleged violations of the Fur Products Labelling Act and the FTC Act by a number of retailers, including some currently under order with the FTC for previous violations of these laws.

As you know, the Commission acts in the interest of consumers to prevent deceptive or unfair acts or practices, pursuant to the Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45. An act or practice is deceptive if it is likely to mislead consumers acting reasonably under the circumstances and if it is material – that is, likely to affect a consumer’s purchase or use decision.¹ An act or practice is unfair if it causes or is likely to cause substantial consumer injury that consumers cannot reasonably avoid, and that is not outweighed by benefits to consumers or competition.²

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The Commission shares your concern that consumers are misled when products are marketed as containing “faux fur” when, in fact, those product contains real fur. As you know,

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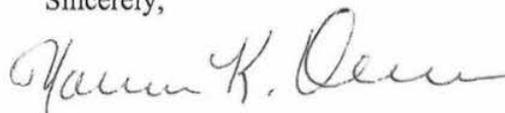
² 15 U.S.C. § 45(n); see also Federal Trade Commission Policy Statement on Unfairness, appended to *Int’l Harvester Co.*, 104 F.T.C. 949, 1070-76 (1984).

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Thank you for writing to the Commission. If you have any other questions, please feel free to contact me or have your staff contact Jeanne Bumpus, the Director of our Office of Congressional Relations, at (202) 326-2946.

Sincerely,

A handwritten signature in cursive script that reads "Maureen K. Ohlhausen".

Maureen K. Ohlhausen
Acting Chairman

³ See "Retailers Agree to Settle Charges They Marketed real Fur Products as Fake Fur", available at <https://www.ftc.gov/news-events/press-releases/2013/03/retailers-agree-settle-ftc-charges-they-marketed-real-fur>.

⁴ See "When Fake Fur is Real, (Dec 21, 2016), <https://www.consumer.ftc.gov/blog/when-fake-fur-real>



OFFICE OF
THE CHAIRMAN

UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
WASHINGTON, D.C. 20580

March 15, 2017

The Honorable Bill Nelson
Ranking Member
Committee on Commerce, Science, and Transportation
United States Senate
Washington, D.C. 20510

Dear Senator Nelson:

Thank you for your letter regarding Fiat Chrysler Automobiles' (FCA) alleged installation of, and failure to disclose, Auxiliary Emission Control Devices (AECDs) in violation of the Clean Air Act. You note that FCA made environmental claims that may be deceptive if, in fact, these AECDs increased nitrogen oxide emissions, and that this matter is reminiscent of Volkswagen's use of "defeat devices." It has been widely reported that the Environmental Protection Agency and the Department of Justice are expending significant resources investigating this matter. Nevertheless, the FTC stands ready to take appropriate action if necessary to protect consumers, without duplicating efforts of other agencies.

We appreciate your kind words regarding the FTC's role as the nation's premier consumer protection agency, and your acknowledgment of our work on behalf of consumers in the Volkswagen matter. If you have any further questions, please do not hesitate to contact me.

Sincerely,

Maureen Ohlhausen
Acting Chairman

ROGER WICKER, MISSISSIPPI
ROY BLUNT, MISSOURI
MARCO RUBIO, FLORIDA
KELLY AYOTTE, NEW HAMPSHIRE
TED CRUZ, TEXAS
DEB FISCHER, NEBRASKA
JERRY MORAN, KANSAS
DAN SULLIVAN, ALASKA
RON JOHNSON, WISCONSIN
DEAN HELLER, NEVADA
CORY GARDNER, COLORADO
STEVE DARNIEL, MONTANA

BILL NELSON, FLORIDA
MARIA CANTWELL, WASHINGTON
CLAIRE McCASKILL, MISSOURI
AMY KLOBUCHAR, MINNESOTA
RICHARD BLUMENTHAL, CONNECTICUT
BRIAN SCHATZ, HAWAII
EDWARD MARKEY, MASSACHUSETTS
CORY BOOKER, NEW JERSEY
TOM UDALL, NEW MEXICO
JOE MANCHIN II, WEST VIRGINIA
GARY PETERIL, MICHIGAN

NICK ROSSI, STAFF DIRECTOR
KIM LIPSKY, DEMOCRATIC STAFF DIRECTOR

United States Senate

COMMITTEE ON COMMERCE, SCIENCE,
AND TRANSPORTATION

WASHINGTON, DC 20510-6125

WEBSITE: <http://commerce.senate.gov>

November 17, 2016

The Honorable Edith Ramirez
Chairwoman
Federal Trade Commission
600 Pennsylvania Ave., NW
Washington, DC 20580

Dear Chairwoman Ramirez:

As Ranking Member of the U.S. Senate Committee on Commerce, Science, and Transportation, I write to request information about the Federal Trade Commission's practice of issuing monetary bonuses or performance awards to Senior Executive Service (SES) employees.

Under federal law, SES bonuses, which are intended "to encourage excellence in performance," must be "paid in a lump sum" and cannot be "more than 20 percent" of an SES employee's base salary.¹ On December 15, 2015, President Obama issued an executive order that raised an agency's aggregate spending cap on bonuses for SES, Senior Level (SL), and Senior Scientific or Professional (ST) employees to 7.5 percent.² I appreciate the important contributions made by SES employees throughout the federal government. At the same time, I want to ensure that agencies are using proper oversight and applying effective performance metrics when awarding bonuses. Therefore, I respectfully request the following:

1. For Fiscal Years (FY) 2015 and 2016, a list of all SES, SL, ST, or equivalent employees who received monetary awards.
2. For each employee identified above, provide:
 - a. employee name;
 - b. employee title;
 - c. employee's base annual pay; and
 - d. the amount, date, and type of each award.
3. For any SES, SL, ST, or equivalent employee who received monetary awards in FY 2015 or 2016 that totaled more than 20 percent of the employee's base annual salary, provide a detailed justification for each award.

¹ 5 U.S.C. § 5384.

² Exec. Order No. 13714, 80 Fed. Reg. 79223 (Dec. 15, 2015).

The Honorable Edith Ramirez

November 17, 2016

Page 2

4. A description of the agency's performance review process and rating scale. For ratings-based awards, include the employee's rating for the period on which the award was based.

Please provide this information as soon as possible. Thank you for your attention to this matter.

Sincerely,



BILL NELSON
Ranking Member

cc: The Honorable John Thune, Chairman

TOM MARINO

10TH DISTRICT, PENNSYLVANIA

COMMITTEE ON THE JUDICIARY

CHAIRMAN, SUBCOMMITTEE ON
REGULATORY REFORM, COMMERCIAL AND
ANTITRUST LAW

COMMITTEE ON HOMELAND SECURITY

COMMITTEE ON FOREIGN AFFAIRS

www.marino.house.gov

www.facebook.com/CongressmanMarino

<http://twitter.com/RepTomMarino>



Congress of the United States
House of Representatives
Washington, DC 20515-3810

December 23, 2016

WASHINGTON OFFICE:

2242 RAYBURN HOUSE OFFICE BUILDING
WASHINGTON, DC 20515
(202) 225-3731

CONSTITUENT SERVICE CENTERS:

1020 COMMERCE PARK DRIVE, SUITE 1A
WILLIAMSPORT, PA 17701
(570) 322-3961

543 EASTON TURNPIKE, SUITE 101
LAKE ARIEL, PA 18436
(570) 689-6024

713 BRIDGE STREET, ROOM 29
SELINGROVE, PA 17870
(570) 374-9469

The Honorable Renata B. Hesse
Acting Assistant Attorney General
U.S. Department of Justice Antitrust Division
950 Pennsylvania Avenue, NW
Washington, DC 20530-2001

The Honorable Edith Ramirez
Chairwoman
U.S. Federal Trade Commission
600 Pennsylvania Avenue, NW
Washington, DC 20580

Dear Chairwoman Ramirez and Acting Assistant Attorney General Hesse:

As the current administration transitions into the next, I write today to urge a smooth transition within our antitrust agencies. Both the Department of Justice Antitrust Division and the Federal Trade Commission are entrusted with enforcing our competition laws. Now is not the time to initiate litigation built on novel and untested legal theories that could damage competition here and abroad. I urge you to exercise your authority modestly in the waning days of this Administration and not saddle the new Administration with job crushing litigation built on untested, unorthodox legal theories.

As Chairman of the Regulatory Reform, Commercial, and Antitrust Law Subcommittee, I have been particularly concerned with the last-minute rush to promulgate "midnight regulations." For the same reasons, I am concerned about "midnight litigation," particularly if such litigation is not essential to address an exigent need, such as protecting health and human safety, or strays from the standard practice of either the Federal Trade Commission or Department of Justice. Congress was so concerned about midnight regulations that it passed, on a bipartisan basis, the Congressional Review Act, which provides Congress with enhanced parliamentary tools to disapprove these last minute regulations.

Congress, however, has little say in litigation decisions. Therefore, the American people must rely on the good judgment of officials like you to exercise your litigating authority appropriately. With less than 30 days left before President-Elect Donald Trump and Vice President Elect Mike Pence take the oath of office, I urge you to approach your duties modestly and with restraint. To ensure this smooth transition, I urge you not to bring ground breaking litigation that could impact enforcement actions in other countries and negatively impact American competitiveness for years to come.

I appreciate your attention to these concerns. Please feel free to contact me or my staff with any questions you may have.

Sincerely,

Tom Marino

Congress of the United States
Washington, DC 20515

December 8, 2016

Edith Ramirez
Chairwoman
Federal Trade Commission
600 Pennsylvania Ave., N.W.
Washington, D.C. 20580

Re: Pending Actions Involving the Dietary Supplement Industry

Dear Chairwoman Ramirez:

We write to express our concern with the Federal Trade Commission's (FTC) process to evaluate the scientific claims for products in the dietary supplement industry that do not present an immediate harm to the health of consumers.

Wisconsin has many established companies in the dietary supplement industry that rely on scientific evidence to support their product claims. These companies play an important part in Wisconsin's economy by providing high-paying jobs and encouraging innovation. These companies must be afforded a fair review that allows for transparency in sharing evidence and considers the consequences on local economies in any proposed action.

Our constituents have expressed concern that the FTC's Bureau of Consumer Protection (BCP) has adopted a practice of reaching judgment on the substantiation of product claims before engaging in a fulsome, transparent examination of the science that supports the claims. We are concerned that this practice hinders the company's ability to present a defense and prevents the BCP from reaching a well-informed conclusion.

We value the FTC's mission to protect consumers and appreciate that, where a product has the potential to cause immediate harm, the FTC should take swift and exacting steps to mitigate the harm. That said, the FTC, like many regulatory agencies, has the ability to significantly affect businesses and shape industry. In instances where a dietary supplement does not impose an immediate health concern, we expect the FTC to fully and thoroughly assess the scientific evidence before reaching a conclusion and exercise its prosecutorial discretion in fashioning an appropriately measured remedy. This practice is consistent with the FTC's mission, "[t]o prevent business practices that are . . . deceptive or unfair to consumers . . . without unduly burdening legitimate business activity."

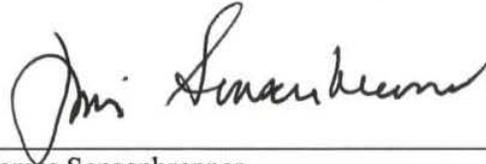
Congress of the United States
Washington, DC 20515

We look forward to working with the FTC to continue to protect American consumers working to create an environment in which legitimate business activity can thrive.

Sincerely,



Sean Duffy
Member of Congress



F. James Sensenbrenner
Member of Congress



Reid Ribble
Member of Congress



Glenn Grothman
Member of Congress



UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
WASHINGTON, D.C. 20580

January 30, 2017

The Honorable Maria Cantwell
United States Senate
Washington, DC 20510

Dear Senator Cantwell:

Thank you for your letter regarding news reports alleging that Office Depot, Inc. uses misleading diagnostic scans and sales pitches to convince consumers to purchase unnecessary computer software and services for computers that, in reality, have no problems.

As you know, the Commission has been directed by Congress to act in the interest of all consumers to prevent deceptive or unfair acts or practices, pursuant to the Federal Trade Commission Act, 15 U.S.C. §§ 41-58. In interpreting Section 5 of that statute, 15 U.S.C. § 45, the Commission has determined that a representation, omission, or practice is deceptive if (1) it is likely to mislead consumers acting reasonably under the circumstances; and (2) it is material, meaning it is likely to affect consumers' conduct or decisions with respect to the service or product at issue.

The Commission takes seriously the harm caused by misrepresentations and deception in the sale of technical support services and software for consumers. In appropriate cases, the Commission has used its authority under Section 5 of the FTC Act to stop such deception. The FTC has brought numerous cases against defendants who use deceptive statements and practices to deceive consumers into purchasing software or technical support services to "fix" non-existent problems with their computers. Most recently, the FTC filed an enforcement action against Global Access Technical Support LLC and related entities.¹ In that case, the FTC alleges that the defendants operated a technical support scheme that deceived consumers into purchasing services to address purported problems with their computers, regardless of whether those problems actually existed.

The Commission remains committed to combatting technical support scams by enforcing applicable laws, assisting criminal law enforcers, helping victims to recover money lost to technical support scams, and educating consumers and businesses on how they can avoid such scams.² In determining whether to take enforcement or other action in any particular situation, the Commission may consider a number of factors, including the type of violation alleged, the likelihood of preventing future unlawful conduct and securing redress or other relief, and the nature and extent of consumer injury, including the number of consumers affected. However, a

¹ See *FTC v. Global Access Technical Support LLC*, No. 16-cv01556-HEA (E.D. Mo. Oct. 3, 2016). See also *FTC v. Inbound Call Experts, LLC*, No. 9:14-CV-81395 (S.D. Fla. Nov. 10, 2014); *FTC v. Vast Tech Support, LLC*, No. 14-CV-81397 (S.D. Fla. Nov. 10, 2014); *FTC v. Pairsys, Inc.*, No. 14-CV-1192 (N.D.N.Y. Sept. 30, 2014).

² See, e.g., www.consumer.ftc.gov/articles/0346-tech-support-scams.

The Honorable Maria Cantwell – Page 2

number of statutory provisions and the Commission Rules of Practice prevent me from discussing what action, if any, the Commission may take in any particular situation.

Complaints from consumers can provide valuable information that we frequently use to identify deceptive and unfair practices in the marketplace. Therefore, please encourage consumers to file their complaints with the FTC, in English or in Spanish, by visiting the FTC's online Complaint Assistant, available at <https://www.ftccomplaintassistant.gov/> or by calling 1-877-FTC-HELP (1-877-382-4357).

I appreciate your concerns about this matter and your commitment to protecting consumers. If you or your staff has additional questions or comments, please feel free to contact Jeanne Bumpus, the Director of our Office of Congressional Relations, at (202) 326-2946.

Sincerely,

A handwritten signature in black ink, appearing to read "Maureen K. Ohlhausen". The signature is fluid and cursive, with the first name being the most prominent.

Maureen K. Ohlhausen
Acting Chairman



UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
WASHINGTON, D.C. 20580

January 30, 2017

The Honorable Amy Klobuchar
Ranking Member
Subcommittee on Antitrust, Competition Policy and Consumer Rights
United States Senate
Washington, DC 20510

Dear Ranking Member Klobuchar:

Thank you for your letter to the Department of Justice and the Federal Trade Commission requesting careful consideration of three proposed mergers involving agricultural biotechnology and seed markets: the proposed acquisition of the Dow Chemical Company by E.I. du Pont de Nemours and Company, the proposed acquisition of Syngenta AG by China National Chemical Corporation, and the proposed acquisition of Monsanto Company by Bayer AG. We appreciate receiving the observations and thoughts presented in your correspondence, including views and concerns drawn from the September 20, 2016 Senate Judiciary Committee hearing entitled "Consolidation and Competition in the U.S. Seed and Agrochemical Industry."

Generally speaking, I can assure you that the Commission is committed to conducting a thorough but expeditious investigation whenever one is initiated in the interest of protecting competition and consumers. I can also assure you that the Commission, the Antitrust Division, and USDA have a strong track record of providing assistance to each other in line with our respective missions of maintaining competitive conditions in agricultural markets. The agency will take appropriate action against any act or practice in the marketplace that violates any statute we enforce.

Thank you again for raising this topic. If you or your staff have any questions, please feel free to have your staff call Jeanne Bumpus, the Director of our Office of Congressional Relations, at (202) 326-2195.

Sincerely,

A handwritten signature in cursive script, reading "Maureen K. Ohlhausen", is positioned above the typed name.

Maureen K. Ohlhausen
Acting Chairman



UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
WASHINGTON, D.C. 20580

January 30, 2017

The Honorable Mike Lee
Chairman
Subcommittee on Antitrust, Competition Policy and Consumer Rights
United States Senate
Washington, DC 20510

Dear Chairman Lee:

Thank you for your letter to the Department of Justice and the Federal Trade Commission requesting careful consideration of three proposed mergers involving agricultural biotechnology and seed markets: the proposed acquisition of the Dow Chemical Company by E.I. du Pont de Nemours and Company, the proposed acquisition of Syngenta AG by China National Chemical Corporation, and the proposed acquisition of Monsanto Company by Bayer AG. We appreciate receiving the observations and thoughts presented in your correspondence, including views and concerns drawn from the September 20, 2016 Senate Judiciary Committee hearing entitled "Consolidation and Competition in the U.S. Seed and Agrochemical Industry."

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Maureen K. Ohlhausen
Acting Chairman



UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
WASHINGTON, D.C. 20580

January 31, 2017

The Honorable Peter Welch
U.S. House of Representatives
Washington, D.C. 20515

Dear Representative Welch:

Thank you for your December 13, 2016 letter regarding competition among payment card networks and potential violations of Regulation II, the Federal Reserve Board rule implementing certain provisions of the Dodd-Frank Wall Street Reform and Consumer Protection Act. We appreciate receiving the views presented in your correspondence on behalf of the small and medium-sized merchants that predominate in your home state of Vermont as well as retail businesses of all sizes throughout the United States.

I can assure you that the Commission is dedicated to protecting competition and consumers and will take appropriate action against any act or practice in the marketplace that violates any statute we enforce. As part of that effort, I can also assure you that we will continue to monitor the conduct of payment card networks to ensure compliance with Regulation II, including in the area of digital commerce, on behalf of retailers of all sizes.

Thank you again for bringing your observations and thoughts to our attention. We look forward to working with you and the Internet of Things Working Group on these important issues. Of course, we will steadfastly continue to promote competition and protect and educate consumers. If you or your staff have any questions, please feel free to have your staff call Jeanne Bumpus, the Director of our Office of Congressional Relations, at (202) 326-2195.

Sincerely,

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Maureen K. Ohlhausen
Acting Chairman



UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
WASHINGTON, D.C. 20580

January 31, 2017

The Honorable Ted Cruz
United States Senate
Washington, DC 20510

Dear Senator Cruz:

Thank you for your letter to the Department of Justice and the Federal Trade Commission requesting careful consideration of certain proposed mergers and acquisitions involving agricultural biotechnology and seed markets. We appreciate receiving the information and concerns presented in your correspondence on behalf of your farmer constituents and your forwarding the September 2016 study from the Agricultural and Food Policy Center at Texas A&M University entitled *Effects of Proposed Mergers and Acquisitions Among Biotechnology Firms on Seed Prices*. Your letter and the enclosed study have been forwarded to appropriate FTC staff members for review.

As you know, statutory and regulatory provisions prevent me from disclosing the existence or details of nonpublic Commission reviews. I can assure you, however, that the Commission is committed to conducting a thorough but expeditious investigation whenever one is initiated in the interest of protecting competition and consumers. I can also assure you that the Commission, the Antitrust Division, and USDA have a strong track record of providing assistance to each other in line with our respective missions of maintaining competitive conditions in agricultural markets. The agency will take appropriate action against any act or practice in the marketplace that violates any statute we enforce.

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Maureen K. Ohlhausen
Acting Chairman



UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
WASHINGTON, D.C. 20580

January 31, 2017

The Honorable Bill Nelson
Ranking Member
Committee on Commerce, Science, and Transportation
United States Senate
Washington, DC 20510

Dear Ranking Member Nelson:

Thank you for your letter raising concerns about “surprise” hospital bills. In your letter, you note that consumers may go to an “in-network” medical facility of their health insurance provider, and then be treated by a doctor or other service provider who is not employed by the facility, and therefore, is considered an “out-of-network” provider. In that situation, consumers have no prior notice that the service provider is not covered by their insurance and may face high medical bills.

As you know, the Commission acts in the interest of consumers to prevent deceptive or unfair acts or practices, pursuant to the Federal Trade Commission Act, 15 U.S.C. § 45. An act or practice is deceptive if it is likely to mislead consumers acting reasonably under the circumstances and is material – that is, likely to affect a consumer’s purchase or use decision. An act or practice is unfair if it causes or is likely to cause substantial consumer injury that consumers cannot reasonably avoid, and that is not outweighed by benefits to consumers or to competition. In determining whether to take enforcement or other action in any particular situation, the Commission may consider a number of factors, including the type of violation alleged, the nature and amount of consumer injury at issue and the number of consumers affected, and the likelihood of preventing future unlawful conduct and securing redress or other relief.

The Commission has a long-held interest in ensuring that consumers have adequate information with which to make informed purchase decisions, including decisions regarding the purchase of health care services. Further, Commission staff has examined the issue of “surprise” billing. Two staffers from our Bureau of Economics recently published a study on this issue: “One In Five Inpatient Emergency Department Cases May Lead To Surprise Bills,” *Health Affairs*, <http://content.healthaffairs.org/content/early/2016/12/13/hlthaff.2016.0970>. The study examined how frequently inpatient hospital admissions were likely to result in a surprise medical bill, and found that it is more likely for admissions initiated in the emergency room than for elective procedures, and that it varies considerably across states. This analysis of a large sample of health claims also revealed that ambulance services were out of network more often than not.

As you may be aware, however, there are limits on our jurisdiction in this area. For example, the McCarran-Ferguson Act, 15 U.S.C. §§ 1011-1015, establishes states as the primary enforcers of insurance and exempts certain insurance practices from various federal statutes,

including the FTC Act, if those practices constitute the “business of insurance.” *Union Labor Life Ins. Co. v. Pireno*, 458 U.S. 119, 129 (1982). In addition, many hospitals and other medical facilities operate as not-for-profit entities. The Commission has limited authority to take action involving some activities of not-for-profit entities. See FTC Act, 15 U.S.C. § 44; *Community Blood Bank v. FTC*, 405 F.2d 1011 (8th Cir. 1969).

We appreciate your efforts to ensure that consumers do not face higher medical bills than they expect. If you or your staff has any additional questions or comments, please contact Jeanne Bumpus, the Director of our Office of Congressional Relations, at (202) 326-2946.

Sincerely,

A handwritten signature in cursive script, appearing to read "Maureen K. Ohlhausen".

Maureen K. Ohlhausen
Acting Chairman



OFFICE OF THE
CHAIRWOMAN

UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
WASHINGTON, D.C. 20850

December 23, 2016

The Honorable Sean Duffy
U.S. House of Representatives
Washington, DC 20515

Dear Representative Duffy:

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Edith Ramirez
Chairwoman



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WASHINGTON, D.C. 20850

December 23, 2016

The Honorable F. James Sensenbrenner
U.S. House of Representatives
Washington, DC 20515

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December 23, 2016

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U.S. House of Representatives
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December 23, 2016

The Honorable Glenn Grothman
U.S. House of Representatives
Washington, DC 20515

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UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
WASHINGTON, D.C. 20580

January 23, 2017

The Honorable Ron Johnson
Chairman
Committee on Homeland Security
and Governmental Affairs
United States Senate
Washington, DC 20510

Dear Chairman Johnson:

I write in response to your and Chairman Lee's correspondence of December 21, 2016 in which you request a list of (1) all Federal Trade Commission matters closed, and (2) the results of every Commission vote between November 9, 2016 and January 20, 2017. As explained below, some of the information you have requested is non-public, confidential information that, by statute, cannot be made public. The Commission has authorized providing the requested information as a response to an official request from a Congressional Committee and Congressional Subcommittee.¹

In response to your request, we are providing four attachments. Attachments A and B are lists of FTC investigations closed between November 9, 2016 and January 20, 2017. Attachment A consists primarily of closed investigations that have not been made public by the Commission, but that would not be protected from disclosure if requested through the Freedom of Information Act ("FOIA").² Nonetheless, the Commission requests that the list in Attachment A be kept non-public, or, at a minimum, that the named parties be advised before any information is made public. Attachment B identifies non-public investigations that may be protected from public disclosure pursuant to the Hart-Scott-Rodino Act. Specifically, Section 7A(h) of the Clayton Act, 15 U.S.C. § 18a(h), prohibits public disclosure of this information, including the fact that a particular premerger notification has been filed and the identity of the parties involved and contours of any non-public transaction.³ The Commission therefore also requests confidential treatment for the information in Attachment B.

¹ See Commission Rule 4.11(b), 16 C.F.R. § 4.11(b) (2017).

² Appendix A does not include four investigations that led to law enforcement actions that the Commission approved and made public prior to November 9, 2016. The investigative files were technically closed in our computer system during this period after they were converted to law enforcement matters for tracking purposes.

³ As a consequence, such information is also exempt from disclosure under FOIA Exemption 3A, 5 U.S.C. § 552(b)(3)(A)(2).

The Honorable Ron Johnson – Page 2

Attachments C and D are public and non-public lists, respectively, of the actions which the Commission has taken during the referenced time period. Attachment D lists votes related to non-public investigations that are exempt from mandatory disclosure under FOIA because disclosure of these actions would reveal the existence of, and information concerning, ongoing, non-public law enforcement investigations or Commission pre-decisional deliberations.⁴ The Commission thus also requests confidential treatment for the Commission actions listed in Attachment D.

If you or your staff have any questions, please feel free to have your staff contact Jeanne Bumpus, our Director of Congressional Relations, at (202) 326-2946.

Sincerely,

A handwritten signature in blue ink, appearing to read "Edith Ramirez".

Edith Ramirez
Chairwoman

Enclosures

⁴ See FOIA Exemption 7(A), 5 U.S.C. § 552(b)(7)(A); *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 232 (1978); *Ehringhaus v. FTC*, 525 F. Supp. 21, 24 (D.D.C. 1980) and FOIA Exemption 5, 5 U.S.C. § 552(b)(5); *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132 (1975).

Attachment A
Investigations Other Than Confidential Investigations Closed
Between November 9, 2016 and January 20, 2017¹

Date Closed	Matter Name
11/9/2016	Promotora de Inversiones Mexicanas/CEMEX
11/9/2016	St. Francis Medical Center/Willis-Knighton Health
11/9/2016	Big Picture Loans, LLC
11/9/2016	Kardashian-Jenner Endorsements
11/14/2016	Down-Lite International, Inc.
11/14/2016	Blount International
11/14/2016	SLP IV Castle Feeder I/Talent
11/17/2016	Microsoft Corporation-Windows X Upg
11/17/2016	Procter & Gamble – Oral-B
11/18/2016	eBay/Intuit
11/22/2016	Fitness Keeper, Inc.
11/22/2016	Sanrio Digital (HK) Ltd.
11/22/2016	Visa Inc.
11/29/2016	Cash Net Us Group
12/02/2016	JL Audio, Inc.
12/02/2016	TecNiq, Inc.
12/6/2016	Celgene Corporation
12/7/2016	Arthur Middleton Capital Holdings, Inc.
12/8/2016	Stub Hub
12/13/2016	Commando Lock Company
12/13/2016	Window Design Group
12/14/2016	Taskrabbit, Inc.
12/20/2016	Airbnb, Inc.
12/20/2016	Elements of Health Care

¹ Only the investigations whose names are highlighted in boldface type have been publicly disclosed. The other investigations have not been publicly disclosed, but the fact that they have been closed would be accessible in response to a Freedom of Information request.

Attachment A
Investigations Other Than Confidential Investigations Closed
Between November 9, 2016 and January 20, 2017 – Page 2

Date Closed	Matter Name
12/20/2016	PregPrep LLC
12/21/2016	Therabotronics, LLC, and related corporation
12/21/2016	Postmates Inc.
12/21/2016	Advanced Air Systems, Inc. (Powertank)
12/21/2016	American Scientific Lighting Corp.
12/23/2016	Lead Vantage
12/28/2016	New Life Technical Academy
1/3/2017	Blackfriars/Saudi Basic
1/5/2017	Cisco Systems, Inc.
1/5/2017	Kaspersky Lab, Inc.
1/5/2017	Synopsys, Inc.
1/5/2017	Louisiana State Board of Dentistry
1/5/2017	Louisiana State Board of Medical Examiners
1/6/2017	RGF Environmental Group, Inc.
1/10/2017	NuStar/Martin Midstream
1/11/2017	Wellforce/Hallmark Health
1/11/2017	B&G Foods/ACH Food
1/11/2017	Shangtex/Luen Thai
1/11/2017	Vidant/Belhaven
1/11/2017	Univ. of Pittsburgh Medical/Susquehanna
1/11/2017	Lehigh Valley Health/Schuylkill Health
1/11/2017	Greenville Health System
1/11/2017	Henkel/Sun Products
1/11/2017	Central Iowa Healthcare/LHP Hospital
1/11/2017	Truckee Meadows Cremation & Burial Services
1/11/2017	Albertsons/Price Chopper
1/12/2017	AbbVie/Stemcentrx
1/12/2017	Agrium/Cargill

Attachment A
Investigations Other Than Confidential Investigations Closed
Between November 9, 2016 and January 20, 2017 – Page 3

Date Closed	Matter Name
1/12/2017.	Allergan/Tobira
1/12/2017.	Berry Plastics/AEP
1/12/2017.	AstraZeneca/Allergan
1/12/2017.	Amgen/Arrowhead Pharmaceuticals
1/12/2017.	US Renal Care/Liberty Administrative
1/12/2017.	Colorcon/BASF
1/12/2017.	Allergan/ForSight VISION5
1/12/2017.	Wegmann Automotive/Plombco.
1/18/2017	Axis LED Group, LLC

Attachment C
Public Commission Votes Between November 9, 2016 and January 20, 2017 – Page 1

Action Date	Matter Name	Commission Action Taken By Vote	Vote Taken (Yes-No-Not Participating)
11/9/2016	E.M. Systems & Services, LLC	COMMISSION APPROVAL OF CONSENTS IN SETTLEMENT OF THE COURT ACTION	3-0-0
11/10/2016	OTC Homeopathic Drugs	COMMISSION APPROVAL OF ENFORCEMENT POLICY STATEMENT ON MARKETING CLAIMS FOR OTC HOMEOPATHIC DRUGS AND APPROVAL OF THE ISSUANCE OF A STAFF REPORT ON THE HOMEOPATHIC MEDICINE & ADVERTISING WORKSHOP	3-0-0
11/14/2016	Cigarette and Smokeless Tobacco 6(b) Orders	COMMISSION APPROVAL OF THE CIGARETTE REPORT FOR 2014 AND THE SMOKELESS TOBACCO REPORT FOR 2014	3-0-0
11/14/2016	Heidelbergcement AG, et al.	COMMISSION APPROVAL OF RESPONDENTS' PROPOSED DIVESTITURE OF THE MARTINSBURG CEMENT BUSINESS TO ARGOS USA LLC.	3-0-0
11/15/2016	Advocate Healthcare Network et al.	COMMISSION APPROVAL OF AN ORDER CONTINUING ADMINISTRATIVE PROCEEDINGS FOR 21 DAYS AFTER THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS RULES ON THE COMMISSION'S REQUEST FOR A PRELIMINARY INJUNCTION.	3-0-0

Attachment C
Public Commission Votes Between November 9, 2016 and January 20, 2017 – Page 2

Action Date	Matter Name	Commission Action Taken By Vote	Vote Taken (Yes-No-Not Participating)
11/17/2016	Warner Bros.	COMMISSION APPROVAL OF FINAL ISSUANCE OF THE COMPLAINT AND THE DECISION AND ORDER, AND APPROVAL OF LETTERS TO THE COMMENTERS OF RECORD	3-0-0
11/21/2016	California Naturel, Inc.	COMMISSION APPROVAL OF AN ORDER EXTENDING THE TIME PERIOD FOR RULING ON THE MOTION FOR SUMMARY DECISION	3-0-0
11/21/2016	Wellmont Health/Mountain States Health	COMMISSION AUTHORIZATION GRANTED TO THE COMMISSION STAFF TO SUBMIT A COMMENT AND DELIVER ORAL REMARKS TO THE TENNESSEE DEPARTMENT OF HEALTH, AND PARTICIPATE IN THE CERTIFICATE OF PUBLIC ADVANTAGE PROCESS IN TENNESSEE RELATED TO THIS TRANSACTION	3-0-0
11/28/2016	FERC Market Power Analysis	COMMISSION APPROVAL OF JOINT COMMENTS WITH THE DEPARTMENT OF JUSTICE ADDRESSING CERTAIN TOPICS IN FERC'S NOTICE OF INQUIRY	3-0-0
11/29/2016	Ethanol Production Industry	COMMISSION APPROVAL OF THE 2016 REPORT ON ETHANOL MARKET CONCENTRATION, FOR TRANSMITTAL TO CONGRESS AND THE ENVIRONMENTAL PROTECTION AGENCY, PURSUANT TO THE ENERGY POLICY ACT OF 2005	3-0-0

Attachment C
Public Commission Votes Between November 9, 2016 and January 20, 2017 – Page 3

Action Date	Matter Name	Commission Action Taken By Vote	Vote Taken (Yes-No-Not Participating)
11/29/2016	Staff Comment to DE Board of Speech/Language Pathologists, Audiologists and Hearing Aid Dispensers re Telehealth	COMMISSION AUTHORIZATION GRANTED TO THE COMMISSION STAFF TO SUBMIT A COMMENT TO THE DELAWARE BOARD OF SPEECH/LANGUAGE PATHOLOGISTS, AUDIOLOGISTS AND HEARING AID DISPENSERS REGARDING ITS PROPOSED TELEHEALTH REGULATION.	3-0-0
12/2/2016	Aura Labs, Inc.	COMMISSION APPROVAL OF A SECTION 13(b) COMPLAINT AND APPROVAL OF A CONSENT IN SETTLEMENT OF THE COURT ACTION	3-0-0
12/5/2016	California Naturel, Inc.	COMMISSION APPROVAL OF THE OPINION OF THE COMMISSION AND THE FINAL ORDER	3-0-0
12/8/2016	Asbury Automotive Group, Inc.	COMMISSION APPROVAL OF ACCEPTANCE OF A CONSENT AGREEMENT FOR PUBLIC COMMENT	3-0-0
12/8/2016	CarMax, Inc.	COMMISSION APPROVAL OF ACCEPTANCE OF A CONSENT AGREEMENT FOR PUBLIC COMMENT	3-0-0
12/8/2016	General Motors Company	COMMISSION APPROVAL OF FINAL ISSUANCE OF THE COMPLAINT AND THE DECISION AND ORDER, AND APPROVAL OF LETTERS TO THE COMMENTERS OF RECORD	3-0-0
12/8/2016	Inbound Call Experts	COMMISSION APPROVAL OF A CONSENT IN SETTLEMENT OF THE COURT ACTION.	3-0-0

Attachment C
Public Commission Votes Between November 9, 2016 and January 20, 2017 – Page 4

Action Date	Matter Name	Commission Action Taken By Vote	Vote Taken (Yes-No-Not Participating)
12/8/2016	Jim Koons Management Company	COMMISSION APPROVAL OF FINAL ISSUANCE OF THE COMPLAINT AND THE DECISION AND ORDER, AND APPROVAL OF LETTERS TO THE COMMENTERS OF RECORD	3-0-0
12/8/2016	Lithia Motors, Inc.	COMMISSION APPROVAL OF FINAL ISSUANCE OF THE COMPLAINT AND THE DECISION AND ORDER, AND APPROVAL OF LETTERS TO THE COMMENTERS OF RECORD	3-0-0
12/8/2016	Mitchell Rales/Colfax	COMMISSION APPROVAL OF A CIVIL PENALTY COMPLAINT AND A CONSENT IN SETTLEMENT OF THE COURT ACTION	3-0-0
12/8/2016	West-Herr Automotive Group, Inc.	COMMISSION APPROVAL OF ACCEPTANCE OF A CONSENT AGREEMENT FOR PUBLIC COMMENT	3-0-0
12/12/2016	J. William Enterprises, LLC	COMMISSION AUTHORIZATION GRANTED TO THE COMMISSION STAFF TO FILE A SECTION 13(b) COMPLAINT	3-0-0
12/12/2016	Mars Petcare US, Inc.	COMMISSION APPROVAL OF FINAL ISSUANCE OF THE COMPLAINT AND THE DECISION AND ORDER, AND APPROVAL OF LETTERS TO THE COMMENTERS OF RECORD	3-0-0

Attachment C
Public Commission Votes Between November 9, 2016 and January 20, 2017 – Page 5

Action Date	Matter Name	Commission Action Taken By Vote	Vote Taken (Yes-No-Not Participating)
12/12/2016	Misc. Matters in the Office of General Counsel	COMMISSION APPROVAL OF TWO FEDERAL REGISTER NOTICES (1) UPDATING THE FEE REGULATION, AND (2) ANNOUNCING A FINAL RULE WITH CHANGES TO THE FREEDOM OF INFORMATION ACT REGULATION.	3-0-0
12/13/2016	Ahmet Okumus/Web.com	COMMISSION APPROVAL OF A CIVIL PENALTY COMPLAINT AND A CONSENT IN SETTLEMENT OF THE COURT ACTION	3-0-0
12/13/2016	Ashley Madison	COMMISSION APPROVAL OF A SECTION 13(b) COMPLAINT AND A CONSENT IN SETTLEMENT OF THE COURT ACTION	3-0-0
12/14/2016	DeVry University	COMMISSION APPROVAL OF A CONSENT IN SETTLEMENT OF THE COURT ACTION	3-0-0
12/14/2016	Turn, Inc.	COMMISSION APPROVAL OF ACCEPTANCE OF A CONSENT AGREEMENT FOR PUBLIC COMMENT	3-0-0
12/14/2016	Vemma Nutrition Company	COMMISSION APPROVAL OF TWO CONSENTS IN SETTLEMENT OF THE COURT ACTION	3-0-0



OFFICE OF THE
CHAIRWOMAN

UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
WASHINGTON, D.C. 20580

January 23, 2017

The Honorable Michael S. Lee
Chairman
Subcommittee on Antitrust,
Competition Policy and Consumer Rights
Committee on the Judiciary
United States Senate
Washington, DC 20510

Dear Chairman Lee:

I write in response to your and Chairman Johnson's correspondence of December 21, 2016 in which you request a list of (1) all Federal Trade Commission matters closed, and (2) the results of every Commission vote between November 9, 2016 and January 20, 2017. As explained below, some of the information you have requested is non-public, confidential information that, by statute, cannot be made public. The Commission has authorized providing the requested information as a response to an official request from a Congressional Committee and Congressional Subcommittee.¹

In response to your request, we are providing four attachments. Attachments A and B are lists of FTC investigations closed between November 9, 2016 and January 20, 2017. Attachment A consists primarily of closed investigations that have not been made public by the Commission, but that would not be protected from disclosure if requested through the Freedom of Information Act ("FOIA").² Nonetheless, the Commission requests that the list in Attachment A be kept non-public, or, at a minimum, that the named parties be advised before any information is made public. Attachment B identifies non-public investigations that may be protected from public disclosure pursuant to the Hart-Scott-Rodino Act. Specifically, Section 7A(h) of the Clayton Act, 15 U.S.C. § 18a(h), prohibits public disclosure of this information, including the fact that a particular premerger notification has been filed and the identity of the parties involved and contours of any non-public transaction.³ The Commission therefore also requests confidential treatment for the information in Attachment B.

¹ See Commission Rule 4.11(b), 16 C.F.R. § 4.11(b) (2017).

² Appendix A does not include four investigations that led to law enforcement actions that the Commission approved and made public prior to November 9, 2016. The investigative files were technically closed in our computer system during this period after they were converted to law enforcement matters for tracking purposes.

³ As a consequence, such information is also exempt from disclosure under FOIA Exemption 3A, 5 U.S.C. § 552(b)(3)(A)(2).

The Honorable Michael S. Lee – Page 2

Attachments C and D are public and non-public lists, respectively, of the actions which the Commission has taken during the referenced time period. Attachment D lists votes related to non-public investigations that are exempt from mandatory disclosure under FOIA because disclosure of these actions would reveal the existence of, and information concerning, ongoing, non-public law enforcement investigations or Commission pre-decisional deliberations.⁴ The Commission thus also requests confidential treatment for the Commission actions listed in Attachment D.

If you or your staff have any questions, please feel free to have your staff contact Jeanne Bumpus, our Director of Congressional Relations, at (202) 326-2946.

Sincerely,

A handwritten signature in blue ink, appearing to read 'Edith Ramirez', with a stylized flourish at the end.

Edith Ramirez
Chairwoman

Enclosures

⁴ See FOIA Exemption 7(A), 5 U.S.C. § 552(b)(7)(A); *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 232 (1978); *Ehringhaus v. FTC*, 525 F. Supp. 21, 24 (D.D.C. 1980) and FOIA Exemption 5, 5 U.S.C. § 552(b)(5); *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132 (1975).



UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
WASHINGTON, D.C. 20580

January 24, 2017

The Honorable Cory A. Booker
United States Senate
Washington, D.C. 20510

Dear Senator Booker:

I write in response to your December 11, 2016 letter requesting that the Federal Trade Commission investigate FieldTurf, the distributor of the now-discontinued DuraSpine artificial sports turf, for claims about DuraSpine's durability. You explain in your letter that FieldTurf marketed and sold over 1,400 DuraSpine fields between 2005 and 2012 to municipalities, schools, and other facilities in New Jersey, and throughout the United States, at a cost ranging from \$300,000 to \$500,000. You express concern that FieldTurf's claims that DuraSpine had a life expectancy of more than ten years, was "far more resistant" to ultraviolet radiation and "foot traffic," and delivered "unmatched durability" were false and have caused consumer loss. You ask the Commission to investigate and take appropriate action.

As you know, the Commission acts in the interest of consumers to prevent deceptive or unfair acts or practices, pursuant to the Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45. An act or practice is deceptive if it is likely to mislead consumers acting reasonably under the circumstances and if it is material – that is, likely to affect a consumer's purchase or use decision. An act or practice is unfair if it causes or is likely to cause substantial consumer injury that consumers cannot reasonably avoid, and that is not outweighed by benefits to consumers or competition. Under Commission law, advertisers must have substantiation for their claims at the time they make the claims; thus, unsubstantiated claims about a product's performance are likely to be deceptive, in violation of Section 5.

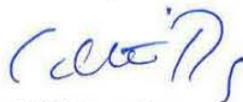
The Commission shares your concern that advertising should be truthful and not misleading, especially where the advertised products are expensive, infrequently purchased, and consumers cannot judge for themselves whether the products perform as advertised until well after purchase. In determining whether to take enforcement in any particular situation, the Commission may consider a number of factors, including the type of violation alleged; the nature and amount of consumer injury at issue, including the number of consumers affected; and the likelihood of preventing future unlawful conduct and securing redress or other relief.

The Commission has a history of taking action against manufacturers exaggerating the performance capabilities of their products. For example, several years ago, the Commission settled charges against replacement-window marketers exaggerating claims about their windows'

efficiency and the amount users could save on heating and cooling bills. The final orders prohibit the companies from making claims about energy consumption or savings unless the claims are true and backed by scientific evidence.¹ The Commission has also reached settlements with companies inflating claims that their insulation additive products would double, or otherwise increase, the insulating power of insulation to which the products were added. The orders entered in these actions similarly prohibit the companies from making claims about their products' insulation-boosting capabilities unless the claims are true and backed by scientific evidence.² As you know, Commission investigations are nonpublic, but I can assure you that truthful advertising remains a top Commission priority. I can also assure you that the Commission will carefully consider the information you provided to determine whether enforcement or other action is appropriate.

I appreciate your commitment to ensuring truthful advertising in the marketplace. If you or your staff has any additional questions or comments, please contact Jeanne Bumpus, the Director of our Office of Congressional Relations, at (202) 326-2946.

Sincerely,

A handwritten signature in blue ink, appearing to read 'Edith Ramirez', is positioned above the printed name.

Edith Ramirez
Chairwoman

¹ See Press Release, FTC Approves Final Orders Settling Charges that Window Marketers Made Deceptive Energy Efficiency and Cost Savings Claims (May 18, 2012), *available at* <https://www.ftc.gov/news-events/press-releases/2012/05/ftc-approves-final-orders-settling-charges-window-marketers-made>.

² See Press Release, The Heat is On: Settlement Bars Firm and its President from Exaggerating the Properties of Their Insulation Additive (June 8, 2010), *available at* <https://www.ftc.gov/news-events/press-releases/2010/06/heat-settlement-bars-firm-and-its-president-exaggerating>.



UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
WASHINGTON, D.C. 20580

January 24, 2017

The Honorable Robert Menendez
United States Senate
Washington, D.C. 20510

Dear Senator Menendez:

I write in response to your December 11, 2016 letter requesting that the Federal Trade Commission investigate FieldTurf, the distributor of the now-discontinued DuraSpine artificial sports turf, for claims about DuraSpine's durability. You explain in your letter that FieldTurf marketed and sold over 1,400 DuraSpine fields between 2005 and 2012 to municipalities, schools, and other facilities in New Jersey, and throughout the United States, at a cost ranging from \$300,000 to \$500,000. You express concern that FieldTurf's claims that DuraSpine had a life expectancy of more than ten years, was "far more resistant" to ultraviolet radiation and "foot traffic," and delivered "unmatched durability" were false and have caused consumer loss. You ask the Commission to investigate and take appropriate action.

As you know, the Commission acts in the interest of consumers to prevent deceptive or unfair acts or practices, pursuant to the Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45. An act or practice is deceptive if it is likely to mislead consumers acting reasonably under the circumstances and if it is material – that is, likely to affect a consumer's purchase or use decision. An act or practice is unfair if it causes or is likely to cause substantial consumer injury that consumers cannot reasonably avoid, and that is not outweighed by benefits to consumers or competition. Under Commission law, advertisers must have substantiation for their claims at the time they make the claims; thus, unsubstantiated claims about a product's performance are likely to be deceptive, in violation of Section 5.

The Commission shares your concern that advertising should be truthful and not misleading, especially where the advertised products are expensive, infrequently purchased, and consumers cannot judge for themselves whether the products perform as advertised until well after purchase. In determining whether to take enforcement in any particular situation, the Commission may consider a number of factors, including the type of violation alleged; the nature and amount of consumer injury at issue, including the number of consumers affected; and the likelihood of preventing future unlawful conduct and securing redress or other relief.

The Commission has a history of taking action against manufacturers exaggerating the performance capabilities of their products. For example, several years ago, the Commission settled charges against replacement-window marketers exaggerating claims about their windows'

efficiency and the amount users could save on heating and cooling bills. The final orders prohibit the companies from making claims about energy consumption or savings unless the claims are true and backed by scientific evidence.¹ The Commission has also reached settlements with companies inflating claims that their insulation additive products would double, or otherwise increase, the insulating power of insulation to which the products were added. The orders entered in these actions similarly prohibit the companies from making claims about their products' insulation-boosting capabilities unless the claims are true and backed by scientific evidence.² As you know, Commission investigations are nonpublic, but I can assure you that truthful advertising remains a top Commission priority. I can also assure you that the Commission will carefully consider the information you provided to determine whether enforcement or other action is appropriate.

I appreciate your commitment to ensuring truthful advertising in the marketplace. If you or your staff has any additional questions or comments, please contact Jeanne Bumpus, the Director of our Office of Congressional Relations, at (202) 326-2946.

Sincerely,

A handwritten signature in blue ink, appearing to read "Edith Ramirez".

Edith Ramirez
Chairwoman

¹ See Press Release, FTC Approves Final Orders Settling Charges that Window Marketers Made Deceptive Energy Efficiency and Cost Savings Claims (May 18, 2012), *available at* <https://www.ftc.gov/news-events/press-releases/2012/05/ftc-approves-final-orders-settling-charges-window-marketers-made>.

² See Press Release, The Heat is On: Settlement Bars Firm and its President from Exaggerating the Properties of Their Insulation Additive (June 8, 2010), *available at* <https://www.ftc.gov/news-events/press-releases/2010/06/heat-settlement-bars-firm-and-its-president-exaggerating>.



UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
WASHINGTON, D.C. 20580

January 24, 2017

The Honorable Bill Nelson
Ranking Member
Committee on Commerce, Science, and Transportation
United States Senate
Washington, D.C. 20510

Dear Senator Nelson:

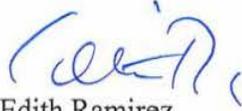
This responds to your letter of November 17, 2016, requesting information about the Federal Trade Commission's monetary bonuses or performance awards to Senior Executive Service employees for Fiscal Years (FY) 2015 and 2016. Specifically, you requested a list of all SES, SL, ST, or equivalent employees who received monetary awards during these fiscal years; each employee's name, title, and base annual pay; the amount, date, and type of each award; for ratings-based awards, employees' ratings for the period on which the award was based; and a detailed justification if any such employee received total awards in a year that totaled more than 20% of base salary. You also requested a description of the agency's performance review process and rating scale.

The enclosed material provides the information you requested with one exception. We have provided a list of the ratings-based performance awards for the agency for the two years, but have not provided the names of the employees who received the ratings. We have done this to protect confidential personal information that is protected under the Privacy Act and the Freedom of Information Act. *See, e.g., Tomscha v. Gen. Svcs. Admin.*, 158 F. App'x 329 (2d Cir. 2005).

No ratings-based award during these years exceeded 20% of the recipient's base pay. We had one SES employee who received total awards exceeding 20% of that employee's base pay for FY 2016. Following his receipt of a Commission performance award, he received a Presidential Rank Award. A press release discussing his award is enclosed.

We appreciate your interest in the Commission. If you or your staff have any questions, please feel free to have your staff call Jeanne Bumpus, the Director of our Office of Congressional Relations, at (202) 326-2195.

Sincerely,

A handwritten signature in blue ink, appearing to read "Edith Ramirez", with a stylized flourish at the end.

Edith Ramirez
Chairwoman

Enclosures

FEDERAL TRADE COMMISSION

SES Monetary Awards Other than Performance Awards Paid Out in FY 2015

Name	Position Title	Base Annual Pay	Type of Award	Date Award Paid	Award Amount
BAK, PATRICIA F	DEPUTY EXECUTIVE DIRECTOR	\$166,400			N/A
BLOOM, MICHAEL J	ASST DIR FOR POLICY & COORDINATION	\$167,300			N/A
BROYLES, PHILLIP L	ASSISTANT DIRECTOR, MERGERS III	\$174,900			N/A
BRUNO, MARIAN R	DEPUTY DIR, BUREAU OF COMPETITION	\$171,900			N/A
CLARK, DONALD S	SECRETARY OF THE FTC	\$168,900			N/A
DOLAN, JAMES R	ASSOCIATE DIR, FINANCIAL PRACTICES	\$164,800			N/A
DUCORE, DANIEL P	ASSISTANT DIRECTOR FOR COMPLIANCE	\$168,700			N/A
ENGLE, MARY KOELBEL	ASSOC DIR OF ADVERTISING PRACTICES	\$175,800			N/A
FORTENBERRY, MONIQUE Y.	DEPUTY EXECUTIVE DIRECTOR	\$175,800			N/A
GREEN, GEOFFREY M	ASST DIR ANTICOMPETITIVE PRACTICES	\$164,800			N/A
GREISMAN, LOIS C	ASSOC DIR FOR MARKETING PRACTICES	\$175,800			N/A
KAUFMAN, DANIEL	DEP DIR, BUREAU OF CONSUMER PROTECTION	\$166,400			N/A
KOHM, JAMES A	ASSOCIATE DIRECTOR FOR ENFORCEMENT	\$163,800			N/A
LEYDON, KAREN F.	CHIEF HUMAN CAPITAL OFFICER	\$166,400			N/A
MITHAL, MANEESHA	ASSOC DIR FOR PRIVACY AND IDENTITY	\$164,000			N/A
MOISEYEV, MICHAEL R	ASSISTANT DIRECTOR, MERGERS I	\$164,700			N/A
MOSCATELLI, CATHARINE M	ASSISTANT DIRECTOR, MERGERS II	\$166,400			N/A
PAUL, BAJINDER P.	CHIEF INFORMATION OFFICER	\$179,700			N/A
RICH, JESSICA L	DIRECTOR, BUREAU OF CONSUMER PROTECTION	\$173,800			N/A
ROBBINS, DAVID	EXECUTIVE DIRECTOR	\$179,700			N/A
SHONKA, DAVID C	PRINCIPAL DEPUTY GENERAL COUNSEL	\$169,400			N/A
STEVENSON, HUGH G	DEPUTY DIRECTOR, OFC INT'L AFFAIRS	\$174,100			N/A
TOROK, DAVID M	ASSOC DIR FOR PLANNING & INFORMATION	\$170,400			N/A
TRITELL, RANDOLPH W.	DIRECTOR, OFFICE OF INT'L AFFAIRS	\$171,200			N/A
VITA, MICHAEL G	DEP DIR FOR RESEARCH & MANAGEMENT	\$166,500			N/A
WHITE, CHRISTIAN S	DEP GEN COUNSEL FOR LEGAL COUNSEL	\$170,400	SPECIAL ACT	10/17/14	\$750

FEDERAL TRADE COMMISSION

SES Monetary Awards Other Than Performance Based Awards Paid Out in FY 2016

Name	Position Title	Base Annual Pay	Type of Award	Date Award Paid	Award Amount
BAK, PATRICIA F	DEPUTY EXECUTIVE DIRECTOR	\$173,900	SPECIAL ACT	10/04/15	\$2,000
BARBER, VICKI A	CHIEF HUMAN CAPITAL OFFICER	\$160,600	SPECIAL ACT	12/10/15	\$3,000
BARBER, VICKI A	CHIEF HUMAN CAPITAL OFFICER	\$160,600	SPECIAL ACT	09/04/16	\$250
BROYLES, PHILLIP L	ASSISTANT DIRECTOR, MERGERS III	\$177,600			N/A
BRUNO, MARIAN R	DEPUTY DIR, BUREAU OF COMPETITION	\$179,400	SPECIAL ACT	09/01/16	\$2,500
BRUNO, MARIAN R	DEPUTY DIR, BUREAU OF COMPETITION	\$179,400	SPECIAL ACT	09/04/16	\$250
CLARK, DONALD S	SECRETARY OF THE FTC	\$175,700	SPECIAL ACT	09/04/16	\$250
CLARK, DONALD S	SECRETARY OF THE FTC	\$175,700	SPECIAL ACT	09/05/16	\$250
DEMARTINO, LAURA	ASSOC DIR, LITIGATION TECH & ANALYSIS	\$166,700	SPECIAL ACT	09/05/16	\$250
DEMARTINO, LAURA	ASSOC DIR, LITIGATION TECH & ANALYSIS	\$166,700	SPECIAL ACT	09/06/16	\$250
DOLAN, JAMES R	ASSOCIATE DIR, FINANCIAL PRACTICES	\$172,200			N/A
DUCORE, DANIEL P	ASSISTANT DIRECTOR FOR COMPLIANCE	\$179,400	SPECIAL ACT	08/30/16	\$2,500
ENGLE, MARY KOELBEL	ASSOC DIR OF ADVERTISING PRACTICES	\$177,600			N/A
FORTENBERRY, MONIQUE Y.	DEPUTY EXECUTIVE DIRECTOR	\$177,600			N/A
GILMAN, ALEXIS J	ASSISTANT DIRECTOR, MERGERS IV	\$173,600	SPECIAL ACT	08/30/16	\$2,500
GREEN, GEOFFREY M	ASST DIR ANTICOMPETITIVE PRACTICES	\$175,800	SPECIAL ACT	08/30/16	\$2,500
GREISMAN, LOIS C	ASSOC DIR FOR MARKETING PRACTICES	\$177,600			N/A
GRIS, BENJAMIN	ASSISTANT DIRECTOR, MERGERS III	\$173,600	SPECIAL ACT	08/30/16	\$2,500
KAUFMAN, DANIEL	DEP DIR, BUREAU OF CONSUMER PROTECTION	\$179,400	SPECIAL ACT	09/04/16	\$250
KOHM, JAMES A	ASSOCIATE DIRECTOR FOR ENFORCEMENT	\$172,000			N/A
MEIER, MARKUS H	ASSISTANT DIRECTOR, HEALTH CARE	\$166,500	SPECIAL ACT	10/04/15	\$2,000
MEIER, MARKUS H	ASSISTANT DIRECTOR, HEALTH CARE	\$173,800	SPECIAL ACT	09/01/16	\$2,500
MITHAL, MANEESHA	ASSOC DIR FOR PRIVACY AND IDENTITY	\$174,800	SPECIAL ACT	09/04/16	\$250
MOISEYEV, MICHAEL R	ASSISTANT DIRECTOR, MERGERS I	\$177,800	SPECIAL ACT	09/01/16	\$2,500
REBICH, DAVID	CHIEF FINANCIAL OFFICER	\$175,400	SPECIAL ACT	09/06/00	\$250
RICH, JESSICA L	DIRECTOR, BUREAU OF CONSUMER PROTECTION	\$182,100			N/A
ROBBINS, DAVID	EXECUTIVE DIRECTOR	\$185,100	SPECIAL ACT	09/04/16	\$250
SHONKA, DAVID C	PRINCIPAL DEPUTY GENERAL COUNSEL	\$177,600	PRESIDENTIAL RANK	12/28/15	\$35,520
SHONKA, DAVID C	PRINCIPAL DEPUTY GENERAL COUNSEL	\$179,400	SPECIAL ACT	09/04/16	\$250
SILVIA, JR., LOUIS	ASST DIRECTOR, ANTITRUST I	\$166,500			N/A

FEDERAL TRADE COMMISSION**SES Monetary Awards Other Than Performance Based Awards Paid Out in FY 2016**

Name	Position Title	Base Annual Pay	Type of Award	Date Award Paid	Award Amount
STEVENSON, HUGH G	DEPUTY DIRECTOR, OFC INT'L AFFAIRS	\$176,800			N/A
STIVERS, ANDREW E	DEP. DIRECTOR FOR CONSUMER PROTECTION	\$158,000			N/A
TOROK, DAVID M	ASSOC. DIR FOR CONSUMER RESPONSE & OPTNS	\$175,500			N/A
TRITELL, RANDOLPH W.	DIRECTOR, OFFICE OF INT'L AFFAIRS	\$178,900			N/A
VAJJHALAL, RAGHAV V	CHIEF INFORMATION OFFICER	\$177,600	SPECIAL ACT	12/10/15	\$3,000
VITA, MICHAEL G	DEP. DIR FOR RESEARCH & MANAGEMENT	\$179,400	SPECIAL ACT	09/04/16	\$250
WHITE, CHRISTIAN S	DEP. GEN COUNSEL FOR LEGAL COUNSEL	\$177,600			N/A
WOOD, NATHANIEL	ASSOC DIR, CONSUMER & BUSINESS EDUCATION	\$166,700	SPECIAL ACT	12/13/15	\$5,000

FEDERAL TRADE COMMISSION

SES Performance Awards Paid Out in FY 15

Performance Cycle Ending 9/30/14

Award	Date Paid	Amount Paid	Rating of Record	Rating of Record Date
PERFORMANCE AWARD	12/12/14	\$17,611	5	09/30/14
PERFORMANCE AWARD	12/12/14	\$16,802	5	09/30/14
PERFORMANCE AWARD	12/12/14	\$15,822	5	09/30/14
PERFORMANCE AWARD	12/12/14	\$11,471	5	09/30/14
PERFORMANCE AWARD	12/12/14	\$11,174	5	09/30/14
PERFORMANCE AWARD	12/12/14	\$10,272	5	09/30/14
PERFORMANCE AWARD	12/12/14	\$9,542	5	09/30/14
PERFORMANCE AWARD	12/12/14	\$9,317	5	09/30/14
PERFORMANCE AWARD	12/12/14	\$9,152	5	09/30/14
PERFORMANCE AWARD	12/12/14	\$9,152	5	09/30/14
PERFORMANCE AWARD	12/12/14	\$9,142	4	09/30/14
PERFORMANCE AWARD	12/12/14	\$9,142	4	09/30/14
PERFORMANCE AWARD	12/12/14	\$9,095	5	09/30/14
PERFORMANCE AWARD	12/12/14	\$9,053	4	09/30/14
PERFORMANCE AWARD	12/12/14	\$8,941	5	09/30/14
PERFORMANCE AWARD	12/12/14	\$8,825	5	09/30/14
PERFORMANCE AWARD	12/12/14	\$8,819	5	09/30/14
PERFORMANCE AWARD	12/12/14	\$8,734	5	09/30/14
PERFORMANCE AWARD	12/12/14	\$8,729	5	09/30/14
PERFORMANCE AWARD	12/12/14	\$8,692	5	09/30/14
PERFORMANCE AWARD	12/12/14	\$8,681	5	09/30/14
PERFORMANCE AWARD	12/12/14	\$8,520	4	09/30/14
PERFORMANCE AWARD	12/12/14	\$8,445	4	09/30/14
PERFORMANCE AWARD	12/12/14	\$8,365	4	09/30/14
PERFORMANCE AWARD	12/12/14	\$8,320	4	09/30/14
PERFORMANCE AWARD	12/12/14	\$8,240	4	09/30/14

FEDERAL TRADE COMMISSION

SES Performance Awards Paid Out in FY 16

Performance Cycle Ending 9/30/15

Award	Date Paid	Amount Paid	Rating of Record	Rating of Record Date
PERFORMANCE AWARD	11/30/15	\$17,447	5	09/30/15
PERFORMANCE AWARD	11/30/15	\$16,121	5	09/30/15
PERFORMANCE AWARD	11/30/15	\$14,885	5	09/30/15
PERFORMANCE AWARD	11/30/15	\$13,474	5	09/30/15
PERFORMANCE AWARD	11/30/15	\$13,474	5	09/30/15
PERFORMANCE AWARD	11/30/15	\$13,474	5	09/30/15
PERFORMANCE AWARD	11/30/15	\$12,474	5	09/30/15
PERFORMANCE AWARD	11/30/15	\$12,062	5	09/30/15
PERFORMANCE AWARD	11/30/15	\$11,392	5	09/30/15
PERFORMANCE AWARD	11/30/15	\$11,209	5	09/30/15
PERFORMANCE AWARD	11/30/15	\$10,260	5	09/30/15
PERFORMANCE AWARD	11/30/15	\$10,151	5	09/30/15
PERFORMANCE AWARD	11/30/15	\$9,455	5	09/30/15
PERFORMANCE AWARD	11/30/15	\$9,229	5	09/30/15
PERFORMANCE AWARD	11/30/15	\$9,101	5	09/30/15
PERFORMANCE AWARD	11/30/15	\$8,880	5	09/30/15
PERFORMANCE AWARD	11/30/15	\$8,880	4	09/30/15
PERFORMANCE AWARD	11/30/15	\$8,840	4	09/30/15
PERFORMANCE AWARD	11/30/15	\$8,775	4	09/30/15
PERFORMANCE AWARD	11/30/15	\$8,700	4	09/30/15
PERFORMANCE AWARD	11/30/15	\$8,596	5	09/30/15
PERFORMANCE AWARD	11/30/15	\$8,485	4	09/30/15
PERFORMANCE AWARD	11/30/15	\$8,325	5	09/30/15
PERFORMANCE AWARD	11/30/15	\$8,325	5	09/30/15
PERFORMANCE AWARD	11/30/15	\$8,325	5	09/30/15
PERFORMANCE AWARD	11/30/15	\$7,900	5	09/30/15


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Chapter 3: Section 431 - Senior Executive Performance Management System (Reviewed May 2015/Updated June 2015)

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1. Functions
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Part I – Introduction

1. Purpose

This section establishes the Federal Trade Commission's (FTC) policy and procedures for the performance management system for members of the Senior Executive Service (SES). The FTC's Senior Executive Performance Management System (SEPMS) seeks to hold executives accountable for their individual and organizational performance in order to improve overall effectiveness in the accomplishment of the agency's mission and goals by:

- A. Expecting excellence in executive performance;
- B. Linking executive performance management with the results-oriented goals of the FTC Strategic Plan, the Government Performance and Results Act (GPRA), and the Government Performance and Results Modernization Act (GPRMA);
- C. Setting and communicating individual and organizational goals and expectations;
- D. Systematically appraising executive performance using measures that balance organizational results with customer, employee, and other perspectives;
- E. Maintaining the FTC's high standards as a consumer-focused agency accountable for results;
- F. Achieving results that meet the Administration's priorities when measured by the Office of Management and Budget (OMB) standards for success;
- G. Using performance results as a basis for recognizing the quality performance of executives, and for pay, awards, development, retention, reassignment, removal, and other personnel decisions.

2. Authority

This section implements and supplements the provisions of:

- A. 5 U.S.C. 4301, 4311-4315, and 4507
- B. 5 U.S.C. 5306-5307 and 5381-5385

- C. 5 CFR 430, subparts C and D
- D. 5 CFR 530, subpart B
- E. 5 CFR 534, subpart D
- F. 5 CFR 451, subpart A and C
- G. 5 CFR 1330, subpart D
- H. 5 CFR 359

3. Definitions

- A. *Annual Summary Rating.* The overall rating level that the FTC Chair assigns at the end of the appraisal period after considering the Performance Review Board's recommendations. This is the permanent and official rating, which becomes part of the executive's record for a period of five years.
- B. *Appointing Authority.* The FTC Chair, unless he or she has delegated in writing to one or more senior executives the authority to make appointments in the Senior Executive Service.
- C. *Appraisal Period.* October 1 to September 30 of each year. The established period of time for which an executive's performance is appraised. A minimum appraisal period consists of 90 calendar days under the same elements and performance standards.
- D. *Appraisal System.* The agency's policies, practices, and procedures established under 5 U.S.C. chapter 43 and 5 CFR 430, subparts C and D, for planning, monitoring, developing, evaluating, and rewarding executive performance.
- E. *Balanced Measures.* An approach to performance measurement that balances organizational results with the perspectives of distinct groups, including customers and employees.
- F. *Basic Pay.* Total amount of pay received at a rate fixed by law or administrative action for the position held by an executive before any deductions and excluding additional pay of any other kind.
- G. *Critical Element.* A key component of an executive's work that contributes to organizational goals and results and is so important that unsatisfactory performance on the element would make the executive's overall job performance unsatisfactory.
- H. *Executive Performance Agreement.* The government-wide form that documents the entire executive performance process from developing the performance plan to assigning the final summary rating.
- I. *Executive Resources Board (ERB).* A board of top FTC executives appointed by the FTC Chair, which sets policy on and oversees functions relating to executives.
- J. *Initial Summary Rating.* An overall rating level that the rating official derives from appraising the executive's performance during the appraisal period. It is the written record of the appraisal and the overall rating level forwarded to the Performance Review Board.
- K. *Intergovernmental Personnel Act (IPA).* Authorizes the assignment of employees between federal, state, and local governments, and other eligible organizations.
- L. *Performance Appraisal.* Review, evaluation, and comparison of an executive's actual performance against established performance elements and standards.
- M. *Performance Expectations.* Critical elements and performance standards that constitute the performance plans established for executives.
- N. *Performance Improvement Officer.* The Performance Improvement Officer (Chief Financial Officer) is responsible for communicating the agency goals and FTC Strategic Plan to staff and ensuring that the FTC's progress towards achieving its goals is communicated to agency managers, supervisors, and employees.
- O. *Performance Management System.* The framework of policies and practices established for planning, monitoring, developing, evaluating, and rewarding both individual and organizational performance, and for using results to make personnel decisions.
- P. *Performance Plan.* The written summary of work the executive is expected to accomplish during the appraisal period and the standards against which performance will be evaluated. The plan includes all critical elements established for the executive.

Q. *Performance Review Board (PRB)*. The agency board that is responsible for making recommendations to the FTC Chair on SES performance ratings, bonuses, and pay adjustments.

R. *Performance Standard*. A statement of the performance expected for a critical element.

S. *Program Performance Measures*. Results-oriented measures of performance.

T. *Progress Review*. A review of the executive's progress in meeting the performance expectations. A progress review is not a performance rating.

U. *Rating Official*. Generally, an executive's immediate supervisor who appraises the executive's performance and prepares the initial summary rating.

V. *Relative Performance*. Performance of an executive with respect to the performance of other executives as determined by application of a certified appraisal system.

W. *Reviewing Official*. An executive assigned to review responses to initial summary ratings and provide recommendations to the PRB and the FTC Chair.

X. *Strategic Planning Initiatives*. Agency strategic plans, annual performance plans, organizational work plans, and related initiatives.

4. Coverage

A. The provisions of SEPMS apply to all FTC executives covered by 5 U.S.C., chapter 31, subchapter II, except the Inspector General.

B. Administrative Law Judges appointed under 5 U.S.C. 3105 are excluded from coverage.

C. Commissioners are excluded from coverage under the Federal Trade Commission Act of September 26, 1914, 38 Stat. 717, as amended, and 5 U.S.C. 4301.

D. Executives are not excluded from coverage by reason of appointment type (e.g., career, noncareer, limited term, or limited emergency) or occupation.

E. Details do not affect an executive's coverage under or exclusion from SEPMS.

Part II – Senior Executive Performance Management System (SEPMS) Requirements

1. System Principles

The following regulatory criteria are incorporated in the design of the FTC's SEPMS and must be applied when implementing and administering the system.

A. *Alignment*. Performance plans and expectations for individual executives will derive from and clearly link to any of the following: the agency's mission, GPRA and GPRMA strategic goals, program and policy objectives, annual performance plans and budget priorities, or other relevant Administration initiatives.

B. *Consultation*. Performance expectations will be consistent with all applicable legal authority and requirements. Executive performance standards will be developed with the input and involvement of individual executives and communicated to them at the beginning of the appraisal period and at other appropriate times.

C. *Measurable Results*. Performance expectations for individual executives will be consistent with their respective areas of responsibility; reflect expected agency or organizational outcomes and outputs, performance targets or metrics, policy or program objectives, and milestones; identify specific programmatic crosscutting, external, and partnership-oriented goals or objectives as applicable; and be stated in terms of observable, measurable, or demonstrable performance.

D. *Balanced Measures*. Performance expectations for individual executives will include appropriate measures or indicators of employee and customer/stakeholder perspectives and feedback; quality, quantity, timeliness, and cost effectiveness, as applicable; and those technical, leadership, and managerial competencies or behaviors that contribute to and are necessary to distinguish exceptional performance.

E. *Agency Performance Assessment and Guidelines*. The Executive Director is designated by the FTC Chair to provide assessments of the agency's performance overall, as well as for each of its major programs and functional areas, and evaluation guidelines to PRB members and executives' rating and reviewing officials. The guidance provided will not be in the form of quantitative limitations on the number of ratings at any given rating level.

F. *Oversight*. The Executive Director, acting for the FTC Chair, will certify that the executive

appraisal process makes meaningful distinctions based on relative performance; that the results take into account, as appropriate, the assessment of the agency's performance against program performance measures as well as other relevant considerations; and that pay adjustments and performance awards are based on the results of the appraisal process and accurately reflect and recognize individual performance and contributions to the agency's performance. Also see Part II.7.

G. *Accountability.* The FTC Chair's final decisions and any PRB recommendations regarding executive ratings must be consistent with applicable regulations and agency policy, individually and overall, and appropriately reflect the executive's performance expectations, relevant program performance measures, and other relevant factors.

H. *Performance Differentiation.* The FTC's performance management system will have five summary levels of performance. Annual administration of the system must result in meaningful distinctions based on relative performance and take into account the assessment of the agency's performance against relevant program performance measures, executive performance expectations, and other relevant factors.

I. *Pay Differentiation.* Executives who have demonstrated the highest levels of individual performance and contribution to the agency's performance will receive the highest annual summary ratings, and will receive the largest corresponding pay adjustment percentages, bonus percentages and levels of pay, particularly above the rate for Level III of the Executive Schedule. Also see Part III.4.

J. *Training and Communications.* Executives must receive training on the operations of the SEPMS. Training and information will be provided on the SEPMS to the executives and others responsible for operating the system. Performance results will be communicated to the executives following each performance cycle.

2. Appraisal Period

A. *Performance Management Cycle.* Executives will receive an initial overall rating, generally within a reasonable period following the end of the October 1 to September 30 appraisal cycle.

B. *Minimum Appraisal Period.* Executives must be under the same critical elements and performance standards for a minimum of 90 calendar days to be eligible to receive an annual summary rating.

C. Career appointees may not be evaluated within 120 calendar days after the beginning of a new Presidential administration.

D. *Adjusting the Appraisal Period.* A performance appraisal period may be ended in any case in which the rating official determines that an adequate basis exists upon which to appraise and rate the executive's performance, provided that the executive has performed for at least 90 calendar days under an approved performance plan.

3. Planning and Communicating Performance

A. Development of the Performance Plan

(1) Supervisors must establish performance plans for executives and communicate the plans to them on or before the beginning of the appraisal period. Using the Executive Performance Agreement form, each supervisor of an executive, in consultation with the executive, develops the executive's annual performance plan, generally by October 1, of each year. Consultations between the supervisor and the executive provide an opportunity for the supervisor to communicate his or her expectations regarding what is required to be done and what constitutes successful performance. These consultations may be accomplished by various means including, but not limited to, the following:

- (a) The executive and supervisor discuss and develop the performance plan together.
- (b) The executive provides the supervisor with a draft performance plan.
- (c) The executive comments on a draft performance plan prepared by the supervisor.

(2) Final authority for establishing the performance plan rests with the executive's supervisor.

(3) The performance plan is finalized when the executive's supervisor signs the Executive Performance Agreement in Part 2. The appraisal period begins once the supervisor signs the performance plan and the executive indicates that he or she has received a copy of the approved plan.

B. Details, Temporary Reassignment, and Changed Duties

(1) When an executive is detailed or temporarily reassigned within the FTC for 120 calendar

days or more, the gaining organization must establish performance expectations and standards for the detail or temporary assignment.

(2) An executive whose work significantly changes within his or her current position or in a new position must be provided a new or revised performance plan that covers the significantly changed duties and responsibilities.

C. *Critical Elements*. Government-wide expectations for SES members are established in critical elements 1 through 4 on the Executive Performance Agreement form and apply to all executives. By their nature, critical elements are so important to a position that failure to achieve at least minimally satisfactory performance in a critical element results in overall unsatisfactory performance of the responsibilities of the position. Each performance plan shall include the following critical elements and performance standards, which are described below at the Commendable performance level.

(1) Critical Element 1: Leading Change

Develops and implements an organizational vision that integrates key organizational and program goals, priorities, values, and other factors. Assesses and adjusts to changing situations, implementing innovative solutions to make organizational improvements, ranging from incremental improvements to major shifts in direction or approach, as appropriate. Balances change and continuity; continually strives to improve service and program performance; creates a work environment that encourages creative thinking, collaboration, and transparency; and maintains program focus, even under adversity.

(2) Critical Element 2: Leading People

Designs and implements strategies that maximize employee potential, connect the organization horizontally and vertically, and foster high ethical standards in meeting the organization's vision, mission, and goals. Provides an inclusive workplace that fosters the development of others to their full potential; allows for full participation by all employees; facilitates collaboration, cooperation, and teamwork, and supports constructive resolution of conflicts. Ensures employee performance plans are aligned with the organization's mission and goals, that employees receive constructive feedback, and that employees are realistically appraised against clearly defined and communicated performance standards. Holds employees accountable for appropriate levels of performance and conduct. Seeks and considers employee input. Recruits, retains, and develops the talent needed to achieve a high quality, diverse workforce that reflects the nation, with the skills needed to accomplish organizational performance objectives while supporting workforce diversity, workplace inclusion, and equal employment policies and programs.

(3) Critical Element 3: Business Acumen

Assesses, analyzes, acquires, and administers human, financial, material, and information resources in a manner that instills public trust and accomplishes the organization's mission. Uses technology to enhance processes and decision making. Executes the operating budget, prepares budget requests with justifications, and manages resources.

(4) Critical Element 4: Building Coalitions

Solicits and considers feedback from internal and external stakeholders or customers. Coordinates with appropriate parties to maximize input from the widest range of appropriate stakeholders to facilitate an open exchange of opinion from diverse groups and strengthen internal and external support. Explains, advocates, and expresses facts and ideas in a convincing manner and negotiates with individuals and groups internally and externally, as appropriate. Develops a professional network with other organizations and identifies the internal and external politics that affect the work of the organization.

(5) Critical Element 5: Results Driven

This critical element includes specific performance results expected from the executive during the appraisal period that focus on measurable outcomes from the strategic plan or other measurable outputs and outcomes clearly aligned to organizational goals and objectives. At a minimum, the performance plan must include specific performance standards for each objective listed under the Results-Driven element, together with measures, targets, timelines, or quality descriptors, as appropriate, and describe the range of performance at the Commendable level for each result specified in Element 5.

(a) The supervisor, in consultation with the executive, will develop specific objectives and results to be achieved in the appraisal period, together with measures and targets, for Critical Element 5 that support the FTC's strategic goals, objectives, performance measures, and other initiatives.

(b) The Results Driven element must identify clear, transparent alignment to relevant agency or organizational goals or objectives and page references from the Strategic

Plan, Congressional Budget Justification/Annual Performance Plan, or other organizational planning documents in the designated section of the performance plan for each performance result specified.

D. Executive performance plans must include the government-wide SES performance standards as written and may include additional agency-specific performance standards written as competencies or specific results/commitments associated with the critical element. Agency-specific standards must be established or approved by the agency ERB.

E. Each critical element must be assigned a weight value, with the total weights adding to 100 percent.

- (1) The minimum weight that can be assigned to the Results Driven critical element is 20 percent.
- (2) The minimum weight that can be assigned to the other four critical elements is 5 percent.
- (3) No single performance element can be assigned a greater weight than the Results Driven element.

F. The Chair of the Executive Resources Board will establish critical element weights annually for executive performance plans.

G. *Performance Standards for Critical Elements*

Performance standards reflect performance expectations. These are the standards against which the executive's performance will be appraised. Performance standards established for each critical element express how well an executive must perform to accomplish results and achieve management and leadership competencies at a particular rating level. The government-wide performance standards are required to be applied to rate each critical element and are specified below.

(1) Level 5 (Exceptional): The executive demonstrates exceptional performance, fostering a climate that sustains excellence and optimizes results in the executive's organization, agency, department or government-wide. This represents the highest level of executive performance, as evidenced by the extraordinary impact on the achievement of the organization's mission. The executive is an inspirational leader and is considered a role model by agency leadership, peers, and employees. The executive continually contributes materially to or spearheads agency efforts that address or accomplish important agency goals, consistently achieves expectations at the highest level of quality possible, and consistently handles challenges, exceeds targets, and completes assignments ahead of schedule at every step along the way. Performance may be demonstrated in such ways as the following examples:

- (a) Overcomes unanticipated barriers or intractable problems by developing creative solutions that address program concerns that could adversely affect the organization, agency, or government.
- (b) Through leadership by example, creates a work environment that fosters creative thinking and innovation; fosters core process re-engineering; and accomplishes established organizational performance targets.
- (c) Takes the initiative to identify new opportunities for program and policy development and implementation or seeks more opportunities to contribute to optimizing results; takes calculated risks to accomplish organizational objectives.
- (d) Accomplishes objectives even under demands and time pressure beyond those typically found in the executive environment.
- (e) Achieves results of significant value to the organization, agency, or government.
- (f) Achieves significant efficiencies or cost-savings in program delivery or in daily operational costs of the organization.

(2) Level 4 (Meritorious): The executive demonstrates a very high level of performance beyond that required for successful performance in the executive's position and scope of responsibilities. The executive is a proven, highly effective leader who builds trust and instills confidence in agency leadership, peers, and employees. The executive consistently exceeds established performance expectations, timelines, or targets, as applicable. Performance may be demonstrated in such ways as the following:

- (a) Advances progress significantly toward achieving one or more strategic goals.
- (b) Demonstrates unusual resourcefulness in dealing with program operations or policy challenges.

(c) Achieves unexpected results that advance the goals and objectives of the organization, agency, or government.

(3) Level 3 (Commendable): The executive demonstrates the high level of performance expected and the executive's actions and leadership contribute positively toward the achievement of strategic goals and meaningful results. The executive is an effective, solid, and dependable leader who delivers high-quality results based on measures of quality, quantity, efficiency, and/or effectiveness within agreed upon timelines. The executive meets and often exceeds challenging performance expectations established for the position. Performance may be demonstrated in such ways as the following:

(a) Seizes opportunities to address issues and effects change when needed.

(b) Finds solutions to serious problems and champions their adoption.

(c) Designs strategies leading to improvements.

(4) Level 2 (Minimally Satisfactory): The executive's contributions to the organization are acceptable in the short term but do not appreciably advance the organization towards achievement of its goals and objectives. While the executive generally meets established performance expectations, timelines and targets, there are occasional lapses that impair operations and/or cause concern from management. While showing basic ability to accomplish work through others, the executive may demonstrate limited ability to inspire subordinates to give their best efforts or to marshal those efforts effectively to address problems characteristic of the organization and its work.

(5) Level 1 (Unsatisfactory): In repeated instances, the executive demonstrates performance deficiencies that detract from mission goals and objectives. The executive generally is viewed as ineffectual by agency leadership, peers, or employees. The executive does not meet established performance expectations/timelines/targets and fails to produce – or produces unacceptable – work products, services, or outcomes.

4. Monitoring Performance

A. *Monitor and Provide Feedback.* The supervisor must monitor executive performance in accomplishing critical elements and performance standards and provide feedback, including advice and assistance on improving performance, when needed, and encouragement and positive reinforcement, as appropriate. Exchanges between the supervisor and executive regarding the executive's performance provide opportunities to identify weaknesses that must be corrected prior to the performance evaluation and may be used to recognize strengths in executive performance.

B. *Progress Review.* Each executive must receive at least one progress review during the appraisal period. At a minimum, the executive must be informed how well he or she is performing against performance standards. The rating official must provide the executive written documentation if performance progress on any element is minimally satisfactory or unsatisfactory. The progress review described below is a suggested process for the ongoing monitoring of an executive's performance.

(1) Progress reviews may be initiated by either the supervisor or the executive at any time during the year. The intent of the progress review is that the supervisor and executive share a common understanding of where the executive stands in his or her performance to date and what is expected of the executive through the remainder of the appraisal period.

(2) At the progress review meeting, the supervisor and executive should review the executive's actual performance in accomplishing the objectives, results, critical elements, and performance standards described in the Executive Performance Agreement. Any problems, experienced or anticipated, should be discussed.

5. Appraising Performance

A. *Assessments.* The Executive Director will provide assessments of the agency's overall performance, as well as for the performance of each of its major programs and functional areas, based on reports of the agency's goals, objectives, and other program performance measures and indicators as provided by the Performance Improvement Officer. The Executive Director will also provide evaluation guidelines, based in part upon those assessments, to executives' rating and reviewing officials and to PRB members. Assessments and guidelines will be provided at the conclusion of the appraisal period but before ratings are recommended in order to serve as a basis for individual performance evaluations, as appropriate.

B. *Annual Appraisals.* At the end of the appraisal period, each executive should document accomplishments by addressing results achieved under his or her Results Driven element and the other critical elements. The rating official then finalizes the appraisal of the executive's performance in an overall narrative appraisal, assigns a rating for each element, and assigns the initial summary rating. The FTC Chair assigns the annual summary rating at the end of the appraisal period. An executive's performance must be appraised on the performance of the

critical elements, taking into account such factors as:

- (1) Organizational results achieved in accordance with goals established by agency strategic initiatives and performance plans, organizational initiatives, and relevant Administration initiatives;
- (2) Customer satisfaction;
- (3) Employee perspectives;
- (4) Effectiveness, productivity, and performance quality of the employees for whom the executive is responsible; and
- (5) Meeting affirmative action, equal employment opportunity, and diversity goals, and complying with the merit system principles set forth under 5 U.S.C. 2301.

C. *Supervisory Executives.* In the case of supervisory executives, appraisal narratives and ratings must:

- (1) Reflect the degree to which performance standards or expectations for their individual subordinate employees clearly link to organizational mission, agency strategic goals, or other program or policy objectives, and
- (2) Take into account the degree of rigor exercised in the appraisal of their subordinate employees.

D. *Details, Job Changes, and Transfers*

- (1) The supervisor of the position to which an executive is detailed or temporarily reassigned must appraise the executive's performance under the performance plan established for the temporary assignment (see II3B above) and transfer the appraisal to the executive's rating official to be considered in deriving the executive's initial summary rating.
- (2) An FTC executive on assignment outside of the agency should, whenever possible, receive a narrative assessment of his or her work performed outside the agency. To facilitate this, supervisors who approve the assignments, including IPA assignments, should make arrangements, whenever feasible, with the borrowing office to provide a written assessment of the FTC executive's work while on temporary assignment. This assessment, when available, should be considered in deriving the executive's initial summary rating.
- (3) An executive whose work significantly changes and serves under a new or revised performance plan for at least 90 calendar days will be appraised for work performed under the plan. The appraisal will be considered in deriving the executive's initial and final summary ratings.
- (4) When an executive has completed at least the minimum appraisal period under an approved performance plan and transfers to another federal agency, the rating official must appraise the executive's performance in writing before the executive leaves. The appraisal will be transferred to the gaining agency with the executive's Employee Performance File (EPF).

E. *Transferred Appraisals and Ratings.* When developing an initial summary rating, a rating official must consider any applicable transferred written summary, appraisal, or rating of an executive's performance received from the former agency or supervisor. A transferred rating is not considered an initial summary rating subject to review.

F. *Extending the Appraisal Period.* If the agency cannot prepare an executive's rating at the end of the appraisal period because the executive has not completed the minimum appraisal period, or for other reasons, the agency must extend the executive's appraisal period and will then prepare the initial and annual summary ratings. Options to address these situations may include, but are not limited to:

- (1) For a newly appointed executive who will not be on performance standards for 90 days at the end of the appraisal cycle, extend the appraisal through the end of the following appraisal cycle.
- (2) For a reassigned executive, end the appraisal period as scheduled and base the initial summary rating on the initial summary rating received while in the position from which reassigned.

G. *Documentation of Appraisals*

- (1) Each executive will be provided a copy of the appraisal documented on the Executive Performance Agreement form at the time it is prepared. It will include the following:
 - (a) The initial element ratings and initial summary rating, including a notice of right to

respond in writing and to request higher level review.

(b) Any comments and recommendations provided by a higher level reviewer.

(c) The annual summary rating.

(2) The executive's signature in Part 3 on the Executive Performance Agreement form acknowledges his or her receipt of the above information and that the rating was discussed. An executive's signature does not constitute agreement with the appraisal.

(3) Initial summary ratings become annual summary ratings when reviewed by the PRB and signed by the FTC Chair.

(4) After the FTC Chair assigns the summary rating on the Executive Performance Agreement form, the original completed form will be sent to the Human Capital Management Office (HCMO) to be filed in the executive's Employee Performance File (EPF). One copy will be given to the executive and one copy will be retained in the bureau or office files. Original executive performance records are maintained for five years from the date the annual summary rating is issued, as required in 5 CFR, Part 293.404(b)(1).

6. Rating Performance

A. *Critical Element Ratings.* Critical element ratings are based on an evaluation of each critical element against the performance standards established for the element, unless the executive has had insufficient opportunity to perform on the element. The executive's rating should reflect his or her furtherance of organizational effectiveness and the accomplishment of the agency's mission and goals. The rating official will assign one of five element rating levels, which are defined in [Part II3G](#) above.

(1) Elements 1 through 4. The rating official will assign a rating level for critical elements 1 through 4 based on his or her judgment as to the extent the executive's performance meets the defined critical elements and performance standards as specified in the Executive Performance Agreement and the FTC's SEPMS.

(2) Element 5. The rating official will assign a rating level for critical element 5, Results Driven, based on the official's judgment as to the overall accomplishments achieved by the executive for listed objectives. The rating official will apply the performance standards in [Part II3G](#) above in conjunction with any other specific measures that are defined for particular objectives, and defined standards as specified in the Executive Performance Agreement, the FTC's SEPMS, and agency policy.

B. *Deriving the Summary Rating*

(1) *Summary Performance Rating Levels.* The FTC's performance management system has five summary performance rating levels: Exceptional (level 5), Meritorious (level 4), Commendable (level 3), Minimally Satisfactory (level 2), and Unsatisfactory (level 1).

(2) *Critical Element Point Values.* Once the rating for each critical element is determined, the following point values will be assigned to the element ratings:

- Level 5 = 5 points
- Level 4 = 4 points
- Level 3 = 3 points
- Level 2 = 2 points
- Level 1 = 0 points

(3) *Derivation Formula.* The derivation formula is calculated as follows:

(a) If any critical element is rated Unsatisfactory (level 1), the overall summary rating is Unsatisfactory. If no critical element is rated Unsatisfactory (level 1), continue to the next step.

(b) For each critical element, multiply the point value of the element rating by the weight assigned to that element.

(c) Add the results from the previous step for each of the five critical elements to come to a total score.

(d) Assign the initial summary rating using the ranges below:

- 475-500 = Level 5
- 400-474 = Level 4
- 300-399 = Level 3
- 200-299 = Level 2

Any critical element rated Level 1 = Level 1

(e) Example below, with the initial summary rating determined to be Meritorious (level 4):

Critical Element	Rating Level	Weight	Score	Summary Level Range
	Initial Element Score		Initial Point Score	
1. Leading Change	4	15	4 x 15 = 60	475-500 = Level 5 400-474 = Level 4 300-399 = Level 3 200-299 = Level 2 Any CE rated Level 1 = Level 1
2. Leading People	5	15	5 x 15 = 75	
3. Business Acumen	3	15	3 x 15 = 45	
4. Building Coalitions	4	15	4 x 15 = 60	
5. Results Driven	4	40	4 x 40 = 160	
Total	100%	400		

C. *Initial Summary Rating.* The rating official will develop an initial summary rating, in writing, and share the initial rating with the executive. Individual ratings assigned to the critical elements are converted to one of the five initial summary ratings utilizing the above derivation methodology.

D. *Higher Level Review and Approval*

- (1) The executive may respond in writing to the initial appraisal within five workdays of receiving the initial summary rating from the rating official.
- (2) The executive is entitled, upon a written request to the PRB Chair, to have the initial rating reviewed by a higher level official before the rating is presented to the PRB. This does not occur when the rating official is the FTC Chair. The reviewing official cannot change the rating official's initial summary rating but may make findings and recommend a different rating to the PRB and FTC Chair.
- (3) The initial summary rating, written response from the appraised executive, and recommendation made by the reviewing official are sent to the PRB for review. Copies of the reviewer's findings and recommendations must also be provided to the appraised executive and the rating official.
- (4) The FTC Chair assigns annual summary ratings after considering the PRB's recommendations. The annual summary rating is the official rating of record.

E. *Forced Distribution.* A forced distribution of rating levels is prohibited.

F. *Authority for Rating.* The annual summary rating must be assigned by the FTC Chair (and may not be delegated to an official who does not have authority to make SES appointments), only after considering the recommendations of the PRB.

G. *Appeals.* Senior executive performance appraisals are not appealable.

7. Oversight and Evaluation

A. The Executive Director provides organizational assessments and evaluation guidelines and is responsible to oversee the system and to certify:

- (1) the appraisal process makes meaningful distinctions based on relative performance;
- (2) executive ratings take into account assessments of organizational performance; and
- (3) pay adjustments, awards, and pay levels accurately reflect individual and organizational performance. The Executive Director provides evaluation guidelines and oversees the appraisal system for the entire agency.

B. The Executive Director, assisted by the PRB and HCMO, will periodically evaluate the effectiveness of the FTC's SEPMS and implement improvements as needed.

8. Training and Communications

The FTC will provide information and training to executives on requirements and operation of the agency's performance management system, including the results of the previous appraisal cycle.

Part III – Using Performance Results

Appraisal results will be used as a basis for adjusting pay, granting awards, determining training needs, reassigning or removing executives, and making other personnel decisions. The FTC links base pay adjustments and performance bonuses to performance results as reflected in performance appraisals and ratings. Performance awards and pay increases are discretionary; however, any bonus granted or increase in pay must be related to an executive's performance or to significant changes in an executive's assignment, consistent with this Part. Performance-based pay adjustments and bonuses are subject to available funding.

1. Eligibility

A. Career executives rated Exceptional (level 5), Meritorious (level 4), or Commendable (level 3) are eligible to receive performance-based pay increases and bonuses. Executives with a final summary rating below Commendable are ineligible for pay increases or bonuses, and may have their base pay decreased by a percentage determined by the FTC Chair.

B. Noncareer executives and executives on limited term or limited emergency appointments are eligible for base pay adjustments based on performance but are ineligible for bonuses.

2. Requirements

A. Regulations (5 CFR 534.403) governing the SES Performance-Based Pay System established a single, open-range "payband" that has minimum and maximum rates of basic pay fixed by statute. The SES pay range has a minimum rate of basic pay equal to 120 percent of the rate for GS-15, step 1, and the maximum rate of basic pay is equal to the rate for Level III of the Executive Schedule. The maximum rate may be raised to the rate for Level II of the Executive Schedule if the Office of Personnel Management (OPM), with OMB concurrence, certifies the agency's executive performance appraisal system.

B. Under the SES Performance-Based Pay System, automatic cost-of-living adjustments and locality-based comparability payments are not applicable. All pay adjustments are based on individual and organizational performance and contributions to the agency's mission, and must fall within the open-range payband referenced in paragraph 2A above.

C. The FTC Chair may adjust (increase or reduce) an executive's basic pay upon determining that the executive's performance and contributions so warrant and the executive is otherwise eligible (i.e., has not received a pay adjustment during the previous 12-month period).

D. Individual pay rates and pay adjustments and their overall distribution must reflect meaningful distinctions among executives based on their relative contributions to the agency's performance. Individual base pay adjustments must reflect meaningful distinctions within a single performance rating level and between performance rating levels. The FTC's highest performing executives will receive the largest corresponding pay adjustment percentages, bonus percentages, and levels of pay, particularly above the rate for Level III of the Executive Schedule.

3. FTC Paybands

A. Within the FTC, there are two paybands (tiers) established within the government-wide payband based on organizational level and scope of responsibility as reflected below:

(1) The Tier 1 payband includes, in most cases, the directors of major organizations who supervise other executives and report directly to the FTC Chair.

(2) The Tier 2 payband includes all other executives.

B. At the FTC Chair's discretion, the FTC paybands may be adjusted annually within the government-wide Executive Schedule payband.

C. The FTC Chair may approve exceptions to the FTC paybands based on an evaluation of an individual's expertise or performance and contributions in achieving the agency's mission.

4. Pay Differentiation

A. Pay adjustment percentages, bonus percentages, and levels of pay are used to ensure that an executive rated Exceptional (level 5) receives a greater compensation adjustment than an executive in the same tier who is rated Meritorious (level 4), or that an executive rated Meritorious (level 4) receives a greater compensation adjustment than an executive in the same tier who is rated Commendable (level 3).

B. Current salaries may be considered in making performance-based decisions on pay increases and bonuses to determine the change to an executive's compensation in consideration of the executive's performance. Two executives with comparable contributions could receive different pay increases and bonuses based on their current salaries.

5. Pay Adjustments

A. Annual pay adjustments require approval by the FTC Chair. The FTC Chair may increase the basic pay of an executive upon a determination that the executive's performance and contributions so warrant and the executive is otherwise eligible.

B. The FTC Chair approves the funding level available prior to the PRB's consideration of individual pay adjustments. An executive who is rated at least Commendable (level 3) will receive an annual pay increase, subject to available funding.

C. Based on annual summary ratings, executives are eligible to receive annual pay adjustments up to the maximum of the applicable FTC payband. The FTC Chair may grant a pay increase for a Tier 2 executive that would place him or her in the Tier 1 payband when it has been determined that the contributions so warrant (see tier definitions in paragraph 3A above).

D. An executive with an annual summary rating of Minimally Satisfactory (level 2) or below will not receive a pay increase and is subject to a reduction in pay as authorized by 5 CFR 534. By law, decreases cannot exceed 10 percent of base pay at any one time.

E. Rates of basic pay higher than the rate for Level III of the Executive Schedule generally are reserved for executives who have demonstrated the highest levels (i.e., Exceptional (level 5) and Meritorious (level 4) ratings) of individual performance or made the greatest contributions to the agency's performance, as determined through the administration of the agency's SEPMS.

F. Pay rates for executives may be adjusted after any 12-month period at a given pay rate. Executives may not receive more than one pay adjustment in any 12-month period unless an exception is specifically authorized in writing by the FTC Chair. Reasons for exceptions include, but are not limited to, reassignment to a position with substantially greater scope and responsibility, or to align an executive's performance cycle with the FTC's appraisal or pay adjustment cycle.

6. Performance Awards (Bonuses)

A. The performance award fund may not exceed 10 percent of the aggregate basic pay of career executive salaries at the end of the annual appraisal period, and individual bonuses may not be less than 5 percent or more than 20 percent of an executive's basic pay at the end of the annual appraisal period.

B. The FTC Chair will determine amounts and distribution of bonus awards. The amount of bonuses for which eligible executives may be considered is determined annually based upon available funding.

C. The rating official's narrative performance appraisal must support the recommended bonus and cite specific achievements and measurable results in line with established critical elements and performance standards.

D. The PRB reviews the initial appraisal and bonus recommendations for all career executives.

E. At the discretion of the FTC Chair, the above bonus criteria may be supplemented or revised, as appropriate.

F. *Paying Bonuses with Other Awards*

(1) A career SES appointee may receive a Presidential Distinguished or Meritorious Executive Rank Award and a performance bonus award in the same calendar year; however, under 5 CFR 534, executives are subject to the aggregate compensation limitations in 5 CFR 530, subpart B.

(2) Superior accomplishment incentive awards for suggestions, inventions, or special acts or service may be paid, but not in lieu of a performance award (bonus). These awards may be granted throughout the year.

(3) For information on superior accomplishment and Presidential Rank awards, see Administrative Manual, Chapter 3, [Section 451, Employee Recognition Program](#).

7. Performance Actions Based on Final Ratings of Less than Commendable

A. Any nonprobationary career appointee may be removed from the SES for performance reasons, subject to the provisions of 5 CFR 359, subpart E.

(1) A career appointee who is assigned one Unsatisfactory (level 1) final rating cannot

remain in the same SES position. The agency must reassign or transfer the career appointee to an SES position or remove the appointee from the SES.

(2) The agency must remove from the SES a career appointee who has been assigned two Unsatisfactory (level 1) final ratings within five consecutive years.

(3) The agency must remove from the SES a career appointee who has been assigned two final ratings of Minimally Satisfactory (level 2) or below within three consecutive years.

B. Probationary career appointees will be removed in accordance with the procedures provided for in 5 CFR 359 subpart D. Nothing in this system shall be interpreted to limit removal from the SES of probationary career appointees as permitted by this regulation.

C. Guaranteed placement of a career appointee who is removed from the SES to a non-SES position will be provided in accordance with the procedures provided for in 5 CFR 359, subpart G, as appropriate.

Part IV – Performance Review Board (PRB)

1. Functions

A. The PRB reviews and evaluates the initial summary rating, narrative appraisal, executive's written response (if any), and any written comments or recommendation by a higher level executive, and conducts any additional review necessary to make written recommendations to the FTC Chair on annual summary ratings, bonuses, and (as applicable) pay adjustments for each executive.

B. The PRB must not be provided a proposed initial summary rating to which the executive has not been given the opportunity to respond in writing.

C. The PRB must be provided with and take into account appropriate assessments of the agency's and organization's performance when making recommendations.

D. The PRB ensures there is no management action (such as a prescribed or fixed distribution of ratings) that prevents a fair rating of performance.

2. Membership

A. The Executive Director serves as the head of the PRB and is the FTC Chair's designated agency performance official. The PRB consists of the Executive Director and at least two other members appointed by the FTC Chair or designee.

B. More than one-half of the PRB membership must be SES career appointees when considering a career appointee's rating or performance award. PRB members may not be involved in deliberations involving their own appraisals.

C. Notice of appointment to the PRB will be published in the Federal Register before service begins.

D. The Chief Human Capital Officer serves as the Executive Secretary to the PRB.

Part V – Executive Resources Board (ERB)

1. Functions

The ERB functions as an advisor to the FTC Chair on executive personnel planning, staffing of executive positions, utilization of executive resources, executive development, policies affecting SES members, and evaluation of executive personnel programs. Assigned functions relating to executive performance include, but are not limited to:

A. Establishes PRB timetables.

B. Recommends:

(1) Policies and procedures for SES performance appraisals, including determining weights for critical elements;

(2) The most effective use of pay flexibilities for the SES;

(3) The annual agency budget for SES base pay increases, performance bonuses, and training; and

(4) Executives for nominations as Distinguished and Meritorious executives.

C. Reviews and coordinates policy on and reviews proposed actions regarding removal from the

SES based on performance or during probation.

D. Reports to the FTC Chair on appropriate issues concerning the SES.

2. Membership

The Executive Resources Board is a board of top FTC executives appointed by the FTC Chair and chaired by the Executive Director. The Chief Human Capital Officer serves as the Executive Secretary to the ERB.



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FTC's Principal Deputy General Counsel David Shonka Earns Presidential Rank Award



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FOR RELEASE

December 16, 2015

TAGS: [Office of the General Counsel](#)

The Federal Trade Commission announced today that David C. Shonka, the Principal Deputy General Counsel at the agency, has received the 2015 Presidential Rank Award of Meritorious Executive.

"As this prestigious award demonstrates, the FTC is very fortunate to have the services of Principal Deputy Counsel David Shonka," FTC Chairwoman Edith Ramirez said. "He has provided sage counsel to the agency on a wide range of issues and advanced the federal government's electronic discovery protocols through his work with the Sedona Conference and intergovernmental organizations."

Shonka oversees the office of the General Counsel's Litigation, Legal Counsel, and Opinions & Analysis groups, and its FOIA, employment law, and Energy Counsel staff. He is a member of the Administrative Conference of the United States, and the Sedona Conference, an institute for the study of law and policy in antitrust and intellectual property rights. Shonka has been the FTC's Assistant General Counsel for Litigation, an associate in a Washington, D.C. law firm, and a litigator in the US Department of Justice's Civil Division. At the FTC, he has advised the Commission on a full range of issues, litigated competition and consumer protection cases, tried cases in administrative proceedings, and represented the agency in appellate cases.

The President's award is among the highest honors given to members of the Senior Executive Service, who serve in key positions between top Presidential appointees and the rest of the federal work force. Each year, the President presents the award to those who have distinguished themselves by achieving results and consistently demonstrating strength, integrity, industry, and a relentless commitment to excellence in public service.

The Federal Trade Commission works to [promote competition](#), and [protect and educate consumers](#). You can [learn more about consumer topics](#) and file a [consumer complaint online](#) or by calling 1-877-FTC-HELP (382-4357). Like the FTC on [Facebook](#), follow us on [Twitter](#), read our blogs and [subscribe to press releases](#) for the latest FTC news and resources.

CONTACT INFORMATION

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December 11, 2016

Edith Ramirez
Chairwoman
Federal Trade Commission
600 Pennsylvania Avenue, NW
Washington, D.C. 20580

Dear Chairwoman Ramirez:

As you may know, earlier this month a national investigation conducted by New Jersey Advance Media¹ uncovered disturbing findings that indicate the company FieldTurf knowingly sold and installed artificial turf playing surfaces across the United States under false marketing claims. Hundreds of thousands of taxpayer dollars were spent to equip schools and facilities under the premise that these field materials were proven and durable. Given the Federal Trade Commission's (FTC) mandate to protect consumers from unfair and deceptive advertising practices, it is imperative that the Commission thoroughly investigate FieldTurf's sales and marketing of their DuraSpine turf product. Your attention to this matter will help protect current victims and ensure more communities don't fall victim to these unfair practices in the future.

FieldTurf, based in Canada, is one of the largest providers of artificial sports turf worldwide. In 2005, FieldTurf began sourcing artificial turf known as DuraSpine from Mattex, a company which has since been acquired by Netherlands-based TenCate. FieldTurf continuously marketed DuraSpine turf to municipalities, school districts, professional sports teams, and other entities, in New Jersey and across the country as having a life expectancy of more than ten years. DuraSpine was also depicted as being "far more resistant" to ultraviolet radiation and "foot traffic" and delivering "unmatched durability."

Between 2005 and 2012, FieldTurf sold 1,428 DuraSpine fields in the United States, each field installation ranging from \$300,000 to \$500,000. This made DuraSpine the most expensive product in the market – a cost which was supposedly justified given the product's superior durability. Most of these fields were procured with taxpayer dollars. An estimated 164 of these fields are in New Jersey.

According to correspondence cited by New Jersey Advance Media report, FieldTurf became aware of serious problems with the quality of DuraSpine fields as early as 2006. Additional court records from the federal suit between FieldTurf and TenCate show that even in 2007 and 2008, FieldTurf continued to install new DuraSpine turfs under contradictory marketing claims regarding the product's durability. Since then, FieldTurf officials have conceded that at least 246 fields have been replaced due to premature degradation, although the full number of fields which have reported defects is unknown and perhaps much greater.

¹ <http://fieldturf.nj.com/>

Official court records and findings published by New Jersey Advance Media indicate that FieldTurf may have engaged in unfair and deceptive trade practices in violation of federal law in their marketing and sale of the now-discontinued DuraSpine turf. We must all be vigilant against deception and misuse of tax payer dollars and therefore, we respectfully request a full investigation of this matter and urge the FTC to take any appropriate actions necessary. We look forward to your response.

Sincerely,



Cory A. Booker
United States Senator



Robert Menendez
United States Senator

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COMMITTEE ON COMMERCE, SCIENCE,
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WASHINGTON, DC 20510-6125

WEBSITE: <http://commerce.senate.gov>

December 1, 2016

The Honorable Edith Ramirez
Chairwoman
Federal Trade Commission
600 Pennsylvania Ave., NW
Washington, DC 20580

Dear Chairwoman Ramirez:

I write today regarding the problem of “surprise” hospital bills. As recently detailed in *The New York Times*, consumers are increasingly facing situations in which they go to an emergency room at an “in-network” medical facility of their health insurance provider but are then treated by a doctor who is not employed by the facility and, consequently, is considered an “out-of-network” provider. In these situations, consumers are often given no notice that a doctor or other service provider is not covered by their insurance, and they are later saddled with massive bills that can cause severe financial distress – and even bankruptcy.

Section 5 of the Federal Trade Commission Act generally prohibits “unfair or deceptive acts or practices in or affecting commerce.” I am concerned that these out-of-network surprise bills could be both unfair and deceptive. As cited in the *Times* article, one consumer specifically checked whether a particular hospital was “in-network” under his health care plan before going to the emergency room. Consumers in such cases have little choice over who provides their medical care and are led to believe that *all* services provided in that facility are covered by their health insurance plan. Unfortunately, it appears that too many medical facilities currently provide no notice of when a service is provided by a doctor or other outside contractor that is “out-of-network,” leading to substantial consumer confusion and large, unforeseen bills.

I urge the FTC to investigate this issue to ensure that consumers are protected against surprise “out-of-network” bills. At a minimum, consumers should be told that they will be, or may be, treated by an “out-of-network” provider and how much that treatment may cost. Furthermore, the Commission should consider whether these “out-of-network” charges should be banned altogether in cases of emergency treatment when a consumer has no other viable choice for treatment options.

The Honorable Edith Ramirez
December 1, 2016
Page Two

Thank you in advance for your attention to this critical consumer issue.

Sincerely,



BILL NELSON
Ranking Member

CC: The Honorable John Thune, Chairman

United States Senate

February 2, 2017

Maureen K. Ohlhausen
Acting Chairman
Federal Trade Commission
600 Pennsylvania Avenue, NW
Washington, D.C. 20580

Dear Acting Chairman Ohlhausen:

As you know, the Federal Trade Commission (FTC) plays a critical role in protecting consumers from potential abuses in the marketplace. I write to express concerns regarding the proposed merger between Walgreens Boots Alliance Inc. (Walgreens) and Rite Aid Corp (Rite Aid). This transaction, now ranging from \$6.8 to \$7.4 billion¹, would merge the second and third largest pharmaceutical chains in the country and could have unintended consequences that could dramatically change the daily lives of my constituents and people across the nation. A merger of this magnitude merits thorough and careful review. Given the FTC's commitment to "prevent mergers and acquisitions that are likely to reduce competition and lead to higher prices, lower quality goods or services, or less innovation,"² I strongly urge the FTC to examine all potential impacts this merger could have on the pharmaceutical drug market and American consumers before arriving at a decision prior to the conclusion of your tenure.

The Walgreens and Rite Aid merger poses serious concerns about the limited role of competition in the healthcare drugstore market, its impact on employment levels and store closures, and the possible increase in drug prices for consumers. As a member of the U.S. Senate Committee on Commerce, Science, and Transportation, which has jurisdiction over consumer protection, I am concerned that the Walgreens and Rite Aid merger could lead to job loss and store closures, less competition, and potentially higher drug costs.

To my knowledge, there has not been a clear explanation of how a potential merger would affect the more than 12,800 stores Walgreens and Rite Aid operate throughout the United States, including the 454 stores located in New Jersey. I understand that both companies have not yet stated how the merger would affect store locations or the thousands of workers they employ.

In addition, the merger could mean less competition in the market. CVS and Walgreens control between 50-75 percent of the drugstore market in the fourteen largest metro areas in the U.S.³ Absent a commitment by Walgreens executives to ensure that a merger will not increase drug prices for consumers, I am concerned that limited competition will lead to increased prices. I implore you to maintain the FTC's commitment to ensuring healthy market competition by examining how this merger will impact the drug store market and its effects on drug prices to consumers.

¹ <http://fortune.com/2017/01/30/walgreens-rite-aid-antitrust>

² <https://www.ftc.gov/enforcement/merger-review>

³ <http://fortune.com/2016/04/20/cvs-walgreens-drugstore-stocks>

At a time when consumers are facing uncertainty about the future of their healthcare plans, and may already be struggling to make ends meet, it is critical that our federal agencies use all of the tools at their disposal to conduct a thorough review of any marketplace changes that could negatively impact them or drive drug prices higher. I will be exercising careful oversight of this transaction through my role in the Senate as well, and I await your thorough analysis and decision on this matter.

Thank you for your prompt attention to this matter.

Sincerely,



Cory A. Booker
United States Senator

Agricultural and Food Policy Center
Texas A&M University

September 2016

Effects of Proposed Mergers and Acquisitions Among Biotechnology Firms on Seed Prices



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Working Paper 16-2

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Executive Summary

- This report examines the likely effects on prices in agricultural seed markets of proposed mergers and acquisitions: DuPont/Pioneer with Dow and Monsanto with Bayer.
- This industry has consolidated substantially in recent decades, and is now dominated by just six large multinational firms.
- Market contestability is a critical concept for analyzing the conditions under which these mergers would occur, and for specifying an empirical model with appropriate assumptions. Due to large sunk research costs and intellectual property protections, these markets are not contestable. There are substantial barriers to new entry into these markets, and competitive pressures will constrain price markups less than they would in contestable markets.
- Empirical evidence in recent years finds prices for seed are somewhat marked up above marginal costs. That is, these firms, in their current forms, are potentially exercising some market power.
- Given the poor contestability of these markets, we employ the Hausman method of estimating the effects of proposed mergers and acquisitions on markups and market prices of differentiated goods under the assumption of no new entry.
- We find that the proposed mergers would cause the following expected increases in seed prices: 2.3% for corn, 1.9% for soybeans, and 18.2% for cotton. We find a 25% chance that price increases would meet or exceed the following values: 2.6% for corn, 2.1% for soybeans, and 20.2% for cotton.
- Changes in market concentration that would result from the proposed mergers meet criteria such that the Department of Justice and Federal Trade Commission would consider them “likely to enhance market power” in the seed markets for corn and cotton.

1. Overview

This report analyzes price effects in the seed markets for corn, soybean, and cotton of two proposed mergers: DuPont with Dow, and Monsanto with Bayer. We review the literature regarding the changes that have occurred in agricultural input markets over the last several years, and relevant concepts from industrial organization theory. We apply a model of changes in price markups (above the marginal cost of production) caused by mergers under the assumption of no new entry to quantify expected price changes.

In the following section, we outline technological changes and rising concentration in agricultural seed and chemical industries, emerging trends in market concentration, and how the mergers and acquisitions further intensified market concentration. In the third section, we discuss the concept of market contestability, particularly as it relates to the agricultural seed and chemical industries. In the fourth section, we present the methodology that we use to analyze the price impacts of the proposed mergers. In the fifth section, we discuss the data employed and list their sources. In the sixth section, we calculate changes in Herfindahl-Hirshman Index values that would result from the proposed mergers. In the seventh section, we apply the methodology to the proposed DuPont/Pioneer-Dow merger in the corn and soybean seed markets and the proposed Monsanto-Bayer merger in the seed market for cotton.

2. Background

In the past few decades one of the most noticeable changes in U.S. agriculture has been in agricultural input markets. The unprecedented growth in yields and agricultural total factor productivity owes much to biological innovations in crop seeds, development of hybrid crops in the early part of the 20th century, with adoption of high-yielding varieties and modern biotechnology. Development of new types of pesticides and seeds have substantially improved agricultural productivity (Fernandez-Cornejo 2004; Fernandez-Cornejo and Just 2007). Agricultural input markets have evolved and family-owned and other small businesses gave way to larger enterprises that integrated in plant breeding, conditioning, production, marketing, and other functions. The evolution in the industry was coupled with increasing market concentration

in seed and chemicals supply, and the industry was further shaped by widespread mergers and acquisitions. These dramatic changes have raised significant concerns regarding market power and its influence on agriculture, in general (Fernandez-Cornejo 2004; Fernandez-Cornejo and Just 2007).

Along with industry evolution, there has been a rapid growth in private research and development, which shifted the roles of public research and development. Thus, research in agricultural input industry became predominantly private, and private firms have transformed from small scale operations to large and integrated enterprises (Fernandez-Cornejo and Schimmpfenning, 2004). Figure 1 depicts the historical trend of private and public R&D expenditures. When adjusted for inflation, private investment in R&D has increased substantially between 1960 and 1996, and R&D investments from the public sector have remained stagnant. As outlined by Fernandez-Cornejo and Schimmpfenning (2004), increased protection of intellectual property rights for crop-seed innovations through patents and certificates has accelerated private investment and stimulated R&D expenditure, even on such crops as soybeans where farmers have often saved part of the current crop for use as seed the following year.

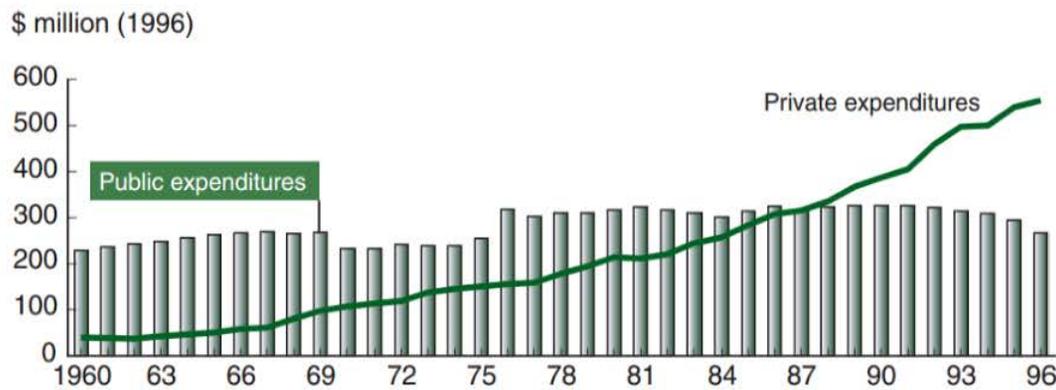


Figure 1. Private vs. public expenditures on crop variety (from Fernandez and Shimelpfenning, 2004)

The clear trends of private and public R&D expenditure, presented in Figure 1, were observed between the years from 1960 through 1996. However, relatively recent study conducted by Fuglie et al. (2012) shows that increased consolidation and concentration in the private seed industry over the past decade have slowed down the intensity of private research undertaken on crop biotechnology relative to what would have occurred without consolidation, at least for corn, cotton, and soybeans. As found by Schimelpfenning et al. (2004), patents and concentration are

substitutes, meaning more concentration is associated with fewer patents. As the input market became increasingly concentrated, and firms developed market power, they had fewer competitors to protect their intellectual property from.

2.1. Market Concentration

Over the last two decades, global market concentration (the share of global industry sales earned by the largest firms) has increased in the crop seed/biotechnology and agricultural chemical industries (Fuglie et al. 2012). These industries also invest heavily in research. Currently, the largest four firms in each of these industries account for more than 50% of global market sales. Growth in global market concentration over 1994-2009 was most rapid in the crop seed industry, where the market share of the four largest firms more than doubled from 21 to 54%.

These firms increased their market dominance through expanding their sales faster than the industry average or by through mergers and acquisitions of other firms (Fuglie et al. 2012). Details about latest mergers and acquisitions are outlined later in this review. Additionally, these big firms increased their sales faster than others in the industry by offering better products or services (often an outgrowth of larger R&D investments), improving their marketing ability, and offering competitive prices (often through economies of scale). Table 1 outlines how four firm concentration has changed over time in agricultural seed and chemical industries. The enormous growth in the concentration mainly came from acquisitions of other firms.

Table 1. Market concentration for global input industries (Fuglie et al. (2012) and ETC Group(2013))

	Year	Four-firm concentration ratio
Crop seed and biotechnology	1994	21%
	2000	33%
	2009	54%
	2013	58%
Agricultural chemicals	1994	29%
	2000	41%
	2009	53%
	2013	62%

As explained by Fuglie et al. (2012), the emergence of biotechnology was a major driver of consolidation in the crop seed industry. Companies sought to acquire relevant technological capacities and serve larger markets to share the large fixed costs associated with meeting regulatory approval for new biotechnology innovations.

The agricultural chemical sector has been mainly affected by regulatory changes by the government regarding health, safety, and environmental impacts of new and existing pesticide formulations. Larger firms appear better able to address these stricter regulatory requirements (Fuglie et al. 2012).

As outlined by Fernandez-Cornejo and Schimmelpfenning (2004), the development and rapid producer acceptance of hybrid seeds and with greater protection of intellectual property rights, the amount of private capital devoted to the seed industry and the number of private firms engaged in plant breeding grew rapidly until peaking in the early 1990s. Later, seed industry consolidation became widespread, with fewer firms capable of investments in research sufficient to develop new seed varieties. This resulted in increased concentration, with the majority of seed sales controlled by four large firms. Current concentration in the seed markets for corn, soybean, and cotton are presented in Table 2. The share of U.S. seed sales controlled by the four largest firms providing seed of each crop reached 91% for cotton, 82% for corn, and 76% for soybeans in 2014-2015. One contrast to this general trend was wheat (not presented in the table), with more than 70% of the planted wheat coming from varieties developed in the public sector (Heyenga 1998).

As of 2010, seven large seed companies each had annual seed sales of over \$600 million. Five of these top seed companies are Syngenta, Bayer, Dow, Dupont, and Monsanto. These companies are also market leaders in agricultural chemicals. A sixth firm, BASF, is making significant investments in crop biotechnology research but so far reports few crop seed or trait sales, although it is a market leader in agricultural chemicals. These companies currently constitute the "Big 6" involved in crop seed, biotechnology, and chemical research (Fuglie et al. 2012).

Table 2. Seed market shares for corn, soybean, and cotton

Crop seed providers	Share in the market
Corn seed:	
Monsanto	36%
DuPont/Pioneer	35%
Dow	6%
Syngenta	6%
Four total	82%
Cotton seed:	
Bayer	39%
Monsanto	31%
Dow	15%
Americot	6%
Four total	91%
Soybean seed:	
DuPont/Pioneer	33%
Monsanto	28%
Syngenta	10%
Dow	5%
Four total	76%

Heyenga (1998) documents the adoption of herbicide-ready plant varieties. The use of insect resistant corn and cotton dramatically reduced insecticide use. He further points out that the combination of insect resistant technologies may dramatically reduce corn insecticide market volumes, reduce chemical industry profits, and result in many companies exiting the market. With regards to cotton, Heyenga (1998) argues that because cotton has a large number of pests, insect resistance to a few will not necessarily eliminate insecticide use in the crop.

Heyenga (1998) further argues that introduction of herbicide resistant seed dramatically affected the soybean and corn herbicide markets, and as mentioned before, it is having less effect in the cotton market. Monsanto's introduction to Roundup is cost-effective for a broad spectrum of weeds which it controls effectively (especially in the case of soybeans). According to the author, the number of soybean acres treated with Roundup doubled in 1998. Accordingly, most competitors had their market share drop by one-third to one-half. American Cyanamid, the

market leader, had the greatest volume reduction. Soybean herbicide prices have plummeted as a result of the Roundup Ready soybean success (Heyenga 1998). Since 1998, the use of Roundup-ready soybeans has become nearly universal.

2.2. Mergers and Acquisitions

Over the last two decades, the big companies (i.e. Monsanto, DuPont) have led the way with massive investments in biotechnology research, and with seed and biotechnology company mergers and acquisitions.

As described by Fuglie et al. (2012), historically the seed-biotechnology companies have been dependent on small and medium scale companies as major sources of innovation. The new small and medium-sized enterprises were specializing in developments of genetic traits, new research, or a combination of both. Most of these new entries occurred in the late 1970s and early 1980s, and in the late 1990s and early 2000s. However, in the last several years, exits of small and medium-sized enterprises have outweighed new entry. By 2010, there were less than 30 active small and medium-sized enterprises that were specializing in crop biotechnology. The main reason of disappearance of these companies was acquisition by larger firms (Fuglie et al. 2012). Fernandez-Cornejo and Just (2007) find a positive link between pesticide productivities and concentration. They discuss that as the productivity of pesticides and seeds has increased, the concentration of these input industries has also increased. In the 1960s, over 70 basic manufacturers of pesticides were operating in the United States, but mergers and acquisitions have combined those firms into roughly eight major multinational manufacturers. Hubbard (2009) backs up the aforementioned arguments and he points out that because of enormous amount of mergers and acquisitions that expanded agricultural biotechnology, many smaller companies could not compete with large firms that owned much of the genetic resource base in seed, and licensing genetics from these firms was costly. He finds that at least 200 independent seed companies have been lost in the thirteen years prior to 2009. Moreover, biotechnology research demands financial resources that most smaller firms do not have. Large firms investing in these technologies and earning royalties from licensing agreements quickly achieved a market advantage that led to numerous buy-outs (Hubbard, 2009). There are several factors that can explain increased merging and acquisitions in agricultural input industries.

One reason discussed in the literature is intellectual property rights (IPRs). Lesser (1998) studied the relationships between IPRs and agricultural biotechnology industry concentration. He argues that IPRs have significant impacts on firm entry, and make vertical integration in downstream industries more or less necessary, which creates financial incentives for downstream mergers and acquisitions. He concludes that IPRs have significant structural impacts in agricultural biotechnology. In addition, Heyenga (1998) discusses that chemical companies have vertically integrated into the seed and biotechnology industries. As he explains, the goal of such integration was to capture profits from biotechnology innovations which, in some cases, are also complementary to their chemical technology. In addition, these moves are an effort by the chemical companies to defend themselves against their competitors' moves. Moreover, Heyenga (1998) argues that as a result of acquisitions the increasing dominance of a few major players, and the biotechnology and chemical patent restrictions on what competitors can do, raised questions regarding the potential for too much market power in parts of the seed and chemical industries.

Other motivations for increased mergers and acquisitions are economies of scale, and scope. As explained by Fulton and Giannakas (2001), economies of scale and scope mean that larger and diversified firms have lower average costs, which gives a clear incentive for firms to get large. Moreover, those that do not get large are vulnerable to being driven out of the market by larger and more cost efficient firms. As mentioned by Fulton and Giannakas (2001), economies of scale and scope are created as a result of investment in non-rival goods, and intellectual property is an example of a non-rival good.

Howard (2009) describes the details on how agricultural chemical and seed industries consolidated and came to be controlled by just six large multinational corporations. Until recently, these big corporations were focused on mainly producing agrochemicals. He points out that new protections for hybrid seeds led to the entrance of oil, pharmaceutical, and grain trading companies. Agrochemical corporations were experiencing declining profit opportunities as a result of increased regulations and fewer markets in which to expand. Therefore, these companies decided to build on their existing relationships with farmers to enter into another, and more profitable input industry, a seed market. As explained by Matson et al. (2014), the main motivation was to grant full patent protections on soon-to-be commercialized transgenic seeds and the expectation of strong government enforcement of these monopolies. Howard (2009)

further stresses that the big companies did not focus on outcompeting already established seed firms, but by acquiring them. Each of these acquisitions not only expanded the market share, but also added to these companies' seed distribution resources. The agrochemical companies bought hundreds of independent biotechnology and seed companies, and they also merged with one another. The outcome was that the number of big multinational companies was reduced to just six, which intensified the agricultural input industry consolidation further.

Figure 2, from Howard (2009), illustrates changes that occurred in the agricultural input industry. Each firm in the figure is labeled by name and parentheses are used to indicate nine transactions that occurred before 1996. In addition, full ownership is represented with a solid line, while partial ownership is represented with a dashed line. Figure 2 indicates that while Monsanto has clearly been the most active in making acquisitions, all of the largest firms have contributed to seed industry consolidation. This figure also shows some connections between these key firms through joint ventures.

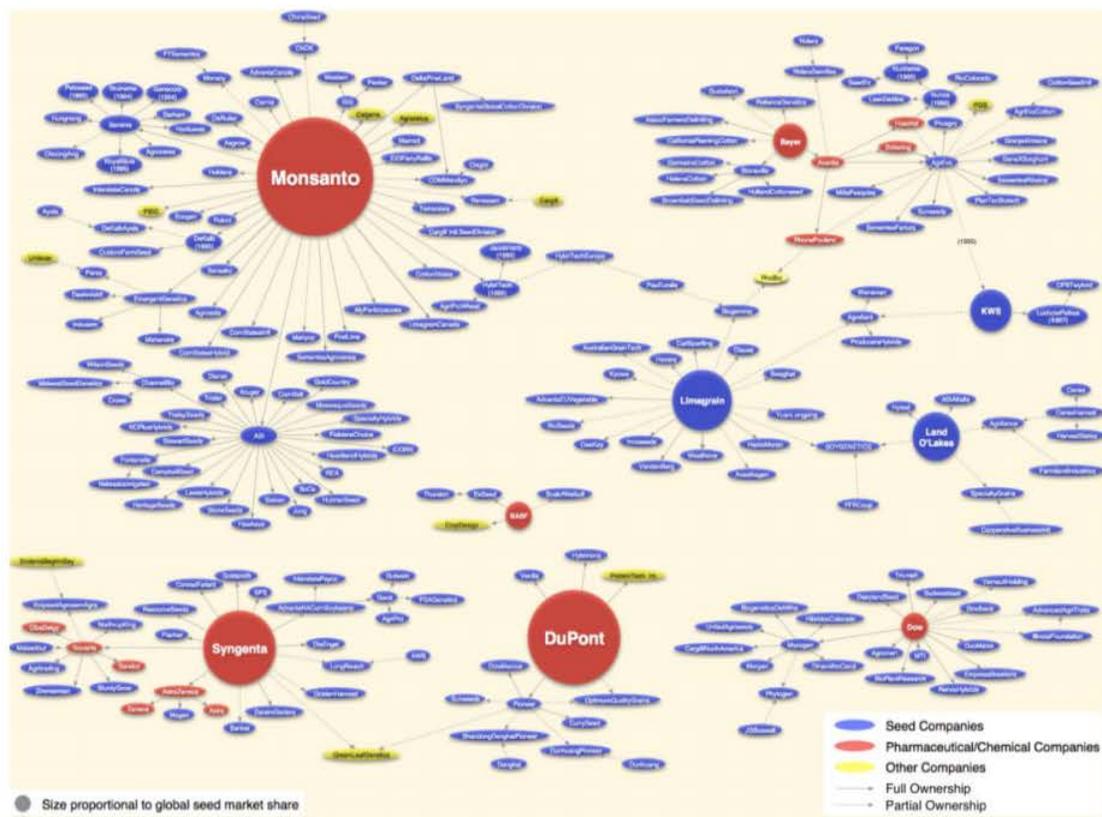


Figure 2. Seed industry structure, 1996 – 2008 (from Howard, 2009)

Although Hennessy and Hayes (2000) concluded that Monsanto was involved in a duopolistic seed market and relatively competitive chemical market, things have since changed. Figure 3 is adapted from Howard (2015) and shows cross-licensing agreements involving pharmaceutical/chemical companies for transgenic seed traits. These arrangements among the big six agrochemical-seed companies are sometimes referred to as “non-merger mergers”, because there is no change in the ownership, but they nonetheless raise serious questions regarding cartel behavior and market dominance.

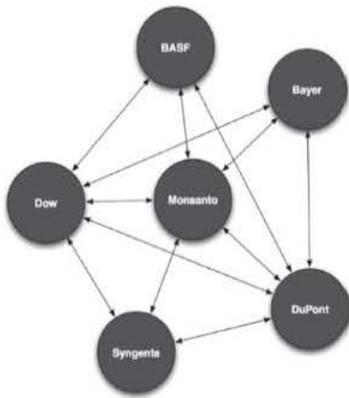


Figure 3. Big Six cross-licensing agreements for transgenic traits (from Howard, 2015)

From Figure 3, we can see that Monsanto has a central position in this network. For example, Smartstax corn includes eight different transgenic traits as a result of agreements between Monsanto and Dow. As explained by Howard (2015), the entire outcome is similar to formation of a cartel that excluded other competitors and potential entrants, implying that many remaining small firms either must to join the big six, or go out of business. This suggests a substantial barrier to new entry in the markets for transgenic seed.

3. Contestability

A market is contestable if there is freedom of entry and exit into the market, and there are little to no sunk costs. Because of the threat of new entrants, existing companies in a contestable market must behave in a reasonably competitive manner, even if they are few in number.

Concentrated markets do not necessarily imply the presence of market power (Fulton and Giannakas, 2001; Henrickson and Heffernan, 2007). Key requirements for market contestability are: (a) Potential entrants must not be at a cost disadvantage to existing firms, and (b) entry and exit must be costless. For entry and exit to be costless or near costless, there must be no sunk costs. If there were low sunk costs, then new firms would use a hit and run strategy. In other words, they would enter industry, undercut the price and exit before the existing firms have time to retaliate. However, if there are high sunk costs, firms would not be able to exit without losing significant portion of their investment. Therefore, if there are high sunk costs, hit-and-run strategies are less profitable, firms keep prices above average costs, and markets are not contestable. In this case, market power is a concern. Fulton and Giannakas (2001) outline that there exist substantial sunk costs in agricultural biotechnology, and firms charge prices above marginal costs. They stress that seed and chemical industry is not contestable and that the threat of entry cannot be relied upon to keep profits at normal levels.

3.1. *Barriers to entry*

Comanor (1964) and Scherer (1984) both suggest that rapidly evolving and costly agricultural biotechnology innovations tend to limit entry. King (2001) points out that investments in agricultural input markets are often risky, expensive, and long-term. Additionally, he discusses that intellectual property protection in the seed industry helps inventors exercise market power and prevents the entry of imitators and competitors. A similar argument was supported by Barton (1998) as well.

Ollinger and Fernandez-Cornejo (1998) examine sunk costs and regulation in the U. S. pesticide industry. Using data over the 1972-89 period, they find that research costs and pesticide regulation costs negatively affect the number of companies in the industry, and that smaller firms are affected more strongly by these costs than are larger firms.

Harl (2000) suggested that increased concentration is leading to control by a few firms of the major processes by which genetic manipulation occurs, thereby blocking use of those technologies by other firms. He also argues that capital needed to conduct the kind of research required to maintain a product flow similar to that of the firms pressing for monopoly-like concentration levels is one of the main barriers. Another barrier, he points out, is that, existing patent and plant variety protection may mean that potential competitors are frozen out of

competition as a practical matter for the duration of the patent. The author further stresses that smaller firms are unable to maintain access to higher performing germ plasm, and most of these firms would not be able to survive economically. Howard (2009) also mentions about high expenditure costs and argues that developing transgenic traits and identifying gene sequences creates a strong barrier to entry for smaller firms.

Brennan et al. (1999) studied the impact of mergers on research and development in the U.S. biotechnology industry. The authors used USDA field trial data for private companies as a measure of innovation activities. The results of Herfindahl-Hirschman Index (HHI) and Four Firm Ratio analyses indicated that the impacts of concentration are negatively related to new firm entry. They point out that cost of obtaining permission to use patented technology or genetic material prevents smaller firms from participating in innovative research and creates significant barriers to entry. Hubbard (2009) also backed up the argument and discussed that there is a financial disincentive to seek access to patented material to expand research because of costly royalties and onerous licensing agreements with patent owners, some of which have led to lawsuits. This reality serves as a major barrier to new companies entering the plant breeding industry.

Boyd (2003) and Glenna and Cahoy (2009) discuss that agrochemical–seed firm relationships are not always cooperative and they have filed numerous lawsuits against each other. As pointed out by the authors, these lawsuits create “patent thickets,” in which broad claims overlap. Such thickets make it difficult to bring a product to market without potentially infringing on a patent, thus creating a significant barrier to entry for small firms.

Moretti (2006) points out that even though the original purpose of patents was to encourage innovation, the increased concentration and intellectual property congestion had an opposite effect. He argues that multinational agrochemical companies have growing control over essential proprietary technologies, and created a barrier to entry for new start-ups.

3.2. Recent Evidence Regarding the Effects of Market Structure on Agricultural Input Prices

If a market was contestable, existing firms would behave in a more or less competitive manner. Thus, if the market is highly profitable, this may suggest that industry is less contestable. According to Yahoo Finance, the aforementioned six multinational companies reported multimillion dollar profits in the years of 2013-2015.

Fuglie et al. (2012) discusses that market power resulting from the structural changes in agricultural input industries make farmers pay higher prices for purchased inputs. Additionally, with stronger legal protection over their intellectual property and fewer firms offering competition, firms charge higher prices for their new innovations. The authors emphasize that over the last two decades, the prices of farm inputs have been rising faster than the prices U.S. farmers receive for their crops and livestock. Although the authors mention that multiple factors could have contributed to changing prices, it is difficult to isolate the effects of market power and other factors affecting high prices.

Shand (2012) also discusses that from 1994-2010, seed prices in the U.S. increased more than any other farm input, more than doubling relative to the price farmer's received for their harvested crops. The author outlines that this increase is due to the increase in value-added characteristics developed by private seed and biotech companies through R&D programs. Hubbard (2015) stressed that with a diminished ability to save seeds and fewer options in the market, the price of seeds has increased as much as 30% annually in recent years, significantly higher than the rate of inflation. In addition, Howard (2015) emphasizes that transgenic seeds frequently require the purchase of proprietary inputs such as glyphosate herbicides, and this precedent is even being extended to non-transgenic seeds. These impacts have served to increase the profits and market capitalization of dominant firms, and they have also reduced options for farmers. This argument was discussed back in 1993 when Just and Heuth (1993) projected that chemical companies would develop biological innovations that increase dependence on the chemicals that they sell.

Howard (2015) projects that given how agrochemical firms increasingly shifted their focus to seed, they will continue seed company acquisitions and farmers will experience additional price increases in the future. The author also suspects that this will also accelerate the synergistic effects of consolidation and increasing intellectual property protections. As the firms that now dominate the global seed industry increase their size and expand intellectual property protections, the disadvantages for their smaller competitors will become even worse. As mentioned earlier, the expense of developing transgenic traits and identifying gene sequences, would create a strong barrier to entry for smaller firms.

As mentioned above, the Big Six firms presented on Figure 3, engage in a web of cross-licensing agreements to share the technologies, particularly for transgenic crops with stacked

traits. The effect is similar to the formation of a cartel to exclude other potential competitors. Therefore, small existing firms will have two main options: to consider strategic alliances (with larger firms) or exit strategies.

In summary, large sunk research costs and intellectual property protections create substantial barriers to new entry in these markets, and they are therefore not contestable. Prices for seed and some other agricultural inputs have consequently increased in recent years.

4. Hausman Methodology

In this section, we briefly review some available methods for analyzing the price effects of proposed mergers, and then describe the Hausman method that we employ in some detail. This method is appropriate for markets with differentiated goods and the assumption of no new entry. We additionally briefly describe the microeconomic theory we use to calibrate, using available econometric evidence, the own and cross-price elasticities of demand that we require.

Several methods have been proposed in the literature to study competitive analysis with differentiated products. Werden and Froeb (1994) used a logit model, and assumed Nash equilibrium in prices and constant marginal costs to study the impact of mergers in differentiated products industries. The authors studied simulations of hypothetical mergers of U.S. long distance carriers. They propose that simulations such as these provide a firmer foundation for antitrust policy than traditional structural indications. However, this approach has been criticized by Hausman (2010). In particular, this method assumes that market shares are indicative of consumer's second choices only if the "independence of irrelevant alternatives" (IIA) property holds for consumer demand. For example, the choice of a given consumer between Monsanto corn seed and Dow corn seed does not depend on whether Du Pont/Pioneer's corn seed is also available. Hausman (2010) further stresses that standard logit models should not be used in merger simulation models because at both the aggregate and individual levels they impose the IIA property. Moreover, assuming that marginal costs are constant, it may not be a realistic assumption. Merger firms may experience efficiency gains, in which case marginal costs may change when compared to the status quo.

The other approach that has been recently employed is "upward pricing pressure" (UPP) technique. This approach was initially proposed by Shapiro (1996) and it is now included in the

2010 Merger Guidelines. This approach heavily depends on a term called the “diversion ratio,” which is closely related to the cross-price elasticity of demand. The diversion ratio is explained as the fraction of unit sales lost by the first product due to an increase in its price that would be diverted to the second product. This approach is a significant improvement when compared to its predecessor, 1992 Merger Guidelines, as the UPP does not require market definition or the calculation of market shares or HHIs. However, this approach, as well, has been heavily criticized by Hausman (2010) for two reasons. First, the UPP is limited to the situation of single product for each merging firm, while in reality many merging firms producing differentiated products produce more than a single product each. Second, and more importantly, the analysis is based on the effect of merger on only one product at a time and does not consider the impact on both products. In other words, price of one product is held constant when the UPP is calculated for the other product. However, in reality, both prices will most likely change simultaneously. In addition, this approach calculates the upward pricing pressure estimate, and not the expected change in prices, which is the focus of unilateral effects analysis to begin with.

Given the limitations of the methods mentioned above, we follow Hasuman et al. (1994), Hasuman and Leonard (1997), and Hausman (2010), and use for our analysis the Nash-Bertrand assumption under conditions where entry is expected not to occur even if prices are raised after a merger. Suppose that firm 1 produces a single product in a market with n products and chooses price to maximize profit

$$\pi = (p_1 - mc_1)Q_1(p_1, \dots, p_n) \quad (1)$$

where p_1 is an output price and mc_1 is a marginal cost. The first order condition, under a Nash equilibrium, is given by:

$$\frac{\partial \pi}{\partial p_1} = Q_1(p_1, \dots, p_n) + (p_1 - mc_1) \frac{\partial Q_1}{\partial p_1} = 0 \quad (2)$$

In equilibrium, the firm sets price based on:

$$\frac{p_1 - mc_1}{p_1} = -\frac{1}{e_{11}} \quad (3)$$

where e_{11} is the firm's own price elasticity.

Suppose that brand 1 merges with brand 2. The merged firm will take into account that if it raises the price of either brand, some of the lost demand will go to the other brand it controls, assuming the products are substitutes. Thus, the price constraining effect of brand 2 on brand 1 will be eliminated if they are no longer independent brands. The merger will remove the competitive constraint, and may lead to higher prices. The size of effect will depend upon the size of the own and cross price elasticities of demand for the brands of the 2 merging firms. On the other hand, the merger could lead to production efficiencies (reductions in marginal costs), which would lead to lower prices. The size of the price reduction is directly related to the size of marginal cost reduction. Whether a merger has overall positive or negative impact on the prices depends on whether the former effect is larger than the latter (Hausman and Leonard, 1997). With brands 1 and 2 merging, the merged firm maximizes its profit as follows:

$$\pi = (p_1 - mc_1)Q_1(p_1, \dots, p_n) + (p_2 - mc_2)Q_2(p_1, \dots, p_n) \quad (4)$$

The first order conditions solve for 2 partial derivatives with respect to p_1 and p_2 . These conditions are expressed as:

$$\begin{cases} s_1 + s_1 * e_{11} * \frac{p_1 - mc_1}{p_1} + s_2 * e_{21} * \frac{p_2 - mc_2}{p_2} = 0 \\ s_2 + s_2 * e_{22} * \frac{p_2 - mc_2}{p_2} + s_1 * e_{12} * \frac{p_1 - mc_1}{p_1} = 0 \end{cases} \quad (5)$$

where e terms are elasticities, s terms denote revenue shares, and mc terms are post-merger marginal costs.

Solving the first equation for brand 1's price-cost markup in terms of brand 2's price cost markup yields:

$$\frac{p_1 - mc_1}{p_1} = \frac{e_{21} \frac{s_2}{e_{22}} - s_1}{s_1 * e_{11} - s_1 \frac{e_{12} * e_{21}}{e_{22}}} \quad (6)$$

Two things emerge from equation (6). First, the higher the pre-merge revenue share of brand 1, the lower expected price increase for brand 1. Second, the higher the share of brand 2, the higher the expected price increase for brand 1. Intuitively this means that, a product with a large amount of sales that merges with a product with small amount of sales, the expected outcome is that price change on the high sales product will be relatively small, while the expected effect on the small sales product is expected to be relatively large.

The remaining $n - 2$ firms, not involved in the merger, still maximize their profits as they were maximizing before the merger situation:

$$\frac{p_i - mc_i}{p_i} = -\frac{1}{e_{ii}} \quad (7)$$

for $i = 3, \dots, n$

To generalize 2 merging firms into m merging firms, the newly combined firm will set its prices optimally, yielding the first order conditions for each product as follows:

$$\left[\frac{p_j}{\sum_{k=1}^m p_k q_k} \right] \frac{\partial \pi}{\partial p_j} = s_j + \sum_{k=1}^m \left[\frac{p_k - mc_k}{p_k} s_k \right] e_{kj} = 0 \quad (8)$$

for $j = 1, \dots, m$

To avoid having to solve for nonlinear equations, Hausman et al. (1994) proposed linearization to approximate the post-merger prices.

$$S + E'w = 0 \quad (9)$$

where s is the vector of revenue shares, E is the matrix of own and cross price elasticities, and w is the vector of price-cost markups multiplied by the share.

$$\begin{bmatrix} s_1 \\ \vdots \\ s_m \end{bmatrix} + \begin{bmatrix} e_{11} & \cdots & e_{m1} \\ \vdots & \ddots & \vdots \\ e_{1m} & \cdots & e_{mm} \end{bmatrix} \begin{bmatrix} s_1 * \frac{p_1 - mc_1}{p_1} \\ \vdots \\ s_m * \frac{p_m - mc_m}{p_m} \end{bmatrix} = \begin{bmatrix} 0 \\ \vdots \\ 0 \end{bmatrix} \quad (10)$$

The individual markup equations are solved through inversion of the matrix of elasticities:

$$\begin{bmatrix} \frac{p_1 - mc_1}{p_1} \\ \vdots \\ \frac{p_m - mc_m}{p_m} \end{bmatrix} = -1 * \begin{bmatrix} e_{11} & \cdots & e_{m1} \\ \vdots & \ddots & \vdots \\ e_{1m} & \cdots & e_{mm} \end{bmatrix}^{-1} \begin{bmatrix} s_1 \\ \vdots \\ s_m \end{bmatrix} o \begin{bmatrix} 1 \\ s_1 \\ \vdots \\ 1 \\ s_m \end{bmatrix} \quad (11)$$

where o stands for Hadamard product of two matrices (element-wise multiplication).

Following Hausman et al. (1994), the percentage change in price following the merger can be expressed as follows:

$$\frac{p_j^M - p_j}{p_j} = \frac{\frac{mc_j^M}{mc_j}}{\frac{e_{jj}}{1 + e_{jj}}(1 - \theta_j^M)} - 1 \quad (12)$$

where θ_j^M is a post-merger price-cost markup, mc_j is a pre-merger marginal cost, mc_j^M is a post-merger marginal cost, and e_{jj} is an own price elasticity. Decreased marginal cost can lead to lower post-merger prices if θ_j^M does not increase too much.

If the merging firm does not have changes in marginal costs, then equation (12) becomes:

$$\frac{p_j^M - p_j}{p_j} = \frac{1}{\frac{e_{jj}}{1 + e_{jj}}(1 - \theta_j^M)} - 1 \quad (13)$$

The percentage change in price of each merging product will depend on the size of θ_j^M which is calculated from equation (11).

4.1 Cross-price Elasticities

As described in the following section, we have estimates of own-price elasticities of demand (or Lerner indices) seed markets. However, we do not have estimates of cross-price elasticities of demand (across firms) that are needed to apply the Hausman methodology. We additionally recognize that the own-price elasticities are not known with certainty, and indeed we have a range of such estimates.

To address these problems, we derive theoretic own- and cross-price elasticities of demand, as a function of seed market shares and a single unknown behavioral parameter. Specifically, we solve the cost minimization problem for a representative seed consumer, assuming an abstract, composite seed input is produced using constant elasticity of substitution (CES) technology. Under this arrangement, we have Hicksian own-price elasticities of demand of

$$e_{ii} = \sigma \left[w_i^{1-\sigma} \alpha_i \left(\sum_k \alpha_k w_k^{1-\sigma} \right)^{-1} - 1 \right] \quad (14)$$

where the w are market prices of seed from individual suppliers, the α parameters describe the intensity of each input, and the σ is the elasticity of substitution. The elasticity of demand for input i with respect to the price of input j is given by

$$e_{ij} = \sigma w_j^{1-\sigma} \alpha_j \left(\sum_k \alpha_k w_k^{1-\sigma} \right)^{-1} \quad (15)$$

Given a value for σ , input cost shares s_i for each input from an observed equilibrium, and assuming all input prices are one¹, the α parameters are calibrated as

¹ Allowing arbitrary quantity units for seed facilitates the assumption that all prices are one. This approach is typical in Computable General Equilibrium modeling.

$$\alpha_i = s_i \left(\sum_k s_k^{1/\sigma} \right)^{-\sigma} \quad (16)$$

4.2 Simulations.

We conduct a simulation exercise, with each trial consisting of the following series of steps:

1. We draw a random value for the σ parameter from a distribution that generates a resulting range of own-price elasticities consistent with econometric evidence described in the data section below.
2. We use the value for σ from step 1, observed market shares described in the data section below, and equations 14 through 16 to calculate commensurate own- and cross-price elasticities.
3. We use the elasticities for the merging firms from step 2 in equation 13 to calculate a percentage change in seed prices due to the merger.²

We then characterize the distribution of possible post-merger price increases using values across all trials.

5. Data

To employ our chosen methodology and analyze the proposed DuPont/Pioneer-Dow and Monsanto-Bayer mergers, we require industry market shares and own-price elasticities of demand. The details of obtaining the data for each component are discussed in the subsequent sections.

² Note that using equation 13 rather than equation 12 implies that marginal costs do not change as a result of the merger. The primary marginal cost associated with seed production, transgenic or otherwise, is simply the cultivation cost, which will scale approximately linearly with quantity produced. Mergers in this industry may well produce reductions in fixed costs (e.g., trait development), but are not likely to substantially reduce the marginal costs of seed production.

5.1. Industry market shares

Industry market shares were obtained from two different sources. Industry shares for the corn and soybean seed industries were obtained from Begemann (2015), and share estimates for seed for upland cotton were obtained from USDA's AMS 2015 report. These data are presented in Table 3. Monsanto currently holds 35.5% of the market for corn seed, while DuPont has 34.5% and Dow has 6%. In soybean seed, Monsanto has a 28% share, while DuPont has 33.2% and Dow has 5.2%. In seeds for cotton, Monsanto, Dow, and Bayer enjoy the largest shares: 31.2%, 15.3%, and 38.5% market shares, respectively.

Table 3. Seed Market Shares

	Corn	Soybeans	Cotton
Monsanto	35.5%	28.0%	31.2%
DuPont Pioneer	34.5%	33.2%	0.0%
Dow	6.0%	5.2%	15.3%
Syngenta	5.7%	9.8%	0.0%
Bayer	0.0%	0.0%	38.5%
Americot	0.0%	0.0%	6.4%
AgReliant	7.0%	3.1%	0.0%
Public saved	0.0%	2.4%	0.0%
Others	11.3%	18.3%	8.6%
Total	100.0%	100.0%	100.0%

Corn and soybeans shares are as of 2014, and upland cotton shares are as of 2015.

5.2. Own-price Elasticities of Demand and Market Power

There are some recent quantitative empirical studies measuring market power in the U.S. seed industry. A few recent studies have examined the pricing decisions of seed firms based on new empirical industrial organization (NEIO) models of the firm's profit function. Shi et al. (2008) used farm-level observations on seed price, quantity, and location from 2000 to 2007 to estimate a model of the implicit value associated with individual traits in hybrid seed corn. The authors incorporated a generalized form of the HHI statistic to account for the local pricing effects associated with differentiated (i.e., multiple trait) products in the corn seed market. The authors found that three of the four main biotech traits (corn borer and rootworm resistance and two forms of herbicide tolerance) attract significant price premiums. The authors found that,

when statistically significant, the Lerner indexes were always positive, ranging from 2.25% for conventional seeds to 21.14% for herbicide tolerance trait. The effect of market power on price is found to be moderate in the conventional seed market, but larger in the herbicide tolerance trait market (HT1). Also, the Lerner index was significant and fairly large in the bundled-seed markets involving HT1, equal to 14.39 for Bt-European Corn Borer (BT-ECB) and HT1, 17.62 for Bt-Rootworm (Bt-RW) and HT1, and 15.32 for Bt-ECB, BT-RW, and BT-HT1. Statistically significant results found by Shi et al. (2008) are summarized in table 4. Implied own-price elasticities of demand are recovered from the Lerner index formula using equation 3.

Table 4. Estimated Lerner indexes from Shi, et al. (2008) for the corn seed market

Seed type	Lerner Index (100 * L)	Implied Elasticity
Conventional	2.25	-44.44
HT1	21.14	-4.73
Bt-ECB and HT1	14.39	-6.95
Bt-RW and HT1	17.62	-5.68
Bt-ECB, Bt-RW, and HT1	15.32	-6.53

Kalaitzandonakes et al. (2010) studied empirical measures of price mark-ups attributable to market power in the U.S. seed industry between 1997 and 2008. This is a period characterized by the vertical integration of leading multinational biotechnology firms. Their results suggest that, in the case of the U.S. corn and soybean seed industry concentration, moderate market power and dynamic market efficiency coincided over the period of the analysis. The authors found that upper bound in the corn and soybean seed mark-up (Lerner index) to be approximately 14.6% and 17.5%, respectively. Their findings are within the range of values found by Shi et al. (2008). The results are summarized in table 5. Implied own-price elasticities of demand are recovered using equation 3.

Table 5. Estimated Lerner indexes in the corn and soybean seed markets From Kalaitzandonakes et al. (2010)

Seed type	Lerner Index (100 * L)	Implied Elasticity
Corn, overall price-cost mark-up for all varieties	14.6	-6.85
Soybean, overall price-cost mark-up for all varieties	17.5	-5.71

Zhang (2014) constructed a multiple discrete choice model with random coefficients that allows participants to purchase multiple items with continuous quantities. The author imposed a flexible correlation structure among products' observable characteristics, and panel effects on individual consumers' seed variety choices. She investigated the U.S. farmers' adoption of different corn seed varieties from 2000 to 2007. Her results indicated that farmers value the biotechnology advances over time, and their preferences are shifted away from conventional and single-trait seeds to newly-introduced multiple trait seeds. She categorized all firms into two groups: integrated biotech/seed firms with both seed and biotech sectors of patented GM traits, and independent seed companies operating only in the seed sector. There are four integrated biotech firms in the data: Monsanto, Syngenta, Dow, and DuPont/Pioneer. The author found that farmers have highly elastic demand for all seed types. The own price elasticities of genetically modified seeds were, on average, greater than conventional seeds. Moreover, the results of cross-price elasticities (across traits, not firms) indicated that farmers are less likely to switch back to conventional seeds as the prices of genetically modified seeds increase, confirming that conventional and genetically modified seeds are not close substitutes.

Table 6. Own price and cross price elasticity estimates for differentiated corn seed types by Zhang (2014)

Quantities/Prices	Conventional seeds	ECB-RW-HT1-HT2	ECB-RW-HT2	ECB-HT1-HT2	ECB-HT1	ECB-HT2	ECB	HT2
Conventional seeds	-11.53	0.216	0.125	0.242	0.284	0.359	0.396	0.292
ECB-RW-HT1-HT2	0.345	-14.793	0.853	0.724	0.701	0.493	0.622	0.55
ECB-RW-HT2	0.37	2.295	-9.416	0.929	0.451	0.461	0.498	0.644
ECB-HT1-HT2	0.389	0.977	0.414	-12.478	0.766	0.573	0.58	0.771
ECB-HT1	0.312	0.518	0.139	0.494	-12.38	0.474	0.474	0.347
ECB-HT2	0.741	0.847	0.302	0.775	1.025	-12.002	1.267	1.017
ECB	0.182	0.24	0.098	0.2	0.327	0.307	-14.04	0.224
HT2	0.488	0.554	0.286	0.657	0.547	0.653	0.696	-12.99

ECB-European Corn Borer, HT1-herbicide tolerance type 1, HT2-herbicide tolerance type 2, RW-resistance to rootworm.

6. Herfindahl-Hirshman Index (HHI)

While market concentration is not a key focus of our analysis, we nonetheless calculate changes in this index, as the U.S. Department of Justice (DOJ) and Federal Trade Commission (FTC) have explicit guidelines related to this measure. The HHI is the sum of squared market share percentages. It therefore falls in the range (0, 10,000], with 10,000 representing a pure monopoly market.

Under DOJ/FTC’s Horizontal Merger Guidelines, a market is considered “moderately concentrated” if the HHI is between 1,500 and 2,500, and “highly concentrated” if the HHI is above 2,500 (U.S. Department of Justice, 2016). For an industry that is highly concentrated, any action that increases the HHI by 200 or more points is considered “likely to enhance market power.”

Based on the data in Table 3, we see that DuPont/Pioneer and Dow have similar market shares in both the corn and soybean seed markets: 34.5% and 6%, respectively in corn, and 33.2% and 5.2%, respectively, in soybeans. The merger would give Dow-DuPont about 41% of the market for corn seeds and 38% of the market for soybean seeds. In the seed market for cotton, Monsanto and Bayer hold 31.2% and 38.5% market shares, respectively, and the proposed merger would consequently give Monsanto-Bayer about 70% of this market.

We calculate HHI values before and after the proposed mergers, which are presented in Table 7. For the seed markets for corn and cotton, the HHI is above 2,500 before the mergers, with soybeans falling somewhat short of 2,500. In all markets, the proposed mergers would increase HHIs by more than 300 points. The HHI change in the market for seed for cotton increases particularly dramatically, with an increase of about 2,400 points. The seed markets for corn and cotton both meet the DOJ/FTC criteria under which market power is likely to be enhanced.

Table 7. Herfindahl-Hirshman Index Values Before and After Proposed Mergers

	Corn	Soybeans	Cotton
Before	2,696	2,360	2,804
After	3,110	2,705	5,205

7. Hausman Results

In this section we calculate expected impacts on seed prices of two proposed mergers, DuPont/Pioneer-Dow and Monsanto-Bayer, for corn, soybean, and cotton. As discussed in the literature, implied own-price elasticities derived from the Lerner indexes by Kalaitzandonakes et al. (2010) and Shi et al. (2008), and empirically estimated own-price elasticities found by Zhang (2014) were in the range of -12% and -5%. Following CES production function framework discussed above, we chose the σ parameter values that would generate the own-price elasticities of demand in the range of -12% and -5%. For simulating the σ parameter, we specify a GRKS distribution. The GRKS is a parametric, piece-wise linear probability distribution function similar to the triangular distribution, that has been used extensively in applied simulation studies (Richardson et al. 2007a, 2007b; Palma et al., 2011; Monge et al., 2014). The distribution is fully characterized by minimum, expected, and maximum values. However, the assumed minimum and maximum values in the GRKS represent the 2.5% and 97.5% quantiles, respectively, whereas for the triangular distribution, they represent the lower and upper bounds of the domain. Hence, in contrast to the triangular distribution, the GRKS allows the random variable to take on values slightly below and slightly above the assumed minimum and maximum, respectively, with low probabilities of occurrence.

6.1. *DuPont/Pioneer-Dow Merger in Corn and Soybean Markets*

We calculated the impacts of the proposed merger between DuPont/Pioneer and Dow in corn and soybean industries. We did not study the impacts of the proposed Monsanto-Bayer merger in the corn and soybean seed markets given that Bayer does not participate in corn and soybean seed markets.

We calculated the change in price for the merging seed products using the methodology described in section 4. The estimated results from the simulation are summarized in table 7. Assuming no changes in the marginal costs, we find that the estimated price increases in both markets would be modest. In corn, average price increases are estimated to be 1.6% and 6.28%. Interquartile range values indicate that there is a 75% chance that the DuPont-Dow merger price increases would be less than or equal to 1.78% and 7.15%.

In soybeans, the results are almost identical. Assuming no changes in the marginal costs, the estimated price increases would be quite small. The average price increases are estimated to be 1.3% and 5.8%. Interquartile range values show that there is a 75% chance that the DuPont-Dow merger price increases would be less than or equal to 1.5% and 6.5%. The market-share weighted expected price increased 2.3% for corn seed and 1.9% for soybean seed.

6.2. Monsanto-Bayer Merger in Seed Market for Cotton

We did not analyze the effects on the seed market for cotton of the proposed DuPont-Dow merger given that DuPont has a 0% share in this market. We calculated the change in prices for the merger and the estimated results are summarized in table 8. Assuming no changes in marginal costs, we find that the estimated price increases would be quite large. The average price increases by Monsanto and Bayer are estimated to be 19.2% and 17.4%, respectively. Interquartile range values indicate that there is a 75% chance that the Monsanto and Bayer would increase their prices by more than 14.5% and 13.1%, respectively. The market-share weighted expected increase in market price for seed for cotton is 18.2%.

Table 8. Estimated Seed Price Increases for Merging Biotech Companies in Corn, Soybeans, and Cotton Industries

	Corn		Soybeans		Cotton	
	DuPont/Pioneer	Dow	DuPont/Pioneer	Dow	Monsanto	Bayer
Average	1.57%	6.28%	1.29%	5.82%	19.23%	17.41%
St. Dev	0.44%	1.76%	0.43%	1.93%	9.06%	8.20%
25% quantile	1.25%	5.00%	1.02%	4.58%	14.51%	13.14%
75% quantile	1.78%	7.15%	1.45%	6.54%	21.29%	19.28%

8. Conclusions

Over the past few decades, development of new types of pesticides and seeds have substantially improved agricultural productivity. Agricultural input markets have evolved and family owned and small businesses gave way to larger enterprises that integrated plant breeding, conditioning, production, marketing, and other functions. This evolution in the industry was coupled with

increasing market concentration in seed and chemical supply and the industry was further shaped by widespread mergers and acquisitions. The agrochemical companies bought hundreds of independent biotechnology and seed companies, and merged with one another. This has resulted in an industry that is comprised primarily of six large multinational firms.

Agricultural input markets are not likely to be contestable. Increased concentration by few firms over the major processes by which genetic manipulation occurs, enables them to control the technologies to block use by other firms. In addition, there are substantial sunk costs, including intellectual property cross-licensing and R&D expenditures, which are a substantial barrier to new entry in these markets. The market power resulting from the structural changes in agricultural input industries make farmers pay higher prices for purchased inputs. Seed prices in the U.S. have increased by larger percentages than other farm inputs in recent years.

The proposed DuPont/Pioneer-Dow merger would increase market concentration by about 414 HHI points, from 2696 to 3110, in the corn seed market. In the soybean seed market, the merger would increase the concentration by 345 HHI points, from 2360 to 2705. These values imply that the DOJ/FTC Horizontal Merger Guidelines would consider the DuPont/Pioneer-Dow merger likely to enhance market power in the corn seed market. Expected seed price increases in both markets are projected to be modest. In corn, the market-share weighted expected price increase is 2.3%. Interquartile range values indicate that there is a 25% chance that the DuPont-Dow merger average price increases for corn seed would be greater than or equal to 2.6%. In soybeans, the results are similar; assuming no changes in marginal costs, the market-share weighted expected price increases is 1.9%, and interquartile range values indicate that there is a 25% chance that the DuPont-Dow merger average soybean seed price increase would be greater than or equal to 2.1%.

The Monsanto-Bayer merger is projected to substantially increase seed prices for cotton. The merger would give Monsanto-Bayer about 70% of the market. The merger would increase market concentration by about 2400 HHI points, from 2804 to 5205. This high starting HHI value and the dramatic increase easily qualifies the proposed Monsanto-Bayer merger as likely to enhance market power in the seed market for cotton under DOJ/FTC merger guidelines. The market-share weighted expected price increase is 18.2%. Interquartile range values indicate that there is a 25% chance that Monsanto and Bayer would increase their seed prices for cotton by more than 20.2%

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United States Senate

January 10, 2017

The Honorable Edith Ramirez
Chairwoman
Federal Trade Commission
600 Pennsylvania Avenue, NW
Washington, DC 20580

Ms. Renata Hesse
Acting Assistant Attorney General, Antitrust Division
United States Department of Justice
950 Pennsylvania Avenue, NW
Washington, DC 20530

Dear Chairwoman Ramirez and Ms. Hesse,

As you continue your review of the proposed merger and acquisition activity in the agricultural chemical and seed industries, I want to encourage a thorough competition review of these transactions that includes consideration of the recent study from the Agricultural and Food Policy Center (AFPC) at Texas A&M University. For your convenience, please find a copy of the AFPC study attached to this letter.

The AFPC study documents the consolidation that has already occurred in the seed and agrochemical industries in recent years and examines a number of potential effects of further consolidation in these industries. Many of the conclusions in the report are consistent with questions that my farmer constituents have asked about the implications of the current consolidation trends within the agricultural industry. Their questions about the effect of further consolidation include ensuring there is continued domestic competition, continued innovation and research, ample farmer choices for seed and agricultural chemicals, continued delivery of farmer services, and competitive prices for products and services.

The purpose of the antitrust laws is to protect consumers—not competitors—and if a proposed merger will increase prices for consumers, it should not be approved. I therefore write to urge the Antitrust Division to conduct a thorough, yet fair, review of these transactions on competition in the U.S. market in accordance with existing statutes and precedent and to consider the findings in the AFPC study as well as the concerns of the farming community in Texas.

Sincerely,



Ted Cruz
United States Senator

PETER WELCH
AT-LARGE, VERMONT

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CHIEF DEPUTY WHIP

HOUSE DEMOCRATIC
STEERING & POLICY COMMITTEE

COMMITTEE ON
ENERGY AND COMMERCE

COMMITTEE ON
OVERSIGHT AND GOVERNMENT
REFORM

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December 13, 2016

The Honorable Edith Ramirez
Chairwoman
Federal Trade Commission
600 Pennsylvania Ave, NW
Washington, DC 20580

Dear Chairwoman Ramirez:

I write to express my appreciation for the attentiveness with which the Federal Trade Commission pursued concerns I raised in my July 11, 2016, letter regarding limitations on debit network routing choices businesses of all sizes were facing with the U.S. chip card deployment.

I was pleased to learn the Commission launched an investigation of Visa's practices surrounding the deployment of EMV chip cards in the U.S. on July 28, and that this investigation resulted in Visa agreeing on November 21 to change several of its rules and acceptance guidelines surrounding EMV chip cards. Those changes, if carried out properly, will improve innovation and competition for debit network services that benefit various financial services companies and Main Street businesses and their customers. This is a significant step toward preserving competition and paving the way for innovation but more work needs to be done.

It is essential that small and medium-sized merchants, such as those that predominate in my home state of Vermont, are aware of business choices afforded to them when they begin to accept EMV chip cards at the register or online. And if they have already rolled out EMV that they are aware of the Visa rule changes and how those changes enable them to adjust their checkout experience to best fit their business and customer needs. I am particularly interested in ensuring merchants and the payment system vendors involved in the EMV certification and deployment process, such as acquirers and hardware providers, have the tools and technology to meaningfully realize these changes, and to carry out EMV deployments in an expeditious and secure manner that meets the competition requirements under Regulation II as recently clarified by the Federal Reserve Board. The Commission can help lead the way in getting information to all interested companies regarding their choices and the changes that the Commission has pushed.

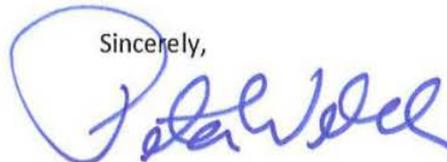
Furthermore, I ask the Commission to continue monitoring card network behavior related to any customer-facing checkout screen due to the complicated and proprietary nature of EMV technology.

I am also encouraged by Visa's statement that merchants can exercise routing choice on the Common Debit application regardless of the verification method used to authenticate transactions. Multi-factor customer authentication is an important customer protection measure to prevent the unauthorized or fraudulent use of a stolen account, and as new customer verification methods become available, it is important they be made readily accessible in the marketplace to preserve competition for the network payment services they help facilitate. I want to ensure merchants have the technical ability going forward to exercise choice on these technologies. Visa's statement is meaningless if there are technical hurdles that prevent it from being realized. It is critical that the Commission continue monitoring routing competition availability on biometric fingerprint authentication, and other emerging authentication technologies.

Lastly, I recently started the bipartisan House Energy and Commerce Committee Internet of Things Working Group, so it is my hope that we can work together to ensure the U.S. can drive a positive and secure customer experience for digital commerce, including in the payments sector. Ensuring competition and interoperability for digital payment routing services is a critical component to laying the groundwork for successful, secure, frictionless and efficient consumer payments for interconnected commerce and the Internet of Things.

Thank you again for the thoroughness of your investigation. I look forward to working with the Commission to ensure Visa's rule changes are realized in the marketplace, and that small businesses are educated on the benefits that the added competition and transparency in payment services afforded by these developments can provide.

Sincerely,

A handwritten signature in blue ink, appearing to read "Peter Welch", is written over a large, hand-drawn blue circle.

PETER WELCH
Member of Congress

United States Senate

WASHINGTON, DC 20510-4705

November 17, 2016

The Honorable Edith Ramirez
Chairwoman
Federal Trade Commission
600 Pennsylvania Avenue, N.W.
Washington, DC 20580

Dear Chairwoman Ramirez:

I have been made aware of attempts to sell consumers unnecessary malware to repair new and unused computers, as a way of increasing the sale of tech services offered by Office Depot, Inc. Therefore, I am requesting that the Federal Trade Commission (FTC) investigate these allegations.

A recent news report by KIRO news of Seattle, Washington documents that many Office Depot stores in Washington State and in other cities across the United States are offering "free computer scans" that often indicate problems and result in consumers purchasing unneeded computer repair packages.

American consumers rely on their personal computers now more than ever. Kids need computers for their school work; families need computers to keep track of their finances; and small business owners need computers to run their enterprises. They are the gateways through which we live our lives. In this context, Office Depot's exploitative behavior is particularly disturbing.

As you know, Section 5 of the FTC Act (15 U.S.C. Section §45) gives the FTC jurisdiction to bring enforcement actions against deceptive or unfair marketing practices. I urge you to use this authority to investigate deceptive and unfair marketing practices Office Depot stores and to punish offenders. I am requesting the FTC to investigate these marketing practices. We must stand up for American consumers and make sure they are not being deceived into making purchases with their hard earned dollars.

Thank you in advance for your attention to this matter. I look forward to working with you to protect consumers and your timely response on this matter.



Maria Cantwell
United States Senator

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United States Senate

WASHINGTON, DC 20510

December 21, 2016

The Honorable Edith Ramirez
Chairwoman
Federal Trade Commission
600 Pennsylvania Ave, N.W.
Washington, D.C. 20580

Dear Chairwoman Ramirez:

We write to express concerns over recently expedited Federal Trade Commission actions against a handful of businesses. While we understand the efforts of the Commission to finalize routine matters during this transition period between administrations, we are concerned that the Commission may be accelerating investigations without substantive process and to the detriment of accepted FTC procedures.

We expect and encourage the Commissioners to avoid unnecessarily rushed resolutions in complex investigations. Given recent case developments, we are particularly concerned with any decisions made by an unprecedented number of Commissioners. We ask that the Commission refrain from expediting any cases during this transition period, particularly those that cannot be decided by at least three Commissioners. We further request that by January 27, 2017 the FTC provides a list of (a) all matters closed and (b) the results of every Commission vote between November 9, 2016 and January 20, 2017.

Sincerely,



Michael S. Lee
United States Senator



Ron Johnson
United States Senator

Cc: Commissioner Maureen K. Ohlhausen
Commissioner Terrell McSweeney

Congress of the United States
Washington, DC 20515

January 9, 2017

Edith Ramirez
Chairwoman
The Federal Trade Commission
600 Pennsylvania Ave, NW
Washington, DC 20580

Dear Chairwoman Ramirez:

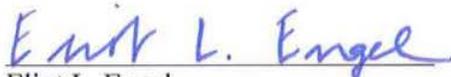
We urge the Federal Trade Commission (FTC) to act swiftly upon the recently submitted petition by The Humane Society of the United States (HSUS) requesting an investigation into and enforcement of violations of the Fur Products Labeling Act and the Federal Trade Commission Act. The FTC must enforce its consent orders and impose civil and criminal penalties where warranted. The petition identifies 32 brands by 17 retailers that sold apparel labelled "faux fur" even though it was made with animal fur.

We were pleased Congress enacted the Truth in Fur Labeling Act (P.L. 111-313) in 2010 with strong bipartisan support in both chambers to close a loophole in federal law that had allowed animal fur products to go unlabeled if the value of the fur was \$150 or less. We have long recognized that consumers have a right to know that the products they are buying are accurately labelled and to avoid purchasing fur if they so choose. Customers often pay a premium for cruelty-free goods and they deserve to know what they're getting.

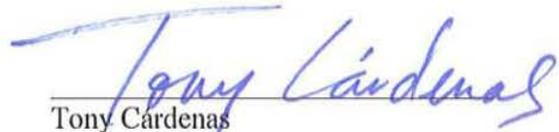
The 17 retailers identified by the HSUS include major companies such as Neiman Marcus, Kohl's, and Nordstrom. It is appalling that they have sold "faux fur" products (coats, footwear, gloves, cardigans, handbags, and other items) really made with animal fur from species including raccoon dog, mink, rabbit, coyote and gray wolf. Federal law is specifically designed to prevent this false labeling, but can only be effective if there is meaningful enforcement. The FTC should act swiftly to take enforcement actions against these retailers.

We will appreciate your prompt response and subsequent updates as the FTC looks into these serious allegations.

Sincerely,



Eliot L. Engel
Member of Congress


Tony Cardenas
Member of Congress



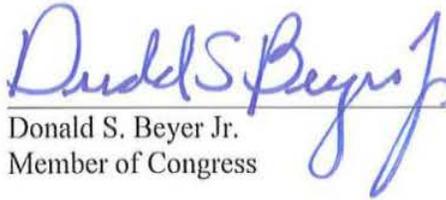
Paul Tonko
Member of Congress



Earl Blumenauer
Member of Congress



Steve Cohen
Member of Congress



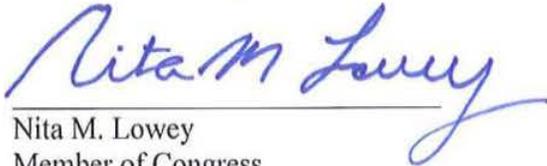
Donald S. Beyer Jr.
Member of Congress



Mike Quigley
Member of Congress



Leonard Lance
Member of Congress



Nita M. Lowey
Member of Congress



Anna G. Eshoo
Member of Congress



Jerry McNerney
Member of Congress

Congress of the United States
Washington, DC 20515

November 22, 2016

The Honorable Edith Ramirez
Chairwoman
Federal Trade Commission
600 Pennsylvania Avenue, NW
Washington, D.C. 20580

Dear Chairwoman Ramirez:

We are writing to express our concerns about the pending Federal Trade Commission (FTC) agenda in light of the recent election and upcoming transition.

Although the leadership of the FTC will soon change, congressional oversight of the Commission will continue. Therefore, any action taken by the FTC before the designation of a new chairman will receive enhanced scrutiny. While we expect and encourage the FTC to continue its routine merger reviews and consumer protection enforcement in support of competition and on behalf of American consumers, we strongly encourage the Commission to avoid focusing its attention and resources in the coming months on complex, partisan, or otherwise controversial items that the new Congress and new Administration will have an interest in reviewing.

Sincerely,



JOHN THUNE
Chairman
Committee on Commerce, Science,
and Transportation
U.S. Senate



FRED UPTON
Chairman
Committee on Energy
and Commerce
U.S. House of Representatives

cc: The Honorable Bill Nelson, Ranking Member
Committee on Commerce, Science, and Transportation
U.S. Senate

The Honorable Frank Pallone, Ranking Member
Committee on Energy and Commerce
U.S. House of Representatives

The Honorable Edith Ramirez

November 22, 2016

Page 2

The Honorable Maurcen K. Ohlhausen, Commissioner
Federal Trade Commission

The Honorable Terrell McSweeney, Commissioner
Federal Trade Commission

Ms. Roslyn Mazer, Inspector General
Federal Trade Commission

CHARLES E. GRASSLEY, IOWA, CHAIRMAN

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RICHARD BLUMENTHAL, CONNECTICUT

United States Senate

COMMITTEE ON THE JUDICIARY

WASHINGTON, DC 20510-6275

KOLAN L. DAVIS, *Chief Counsel and Staff Director*

KRISTINE J. LUCIUS, *Democratic Chief Counsel and Staff Director*

The Honorable Edith Ramirez
Chairwoman
Federal Trade Commission
600 Pennsylvania Avenue, NW
Washington, DC 20580

Ms. Renata Hesse
Principal Deputy Assistant Attorney General, Antitrust Division
United States Department of Justice
950 Pennsylvania Avenue, NW
Washington, DC 20530

Dear Chairwoman Ramirez and Ms. Hesse:

We write to you regarding three proposed transactions in the seed and agrochemical industry: the merger of Dow Chemical and DuPont, the acquisition of Syngenta by ChemChina, and the acquisition of Monsanto by Bayer. These transactions are currently being reviewed by either the Federal Trade Commission or the Department of Justice. While we take no position about the legality of any of the proposed transactions under the antitrust laws, we believe they raise important competition issues that the Department and Commission should carefully review.

The seed and agrochemical industry has gone through a wave of consolidation over the last few decades. As such, the Big Six—Monsanto, Syngenta, Bayer, DuPont, Dow, and BASF—control considerable market share for seeds, traits, and agricultural chemicals. While the industry has continued to innovate, prices have also increased concurrent with this consolidation. Collaboration across companies, both among the Big Six and with smaller seed companies, has also emerged as an important characteristic of the market. Transgenic seeds allow crops to possess particular traits that can increase yields and provide resistance to a variety of adverse conditions, from insects to disease to drought. These traits, though, are expensive to develop, and firms increasingly cross-license each other's traits rather than develop their own. As more traits are developed, seed companies have begun stacking traits on seeds, creating seeds with multiple different traits.

We ask a lot of our farmers. Farmers make large capital investments in their crops, livestock, buildings, and equipment, and sometimes face heavy losses due to natural and market circumstances beyond their control. We have heard from many of our farmer constituents who are deeply concerned about rapidly deteriorating economic and market conditions. Even as farm incomes and margins have fallen in the last 15 years, input prices have steadily risen.

On September 20, 2016, the Senate Judiciary Committee held a hearing on Consolidation and Competition in U.S. Seed and Agrochemical Industry in order to hear from the agrochemical companies and others in the marketplace about the potential impact of these transactions. Executives from the merging companies insisted that their individual transactions would increase innovation and benefit consumers and farmers. For instance, DuPont Executive Vice President Jim Collins stated, “By combining our complementary strengths, such as DuPont’s seed expertise with Dow’s trait development, we will be able to respond faster and more effectively to the changing conditions that impact farmers with innovative products, greater choice and competitive price for value, ultimately increasing farmer productivity and profitability.” Dr. Robert Fraley, Executive Vice President and Chief Technology Officer of Monsanto, echoed that sentiment, stating, “Monsanto’s expertise in seeds, traits, and data science—combined with Bayer’s crop chemistry portfolio—will strengthen R&D and create new pathways to innovation.”

However, other panelists raised significant concerns regarding the potential combinations of Dow-DuPont and Bayer-Monsanto. Roger Johnson, President of the National Farmers Union, stated that these transactions would result in worryingly high levels of concentration across a wide swathe of products, from corn to soybeans to cotton to canola. According to the International Service for the Acquisition of Agri-Biotech Applications’ GM Approval Database, Dow-DuPont and Bayer-Monsanto would account for up to 60 percent of approved genetic events.

Statistics alone are not dispositive, but they do suggest a careful review is appropriate. A study from the Agricultural and Food Policy Center at Texas A&M introduced into the record concluded that the increased concentration would result in higher prices for corn, soybean, and cotton seed. Chris Novak, CEO of the National Corn Growers Association, stated that these transactions may decrease innovation in the market, both by eliminating significant head-to-head competition for innovation and reducing incentives to cross-license. Mr. Novak explained, “[w]ith any reduction in the number of major market players in the seed industry, it is imperative that open and competitive licensing of biotechnology traits to local and regional seed companies be maintained. The ability of regional seed companies to compete is heavily dependent upon having commercial access to the innovative traits that are likely to come from newly merged companies.” Finally, Diana Moss, President of the American Antitrust Institute, testified that the resulting vertically integrated companies may have the incentive to foreclose competitors by creating platforms of traits, seeds, and chemicals that do not interoperate with rival products.

Additionally, although ChemChina’s proposed acquisition of Syngenta does not appear to increase concentration, several panelists repeated anticompetitive concerns that we have heard from farmers and consumers in our home states and throughout the country. Bob Young, chief economist of the American Farm Bureau Federation, testified that Chinese ownership of Syngenta could lead to “preferential product approval . . . which could create subsequent challenges and implications back into the United States market.” This concern is not purely speculative for those in the agricultural industry. Two years after a Chinese state-owned entity purchased Smithfield Foods, Smithfield’s exports to China rose by 50 percent, giving Smithfield control of 97% of all U.S. pork exports to China—almost to the complete exclusion from the China market of other pork processors. These competition concerns can be particularly complex

when dealing with the web of Chinese state-owned entities,, which may be able to act as a joint economic block, coordinating overlapping businesses and regulatory authorities and reducing competition. The seed market, however, may be different because, as Syngenta CEO Erik Fyrwald explained, all seeds involve cross-licenses to multiple companies and, “the Chinese have no way of exclusively wanting to import grain that has been made from Syngenta seed. It is impossible to do.”

These are important transactions that are critical to a vital industry that affects every American. It is critical that these mergers, alone or in combination, do not substantially lessen competition or tend to create a monopoly. We urge careful consideration of the potential benefits and harms. Further, if you consider potential conditions, you must be confident that they would restore competition that would otherwise be lost.

Thank you for your attention to this matter.

Sincerely,



Mike Lee
Chairman
Subcommittee on Antitrust, Competition
Policy and Consumer Rights



Amy Klobuchar
Ranking Member
Subcommittee on Antitrust, Competition
Policy and Consumer Rights