UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
WASHINGTON, D.C. 20580

Office of International Affairs

July 22, 2014

Competition Policy Review Secretariat
The Treasury
Langton Crescent
PARKES ACT 2600

Re: Competition Policy Review

Dear Secretariat,

Staff of the US Federal Trade Commission[1] commend the government of Australia for conducting this review of its competition laws and policy and appreciate the opportunity to make the attached submission to the Competition Policy Review Panel.

Our comments address misuse of market power by a dominant firm, price signaling, and merger notification and review procedures. We also share our experience as the only federal agency in the United States with both consumer protection and competition jurisdiction in broad sectors of the economy.

We are available to respond to any questions in writing or by telephone and would welcome the opportunity for continued engagement in this review.

Best regards,

Randolph W. Tritell
Director
Office of International Affairs

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[1] The views in this submission do not necessarily reflect those of the Federal Trade Commission or its Commissioners.

I. Proof of Actual or Likely Anticompetitive Effects is the Predominant Basis for Liability in US Monopolization Cases

In connection with the Competition Policy Review Panel's consideration of how the Competition and Consumer Act 2010 ("CCA") would address misuse of market power, we provide the US experience analyzing anticompetitive conduct by firms with substantial market power using an effects-based analysis.

United States antitrust law prohibits conduct by a single firm that unreasonably restrains competition by creating or maintaining monopoly power. Most monopolization cases involve the conduct of a firm with substantial market power, although Section 2 of the Sherman Act also prohibits attempts to monopolize and conspiracies to monopolize. The legal analysis of monopolization claims requires a plaintiff to make two showings: monopoly power and conduct resulting in harmful effects. Under the first prong, courts consider evidence of substantial market power. Courts next ask if that market power was gained or maintained through improper exclusionary or predatory conduct – that is, something other than having a better product or superior management, or as a result of historical accident. One commentator described this inquiry as requiring conduct that excludes rivals on some basis other than efficiency.[2]

Under the second prong, courts evaluate the conduct's actual or likely anticompetitive effects and procompetitive benefits and justifications. In recent cases, intent is rarely, if ever, the focus of the analysis. However, clear evidence of intent to achieve an anticompetitive objective, such as a restriction of overall output or elevation of prices, may be probative of the conduct's harmful character or likely anticompetitive effects. Conversely, a test based on proof of specific intent – or the subjective, conscious objective to monopolize – would not answer the key question of whether a dominant firm's conduct threatened or actually harmed competition in a relevant market. A subjective intent test risks attributing too much weight to hyperbole or unrealistic speculation or too little weight to the harm from objectively anticompetitive acts.

Over the past century, US courts have moved from using intent to an expressly objective effects test. Early Sherman Act cases often addressed anticompetitive intent, although they typically did so in the context of evaluating the character of the defendant's conduct. For example, Chief Justice White's decision in the landmark *Standard Oil* case spoke of an "intent and purpose to maintain the dominancy over the oil industry, not as a result of normal methods of industrial development, but by new means of combination … with the purpose of excluding others from the trade…."[3] Later decisions clarified that monopolization turned on an objective characterization of conduct and, with narrow exceptions, did not depend upon proof of specific intent to achieve an unlawful objective. Thus, Judge Learned Hand's *Alcoa* decision explained: "We disregard any question of intent…; no intent is relevant except that which is relevant to any liability, criminal or civil: *i.e.*, an intent to bring about the forbidden act…. To read the passage

[2] Robert Bork, The Antitrust Paradox 138 (1978) (cited in *Aspen Highlands v. Aspen Highlands Ski Co.*, 472 US 585, 597 n. 33 (1986)).
[3] *Standard Oil Co. v. United States*, 221 US 1, 75 (1911).

as demanding any 'specific' intent, makes nonsense of it, for no monopolist monopolizes unconscious of what he is doing…."[4]

While courts still occasionally mention a defendant's motivation or intent, recent cases objectively evaluate the conduct and its actual or likely effects. For example, in *United States v. Microsoft Corp.*, the US Court of Appeals for the District of Columbia Circuit defined monopolizing behavior, starting with proof of anticompetitive effect:

> First, to be condemned as exclusionary, a monopolist's act must have an "anticompetitive effect." That is, it must harm the competitive *process* and thereby harm consumers. In contrast, harm to one or more *competitors* will not suffice… Second, the plaintiff, on whom the burden of proof of course rests, … must demonstrate that the monopolist's conduct indeed has the requisite anticompetitive effect.… Third, if a plaintiff successfully establishes a *prima facie* case under § 2 by demonstrating anticompetitive effect, then the monopolist may proffer a "procompetitive justification" … –a nonpretextual claim that its conduct is indeed a form of competition on the merits because it involves, for example, greater efficiency or enhanced consumer appeal…. [If such a justification is offered,] then the burden shifts back to the plaintiff to rebut that claim.[5]

While other tests apply to specific types of potentially monopolizing conduct, such as predatory pricing, the *Microsoft* test is probably the most influential recent statement of the general Section 2 standard, which applies to conduct not covered by a more specific test.

The effects test requires a thorough inquiry, yet permits flexibility of proof. First, as the *Microsoft* court stated, it requires actual or threatened harm to the competitive process or to the effectiveness of overall competition. Monopolization enlarges or preserves the defendant's market power at the expense of its competitors. It necessarily injures rivals by preventing them from competing, or by interfering with their opportunities to do so effectively. Yet, aggressive competition on the merits harms rivals or compromises their opportunities. Thus, the effects test looks beyond the effect on rivals, and asks whether the conduct at issue causes or threatens harm to consumers in some manner, such as restricted market output, higher price levels, or reduced innovation. Courts reach a judgment based upon the nature of the conduct, the substantiality of its effects on competitors, and the likelihood of harm to competition itself. A substantial effect on one or more rivals alone is insufficient to show the required effect on competition.

Second, courts apply the effects test pragmatically based upon available evidence. Because the available evidence of effects varies by case and industry context, courts must draw reasonable inferences from the best available evidence, which is often circumstantial. For example, in a case brought by a government agency to enjoin conduct that threatens prospective harm, it may be impossible to show an actual effect on price levels or output even though the

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[4] *United States v. Alcoa*, 148 F.2d 416, 431-32 (2d Cir. 1945); *see also United States v. Griffith*, 334 US 100 (1948) ("It is sufficient that a restraint of trade or monopoly results as a consequence of the defendant's conduct or business arrangements.").
[5] 253 F.3d 34 (D.C. Cir. 2001) (*en banc*) (*per curiam*).

conduct is objectively pernicious and threatens substantial harm. The effects test permits flexibility of proof based on the context and best available evidence.

II. <u>Disclosure and Exchange of Competitively Sensitive Information</u>

We understand that, in the banking sector, the CCA categorically prohibits the private disclosure of price information to a competitor. It also prohibits any public or private disclosure of price, capacity, or strategic information for the purpose of substantially lessening competition. The law appears to apply to both the unilateral disclosure of competitively sensitive information by one or more firms and to exchanges among competitors pursuant to an agreement, such as through a trade association.

As the Review Panel considers changes to price signaling provisions of the CCA, including expanding the existing, sector-specific prohibition on the exchange of price and other competitively sensitive information to cover the entire economy, we hope that the US experience, described below, will be instructive. In particular, the distinctions drawn in the US between unilateral and concerted disclosure, and between public and private disclosures, are useful ways to approach competition concerns related to the exchange of competitively sensitive information. Categorical rules that prohibit all disclosure or exchange of certain types of information sweep too broadly and would prohibit some beneficial information sharing.

The disclosure of accurate information to customers, investors, and other members of the public can be procompetitive or competitively neutral. Markets operate more efficiently when participants convey relevant information, such as prices, quality, and other product attributes, to others in the market. For example, companies may provide information about future price increases to allow customers to adjust their production plans or the timing of their purchases. Similarly, securities markets perform more efficiently when companies disclose relevant information about financial performance, company operations, and business plans to investors. Information about industry production capacity may be used for business planning, including decisions concerning capacity expansion or entry into new markets.

Exchanges of historical, aggregated price, output, or capacity information are often considered lawful because market participants use this information for legitimate business purposes, and it typically does not invite or facilitate harmful price or output coordination. Exchanges of even the most competitively sensitive information, such as future prices, may be justified in certain circumstances. For example, private exchanges of demand projections and future price information by financial institutions acting as issuers, or market makers, allow for price discovery for certain types of securities. US law and enforcement practices do not categorically prohibit disclosures or exchanges of any type of competitively sensitive information because of their recognized benefits in many commercial contexts.

Although information exchanges can be procompetitive or competitively neutral, both unilateral and concerted disclosures of competitively sensitive information can violate US antitrust law under certain circumstances. The US experience is that disclosures and exchanges of competitively sensitive information occur in such diverse commercial contexts that it is not possible to address all of them in a categorical rule of legality or illegality. US courts and the Federal Trade Commission ("FTC" or "Commission") and the Department of Justice, Antitrust Division ("DOJ") (collectively, "the Agencies") apply a categorical, or *per se*, rule only in those cases where the context shows that an information exchange was a component of price-fixing, customer allocation, or other type of cartel arrangement.

In the US, different provisions of our antitrust laws apply to unilateral disclosures of competitively sensitive information, as opposed to exchanges of competitively sensitive information pursuant to an agreement. Section 1 of the Sherman Act, which prohibits agreements that restrain competition, applies to trade association activity and other agreements among competitors. By comparison, a unilateral disclosure of information may, in certain circumstances, violate Section 5 of the Federal Trade Commission Act ("FTC Act"), which prohibits "unfair methods of competition," or Section 2 of the Sherman Act, which prohibits monopolization and attempts to monopolize (as well as a little-used provision prohibiting conspiracy to monopolize). While the legal standards are different under each of these statutory provisions, the Agencies and US courts analyze exchanges of price and other competitively sensitive information on a case-by-case basis and consider both the benefits of and the likely or demonstrated harms from the conduct.

Unilateral Disclosure

Unilateral disclosures of information may, in some circumstances, result in competitive harm. For example, disclosure may be accompanied by a direct invitation from a competitor to collude – a company may unilaterally offer to raise its prices if a competitor will follow suit. Disclosure may also provide competitors with information that allows them to coordinate tacitly in a manner that lessens competition. A unilateral disclosure of information also may raise competitive concern by providing competitors with non-price information about future plans, which would allow them to alter their business plans in a way that allocates customers or territories or otherwise reduces competition. Such practices are sometimes described as signaling, because they remove uncertainty and indicate to competitors how to reach less competitive market outcomes.

FTC enforcement related to signaling have involved unilateral disclosures that amounted to an offer or invitation to a competitor to enter into an agreement. In these cases, had the offer been accepted, the resulting agreement would have violated the Sherman Act. Communications that are offers or invitations to enter illegal agreements are not legitimate business conduct and prohibiting them does deprive market participants or investors of beneficial information.

Three FTC cases illustrate the types of unilateral disclosures that the FTC finds unlawful. *U-Haul International* involved a respondent company that rents trucks to individuals for moving household goods between cities.[6] The company's profits had been held down by aggressive

[6] Complaint, U-*Haul Int'l., Inc.*, FTC File No. 081-0157 (July 14, 2010). http://www.ftc.gov/sites/default/files/documents/cases/2010/07/100720uhaulcmpt.pdf; Decision & Order, *U-Haul Int'l., Inc.*, FTC File No. 081-0157 (July 20, 2010),

competition for market share, particularly from its largest competitor. The FTC alleged in its complaint that U-Haul had developed a strategy to raise its rental rates, call its competitor to disclose that it had done so, and encourage its competitor to increase its rates as well. In addition, the FTC alleged that U-Haul had announced on an investor conference call that it recently had increased its rates and encouraged its competitor to do the same, while warning that it would drop its rates if its competitor did not match them within a specific period of time. U-Haul also announced the level of discount that it would accept from its competitor without retaliation. The FTC alleged that these private and public disclosures created a significant risk of competitive harm – because the proposals could have been accepted and, even if not formally accepted, they could have led to less aggressive competition – and thus violated Section 5 of the FTC Act. The FTC reached a consent decree with U-Haul that prohibited future efforts to use communications of this type to raise or stabilize prices or otherwise to coordinate with other companies on pricing.

Valassis Communications involved an alleged invitation to collude from one publisher of newspaper advertising inserts to its only rival.[7] The FTC alleged in a complaint that, during a public earnings conference call, the CEO of Valassis announced a new strategy to end a contest for market share between the two companies by raising prices of Valassis's inserts. The company knew that its rival, News America, would be monitoring the call. The FTC alleged that Valassis intended to facilitate collusion through its announcement. Moreover, it alleged that there was no legitimate business reason for Valassis to disclose its new pricing strategy. The FTC determined that if News America had accepted the invitation from Valassis, higher prices and reduced output of newspaper advertising inserts were likely to result, and that the conduct violated Section 5. Valassis entered into a consent order with the FTC that prohibits unilateral communications, both public and private, concerning the company's willingness to refrain from competing with rivals or to coordinate pricing with them, as well as prohibiting actual coordination on pricing.

In *Bosley, Inc.*, the Commission alleged in a complaint that Bosley exchanged information on competitively sensitive subjects, including future plans to close existing facilities and current strategies regarding price discounting, with and Hair Club and other rivals in violation of Section 5.[8] Bosley and Hair Club's alleged tacit understanding to exchange the information could facilitate coordination or endanger competition by reducing uncertainty about a rival's product offerings, prices, and strategic plans. For example, the information exchanges could lead a competitor to determine not to open facilities or market its services in a particular location. Alternatively, a competitor might avoid granting additional discounts to maintain existing price levels for surgical hair transplantation services. Any or all of these decisions could result in consumer harm in the form of reduced choice or artificially inflated prices. The potential for harm increased to the extent that Bosley engaged in similar communications with additional rivals. Bosley entered into a consent order with the FTC that bars Bosley from communicating

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http://www.ftc.gov/sites/default/files/documents/cases/2010/07/100609uhauldo.pdf; Analysis of Agreement Containing Consent Order to Aid Public Comment, *U-Haul Int'l., Inc.*, 75 Fed. Reg. 35,033 (June 21, 2010), http://www.ftc.gov/sites/default/files/documents/cases/2010/06/100609uhaulanal.pdf.

[7] *In re Valassis Communications, Inc.*, F.T.C. No. C-4160 (April 19, 2006) (consent order), http://www.ftc.gov/os/caselist/0510008/0510008c4160ValassisDecisionandOrder.pdf.

[8] In re Bosley, Inc., F.T.C.. No. C-4404 (May 30, 2013) (consent order) http://www.ftc.gov/sites/default/files/documents/cases/2013/06/130605aderansregisdo.pdf.

competitively sensitive, nonpublic information directly to any hair transplantation competitor. It also bars Bosley from requesting, encouraging, or facilitating the communication of any such information from any of its competitors.

In these cases, the FTC looked at a variety of factors beyond the type of information disclosed to determine the competitive effect. For example, it considered the context of the disclosure, the nature of industry and market including whether it was susceptible to collusive or coordinated behavior, and any procompetitive business justifications for the disclosure of information.

In contrast to the above cases, unilateral disclosures of competitively sensitive information without an offer to enter an illegal agreement are more difficult to sanction under US antitrust law.

Agreements to Exchange Competitively Sensitive Information

Agreements among competitors to exchange competitively sensitive information are subject to stricter scrutiny under US law than unilateral disclosures. Justifications for agreements to exchange information among competitors are more limited, and their potential to facilitate collusion or coordination, particularly in a concentrated market, is greater. For example, agreements to exchange information are rarely, if ever, needed to inform investors about financial or business information as individual firms may decide to disclose all such relevant information themselves at their own discretion.

The Agencies distinguish between agreements to engage in practices that make it easier for parties to coordinate price or other behavior in an anticompetitive way and hard-core price-fixing, applying stricter analysis and harsher sanctions to the latter. The DOJ focuses its criminal enforcement on cases in which there is no plausible argument that the conduct had a legitimate objective.

When not directly related to cartel activity, an agreement between competitors to exchange competitively sensitive information is generally not *per se* illegal because US law recognizes that information exchanges may produce a variety of procompetitive benefits. Accordingly, these types of arrangements are typically analyzed under the rule of reason.

The Agencies have frequently evaluated information exchanges in the context of physician group negotiation with health care insurers. Through this experience, the Agencies have developed guidelines for exchanges of price and cost information among competitors.[9]

These guidelines indicate that the Agencies will not, absent extraordinary circumstances, challenge provider participation in written surveys of prices for health care services or of wages, salaries, or benefits of health care personnel if the following conditions are satisfied:

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[9] Statements of Antitrust Enforcement Policy in Health Care Issued by the DOJ and the FTC (Aug. 1996), Statement 6, pp.49-52, http://www.ftc.gov/sites/default/files/attachments/competition-policy-guidance/statements_of_antitrust_enforcement_policy_in_health_care_august_1996.pdf.

1. the survey is managed by a third party (*e.g.*, a purchaser, government agency, health care consultant, academic institution, or trade association);

2. the information provided by survey participants is based on data more than 3 months old; and

3. there are at least five providers reporting data upon which each disseminated statistic is based, no individual provider's data represents more than 25 percent on a weighted basis of that statistic, and any information disseminated is sufficiently aggregated such that it would not allow recipients to identify the prices charged or compensation paid by any particular provider.

The Agencies describe these conditions as an “antitrust safety zone intended to ensure that an exchange of price or cost data is not used by competing providers for discussion or coordination of provider prices or costs.” The safety zone is intended as a practical mechanism to balance a provider's individual interest in obtaining information that is useful in adjusting the prices it charges, or the wages it pays in response to changing market conditions, against the risk that the exchange of such information may permit competing providers to communicate with each other regarding a mutually acceptable level of prices for health care services or compensation for employees. This guidance often is applied outside of the health care sector.

While conduct that falls outside of the safety zone would not necessarily violate US antitrust law, the guidelines explain:

> Exchanges of price and cost information that fall outside the antitrust safety zone generally will be evaluated to determine whether the information exchange may have an anticompetitive effect that outweighs any procompetitive justification for the exchange. Depending on the circumstances, public, non-provider initiated surveys may not raise competitive concerns. Such surveys could allow purchasers to have useful information that they can use for procompetitive purposes.
>
> Exchanges of future prices for provider services or future compensation of employees are very likely to be considered anticompetitive. If an exchange among competing providers of price or cost information results in an agreement among competitors as to the prices for health care services or the wages to be paid to health care employees, that agreement will be considered unlawful per se.

When information exchanges facilitated price coordination or collective bargaining, the Agencies have brought enforcement actions. For example, in 2003, the FTC filed a complaint against North Texas Specialty Physicians (“NTSP”), a group of approximately 500 physicians formed to negotiate with health insurers. The complaint challenged the organization’s conduct in securing fee for service contracts on behalf of member physicians. Each of NTSP’s physicians entered into a participation agreement that required every offer made to the physician by a payor be forwarded to NTSP. The physicians agreed not to pursue separate negotiations with payors unless NTSP notified them that it had declined to negotiate with a particular payor. NTSP polled its physicians annually to determine the fees each considered acceptable. The organization then calculated the mean, median, and mode of these amounts. NTSP reported these figures back to its physicians and used the data to calculate a minimum reimbursement schedule. NTSP refused to send offers from payors to its physicians that did not exceed this minimum amount.

An administrative law judge found that NTSP's conduct violated the FTC Act, a finding later affirmed by the Commission. The Commission followed what it calls an "inherently suspect" analysis. While the Commission considered market context, harms, and plausible benefits, the analysis was a truncated rule of reason, consistent with the suspect nature of the conduct and the clear threat of harm to competition.[10] On review, the US Court of Appeals for the Fifth Circuit affirmed, concluding that "the net anticompetitive effects of certain of NTSP's practices were obvious" and the burden properly was shifted to NTSP to show procompetitive justifications. NTSP's conduct, however, did "not plausibly result in a net procompetitive effect or in no effect at all on competition. Accordingly, a quick-look analysis was appropriate in this case."[11]

III. <u>The US Merger Review Process</u>

This section on the premerger notification and review process in the United States supplements the information provided by the Australian Competition and Consumer Commission to further inform the Review Panel's consideration of merger review issues.

<u>Notifiable and Non-notifiable Transactions</u>

In the United States, parties to certain large mergers and acquisitions must notify the FTC and DOJ and wait a specified period before consummating the proposed transaction.[12] The premerger notification system was established to avoid some of the difficulties the Agencies encountered when they challenged suspected anticompetitive acquisitions after they occurred.

Under the Hart Scott Rodino Act ("HSR Act"), the Agencies have 30 days to conduct an initial review of most transactions (15 days in the case of a cash tender offer or a bankruptcy sale). If either Agency decides that further inquiry is necessary, it must seek clearance to make sure only one Agency engages in the substantive review of the transaction. If needed, the Agency can issue a request for additional information and documentary material ("second request"). The second request extends the waiting period until 30 days after all parties have substantially

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[10] *In the Matter of North Texas Specialty Physicians*, http://www.ftc.gov/enforcement/cases-proceedings/0210075/north-texas-specialty-physicians-matter.

[11] *North Texas Specialty Physicians v. Fed'l Trade Comm'n*, 528 F.3d. 346, 360-61 (5th Cir. 2005).

[12] 5 U.S.C. § 18a, Section 7A of the Clayton Act. The HSR Act requires companies to file with the Agencies if the value of a transaction exceeds the Size of Transaction filing threshold, and in some cases the Size of Person threshold, absent an applicable exemption. See tip sheet, http://www.ftc.gov/enforcement/premerger-notification-program/hsr-resources/steps-determining-whether-hsr-filing. The FTC revises the HSR thresholds annually based on the change in gross national product. As of February 24, 2014, the size of transaction threshold is $75.9 million. A full listing of current thresholds can be found on the FTC's website, http://www.ftc.gov/enforcement/premerger-notification-program/current-thresholds. Acquisitions that lack sufficient nexus to US commerce and certain classes of acquisitions that are not likely to raise antitrust concerns are exempt from notification.

complied with the request (or, in the case of a tender offer or a bankruptcy sale, 10 days after the acquiring person complies). At any point during the review, the Agency and the merging parties may enter into a settlement with remedies designed to address the competitive concerns raised by the transaction. If the Agency and parties do not reach a settlement, the Agency may seek an injunction prohibiting the transaction from a federal district court.

An important feature of US antitrust law is the Agencies' ability to reach transactions that are not subject to mandatory notification under the HSR Act.[13] The investigative procedures are largely the same for non-notifiable mergers as for notifiable ones, but without a second request procedure or statutory deadlines. The Agencies can issue compulsory process in the form of subpoenas and civil investigative demands ("CIDs") with questions aimed at obtaining the same information from the parties that a second request would under the HSR process. In these cases, the thirty-day statutory waiting period does not apply, and timing issues are critical. If the transaction has been consummated, the Agencies proceed rapidly to avoid changes in the disposition of assets that would make it more difficult to restore competition if the transaction is deemed to violate the law, but the investigative process is in practice generally no different than if the parties had not yet merged. In addition, the Agencies may seek to obtain an asset maintenance or hold separate agreement from the parties to avoid further integration of the assets. If the Commission determines that a consummated merger violates the antitrust laws, it can require the same types of remedies that are available in the case of reportable mergers, including a complete unwinding of the acquisition.

HSR Notification

The FTC administers the Premerger Notification Program and processes HSR filings. Staff of the Premerger Notification Office are available to give informal advice on the potential reportability of transactions and to provide assistance in completing the HSR Notification and Report Form ("HSR Form").[14] Given the relatively straightforward nature of the information requested in the HSR Form, parties do not need to engage in extensive discussions with the

[13] 15 U.S.C. § 18. The Agencies have investigated and challenged under Section 7 of the Clayton Act a number of transactions that were not reportable under the HSR Act. In addition, the Agencies do not "clear" or "approve" mergers that were notified under the HSR Act. The Agency can challenge a notified merger that was consummated after the expiration of the initial HSR waiting period if it later has reason to believe that the transaction is anticompetitive. In either situation, FTC or DOJ may choose to open an investigation based on complaints from customers or evidence of actual anticompetitive effects that have occurred after closing. The Agencies may also learn of a potentially anticompetitive merger through news reports, information from other investigations, or in some cases self-reporting by the parties. *See* Note submitted by United States to the OECD Competition Committee Working Party No. 3 on Investigations of Consummated and Non-Notifiable Mergers, http://www.ftc.gov/system/files/attachments/us-submissions-oecd-other-international-competition-fora/consummated_mergers_us_oecd.pdf.

[14] It is very common for staff to assist with technical, notification-related questions in determining whether a transaction is reportable under the HSR Act. http://www.ftc.gov/enforcement/premerger-notification-program. The HSR Form and instructions are available at http://www.ftc.gov/enforcement/premerger-notification-program/form-instructions.

Agencies to perfect the filing. Typically, the initial substantive discussions will occur after a filing is made.[15]

The HSR Form requires filing parties to identify the persons involved in and the structure of the transaction. The form also requires the parties to disclose whether the acquiring person and acquired entity currently derive revenue from businesses that fall within any of the same industry and product codes using the North American Industry Classification System ("NAICS"),[16] and, if so, in which geographic areas they operate. Identification of overlapping codes may indicate whether the parties engage in similar lines of business. Acquiring persons must also identify certain recent acquisitions of companies or assets engaged in businesses in any of the sectors covered by the overlapping codes.

With the HSR Form, parties must submit certain documents, such as annual reports and copies of all studies, surveys, and analyses prepared by or for officers or directors analyzing the proposed transaction with respect to market shares, competition, competitors, markets, potential for sales growth, or expansion into product or geographic markets (known as Item 4(c) documents) and confidential information memoranda, bankers' books and other third party consultants' materials, and documents that identify synergies related to the acquisition (known as Item 4(d) documents).

Item 4(c) and 4(d) documents are among the most useful information provided in the initial filings. They are always a focal point for initial review by Agency staff because they often include information about potential markets, strategic plans, and business reasons for the merger. Along with the basic product overlap information provided on the form, 4(c) and 4(d) documents are critical to the Agencies' early review and screening.

Once an HSR Form has been filed, parties can voluntarily provide additional information during the initial 30-day waiting period. Documents typically provided in the small percentage of matters that raise competition concerns include: (i) organizational charts; (ii) strategic plans for the past three years; (iii) marketing plans for the past three years; (iv) lists of products manufactured and sold, and; (v) lists of products in development. For products that overlap, parties typically provide: (i) a list of each side's top 10 customers and customers' contact information; (ii) a list of competitors, including contact information,, and; (iii) market share information. Agency staff routinely request that parties voluntarily provide these documents and information to assist staff in quickly and efficiently evaluating whether the proposed transaction raises competitive concerns.[17]

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[15] Substantive pre-notification meetings with investigative staff at the Agencies are not common, but are possible. See http://www.ftc.gov/enforcement/premerger-notification-program.

[16] Information regarding NAICS is available at the Bureau of the Census website at http://www.census.gov/epcd/www/naics.html.

[17] Examples of such information requests can be found at: http://www.ftc.gov/enforcement/premerger-notification-program/hsr-resources/guidance-voluntary-submission-documents and http://www.justice.gov/atr/public/220237.htm.

In fiscal year 2013, 1,286 transactions were filed with the Agencies pursuant to the HSR premerger notification rules. Second requests were issued in 47 merger investigations (25 by the FTC and 22 by the DOJ), representing 3.7% of notified transactions.[18]

Second Requests

Second requests are issued when Agency staff is unable to resolve competitive concerns prior to the expiration of the initial waiting period.[19] Over the past ten years, second requests have been issued in less than 5% of HSR reported transactions.[20] Second requests seek documents, data, and responses to questions that are tailored specifically for the transaction at hand.[21] A second request typically asks for business documents and economic data that will inform the reviewing Agency about the company's products or services, market conditions, and the likely competitive effects of the proposed transaction.[22] To obtain and evaluate pertinent information, the FTC or DOJ staff also may conduct interviews, either informally or by sworn testimony, of parties' employees and others with knowledge of the industry, and engage parties' economists on the economic analysis of the transaction's likely effects.

Once the parties have substantially complied with the second request, the reviewing Agency has 30 additional days to challenge a transaction or close its investigation, allowing the transaction to proceed (10 days for cash tender offers and certain bankruptcy sales) (the "second waiting period"). The parties and the reviewing Agency may agree to a longer review period that would permit the Agency to resolve any remaining issues without litigation. For instance, under a timing agreement, the parties may agree to wait to certify substantial compliance with the second request, which delays the start of the second waiting period. The parties may consummate the transaction if the reviewing Agency decides to close its investigation prior to the expiration of the second waiting period.

If the reviewing Agency determines that certain information and data sought in the second request can assist staff in more quickly resolving one or more issues critical to the investigation, Agency staff may suggest that the filing parties focus their initial submissions on the most critical competitive issues and staff will conduct an informal "quick look" review of those submissions. If the initial submissions resolve staff's concerns, the Agency will terminate the waiting period, and the parties can consummate the transaction without responding to the full second request. Similarly, parties also may produce documents on a rolling basis in an attempt to

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[18] See HSR Annual Report for FY 2013, http://www.ftc.gov/system/files/documents/reports/federal-trade-commission-bureau-competition-department-justice-antitrust-division-hart-scott-rodino.s.c.18a-hart-scott-rodino-antitrust-improvements-act-1976/140521hsrreport.pdf.

[19] In some investigations, the buyer may voluntarily choose to withdraw and refile an HSR notification to allow additional time to review a transaction during the initial waiting period, thus potentially avoiding a costly second request; the buyer is not required to pay an additional filing fee if it refiles within two business days. For more information on withdrawal and refiling, see http://www.ftc.gov/news-events/press-releases/2013/06/ftc-finalizes-amendments-premerger-notification-rules-related. and http://www.ftc.gov/system/files/attachments/hsr-resources/withdraw_and_refile_procedures_tip_sheet.pdf

[20] See HSR Report for FY 2013 at Figure 2.

[21] Staff and the parties often have extended discussions and agree to modifications to the second request.

[22] A model second request is available at http://www.ftc.gov/sites/default/files/attachments/merger-review/guide3.pdf.

resolve competitive issues without substantially complying with the second request. If the submitted information adequately addresses any competitive concerns, staff many close the investigation or the parties may offer to resolve any remaining competitive concerns through a negotiated settlement including divestitures.

Engagement with the Parties

At every stage of an FTC merger investigation, parties are encouraged to meet with the lawyers and the economists investigating the transaction. The ongoing dialogue over the course of an investigation often covers both substantive and procedural issues.

Upon initiating an investigation, staff will often discuss its working theories and any changes to its working theories or new allegations as they arise during the course of an investigation. This frequent interaction includes telephone discussions as well as periodic meetings. As part of the ongoing dialogue with parties, staff typically will explain the general nature of the evidence uncovered during the investigation, subject to confidentiality protections. For example, investigative staff may informally summarize facts and the nature of evidence obtained from third party interviews and information requests, but they will not – and cannot – share confidential information submitted by third parties or even the identity of the third party.[23]

The parties and staff will also discuss the anticipated timing of major aspects of an investigation, such as Agency requests for information and the Agency's decision-making process. The parties will have opportunities to meet with senior managers and, in cases that may result in law enforcement action, each of the Commissioners. The parties often choose, but are not required, to enter into a timing agreement with the FTC to delay the start of the waiting period for mergers raising anticompetitive issues. These agreements typically set out a timeline for submission of information and meetings with FTC staff and decision makers.

[23] The FTC generally treats information provided by the parties and third parties as confidential, both as a matter of policy and pursuant to statutory restrictions. The identity of an informant or complainant is confidential and is not disclosed during an investigation (but is made known if the agency relies on information they provide in an adjudicative proceeding). Parties or third parties may choose to waive confidentiality protections to permit the Agencies and non-US competition authorities to share the party's or third party's confidential information. This enables more informed discussions between the US agency and non-US competition authority reviewing the same transaction. This does not alter the obligations under applicable law to prevent public disclosure of this information.

IV. Competition & Consumer Protection Linkages

Like the Australian Competition and Consumer Commission, the FTC has responsibility for enforcing competition and consumer protection laws. The FTC is the only federal agency in the United States with both consumer protection and competition jurisdiction in broad sectors of the economy.[24] To better promote the United States' market-based economic system, the FTC enforces consumer protection laws that prevent fraud, deception and unfair business practices and competition laws that prohibit anticompetitive mergers and other business practices that could lead to higher prices, fewer choices, or less innovation.

The FTC's activities in these two areas enhance consumer welfare by fostering a vigorous, competitive marketplace that enable consumers to make better informed choices and leads to greater availability of products with the qualities desired by consumers at competitive prices. Strong competition benefits consumers by encouraging new market entrants, by creating incentives for innovation, and by motivating sellers to provide more truthful, useful information about their products. Consumer protection policy supports those goals by ensuring the empowerment of consumers to participate in the marketplace by enabling them to make well-informed decisions about their choices. Sound consumer protection policy also reinforces sound competition policy by ensuring that firms are not constrained from truthful marketing of new and innovative products and services. Unwarranted restrictions deter such innovation, because there will be no incentives for a firm to invest in developing a new product or service if it cannot advertise and market it.[25]

Maintaining both missions within the FTC ensures that competition principles form the foundation of a sound consumer protection program while ensuring that competition law enforcement keeps consumer interests in the foreground of its mission.

The FTC has three bureaus broadly divided along mission lines. The Bureau of Competition ("BC") focuses primarily on enforcement of the FTC Act's prohibition of unfair methods of competition under antitrust law. The Bureau of Consumer Protection ("BCP") is

[24] In addition to sharing responsibility for enforcing the US antitrust laws with the Antitrust Division of the Department of Justice, the FTC shares responsibility at the federal level for enforcing certain consumer protection laws, such as financial consumer protection laws, with other US agencies such as the Consumer Financial Protection Bureau. Other federal agencies, such as the Consumer Product Safety Commission, are responsible for other aspects of consumer protection.

[25] The linkages between competition and consumer protection have been discussed by the FTC in more detail in other publications. *E.g.*, Interface of Competition and Consumer Policies, Note by the United States Federal Trade Commission (Organization for Economic Competition and Development, Competition and Consumer Policy Committees, Oct. 7, 2003), http://www.ftc.gov/sites/default/files/attachments/us-submissions-oecd-and-other-international-competition-fora/Comp-ConsumerPro%20jnt%20rndtbl_2003%20Oct_US%20paper.pdf; Timothy J. Muris, The Interface of Competition and Consumer Protection, Prepared Remarks at The Fordham Corporate Law Institute's Twenty-Ninth Annual Conference on International Antitrust Law and Policy, New York City (Oct. 31, 2002), http://www.ftc.gov/sites/default/files/documents/public_statements/interface-competition-and-consumer-protection/021031fordham.pdf. *See also* Thomas B. Leary, Competition Law and Consumer Proteciton Law: Two Wings of the Same House, 72 ANTITRUST L.J. 1147 (2005); Neil W. Averitt and Robert H. Lande, Consumer Sovereignty: A Unified Theory of Antitrust and Consumer Protection Law, 65 ANTITRUST L.J. 713 (1997).

responsible for the FTC's mission to prevent unfair or deceptive acts or practices. The Bureau of Economics ("BE") supports the competition and consumer protection enforcement work of the other bureaus and carries out much of the agency's research mission.

The FTC integrates its competition and consumer protection missions by focusing policy and enforcement in both areas on market-oriented outcomes. BC and BCP look for opportunities to exploit potential synergies and to coordinate on agency priorities and activities. BE, in particular, helps ensure that the FTC considers the economic implications of its actions in markets as they relate to antitrust, consumer protection, and regulation.

In both competition and consumer protection, the FTC focuses on areas that affect consumers most and selects the tool best adapted to the problem. Whether the remedy is to address impediments to competition or impediments to information that prevent consumers from reaping the benefits of competition, coordinating competition and consumer protection policy ensures that both supply and demand side imperfections are addressed in a complementary manner.

While most aspects of the FTC's competition and consumer protection enforcement do not entail overlaps between the two missions, the following are examples of areas in which two missions' functions can complement each other.

Real Estate

A home is typically the single most expensive and complicated purchase consumers make. Consumers purchase real estate infrequently, and many are uninformed about the process. Consequently, most consumers must engage real estate brokers, mortgage lenders, settlement services, and other service providers to help them. Established service providers, however, have found opportunities to capitalize on consumer inexperience and exclude new forms of competition from the market, both through coordinated private conduct and attempts to secure favorable governmental regulation. The FTC helps to promote real estate markets that deliver the benefits of competition to consumers by eliminating anticompetitive barriers to competition through enforcement and advocacy and providing consumers with the information they need to take advantage of a competitive marketplace.

These efforts are described more fully in the United States' 2009 OECD submission on the interface between competition and consumer policy.[26] In two investigations described in that submission, the FTC explored suspected horizontal agreements to suppress the advertising of low-cost brokerage services to consumers. In these matters, trade associations of real estate brokers disciplined discount brokers on the grounds that their low-price claims misled consumers in violation of association ethics codes. Analysis of these matters required not only an

[26] http://www.oecd.org/unitedstates/39915760.pdf. Since that submission was prepared, the US Court of Appeals for the Sixth Circuit upheld the Commission's decision in *Realcomp II*, finding that Realcomp II violated federal law by restricting the ability of member real estate agents to offer consumers lower priced alternatives to traditional real estate services by refusing to transmit discount real estate listings to its own and other publicly available websites and excluded such listings from the default searches within its own database. See http://www.ftc.gov/sites/default/files/documents/cases/2010/04/110408realcompopinion.pdf.

assessment of whether the associations engaged in anticompetitive practices, but whether the advertising claims were misleading. These cases also required the FTC to strike an appropriate balance between consumer protection interests in promoting effective industry self-regulation and competition interests in ensuring that industry self-regulation does not create anticompetitive barriers to entry by low-cost competitors.[27] The investigations ultimately were closed, but they effectively illustrate the importance of considering cases that implicate restrictions on consumer information from both a competition and consumer protection point of view.

<u>Self-regulation</u>

The self-regulatory aspect of the real estate cases also highlight the complementary nature of the FTC's joint consumer protection and competition responsibilities. The FTC has long considered self-regulation, whether industry-led or involving some level of governmental participation, to be an important tool for increasing consumer welfare. From a consumer protection perspective, self-regulation, when it is designed and implemented correctly, can benefit consumers and regulators by regulating industry conduct more promptly, flexibly, and effectively than government regulation alone. Self-regulation, especially self-regulatory dispute mechanisms, can resolve consumer concerns, so that government enforcement resources can be preserved for the most egregious cases of consumer harm. Viewed through a competition lens, self-regulation is an important tool that can be used to improve markets because it gives consumers access to information so they can make better-informed decisions about products and services. Self-regulation, however, raises certain competition risks when it provides an opportunity for incumbents to create barriers to entry or block new forms of competition. Accordingly, the agency has applied its expertise in consumer protection and competition issues to provide guidance for businesses on self-regulation and assess how well certain self-regulatory mechanisms are working.[28]

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[27] Industry self-regulation identifies a classic situation that our experience shows requires a coordinated view of competition and consumer protection considerations. Self-regulation often offers a more efficient way to protect consumers from fraud, deception, and confusion than government regulation can provide. *See* Deborah Platt Majoras, "Self Regulatory Organizations and the FTC," Address to the Council of Better Business Bureaus (Apr. 11, 2005), http://www.ftc.gov/speeches/majoras/050411selfregorgs.pdf. At the same time, self-regulation, if not administered with an eye to sound competition principles, can restrict competition and harm consumer welfare. *See* Thomas B. Leary, "Self Regulation and The Interface Between Consumer Protection and Antitrust," informal seminar remarks, (Jan. 28, 2004), http://www.ftc.gov/speeches/leary/040128deweyballantine.pdf. With its institutional understanding of competition and consumer protection issues raised by self-regulation, the FTC has been in a unique position to interact with self-regulatory programs to ensure that they realize their full potential to maximize consumer welfare. *See also* Maureen K. Ohlhausen, Success in Self-Regulation: Strategies to Bring to the Mobile and Global Era, BBB Self-Regulation Conference remarks (June 24, 2014), http://www.ftc.gov/system/files/documents/public_statements/410391/140624bbbself-regulation.pdf.

[28] See, *e.g.*, FTC reports and recommendations on food advertising and advertising of violent content in the movie, music, and gaming industries, collected at http://www.ftc.gov/food-marketing-to-children-and-adolescents and http://www.consumer.ftc.gov/features/feature-0024-entertainment-ratings.

The FTC interacts with self-regulatory schemes in three main ways: (i) via a shared regulatory arrangement with an industry self-regulatory organization pursuant to statute or rule (*e.g*., the Funeral Rule Offenders Program, the COPPA Safe Harbor)[29]; (ii) through referrals for investigation and enforcement, essentially as the "backstop" enforcer for private self-regulatory schemes; and (iii) by exercising its information gathering authority to examine and report on industry compliance with self-regulatory schemes (*e.g*., Food, Violence, Alcohol reports)[30]. In all of these interactions, the FTC is mindful of the competition concerns – as the agency has explained to the US Congress, "[t]he role of government enforcers ... is not to interdict legitimate industry self-regulation but to ensure that such efforts are consistent with the operation of competitive markets."[31] Given the increasing use of self-regulation, the FTC's combined expertise on competition and consumer protection serves as an important touchstone for legitimate self-regulation.

Indeed, industry self-regulation in the name of consumer protection can directly impede competition, inadvertently undermining consumer welfare. Industry codes of conduct that banned comparative advertising were officially tolerated in the United States until the benefits of truthful comparative advertising were recognized by the FTC in the 1970s.[32] It is now well-recognized that truthful comparative advertising provides useful information to consumers that allows them to choose make better informed decisions among competing firms and thus promotes competition among firms to provide consumers with better products.[33]

Professional Services

Professional regulation is another area in which the FTC strikes a balance between the competition concerns that arise when professionals regulate their peers and the potential benefits to consumers. An example of how FTC's synergistic approach has been applied in this area is the regulation of ophthalmic goods and services. When concerns over the high cost of such goods and services first arose in the 1980s, the FTC decided to review whether private and governmental restraints with the purported goal of consumer protection were preventing the expansion of a more efficient segment of the industry. Consequently, the FTC conducted two in-depth studies that showed that restrictions on the commercial practice of optometry reduced

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[29] http://www.ftc.gov/news-events/press-releases/2014/03/ftc-undercover-inspections-funeral-homes-nine-states-test; http://www.business.ftc.gov/content/safe-harbor-program.

[30] http://www.ftc.gov/system/files/documents/reports/self-regulation-alcohol-industry-report-federal-trade-commission/140320alcoholreport.pdf; http://www.ftc.gov/sites/default/files/documents/reports/marketing-violent-entertainment-children-sixth-follow-review-industry-practices-motion-picture-music/p994511violententertainment.pdf; http://www.ftc.gov/sites/default/files/documents/reports/marketing-food-children-and-adolescents-review-industry-expenditures-activities-and-self-regulation/p064504foodmktingreport.pdf.

[31] http://www.ftc.gov/news-events/press-releases/2000/09/federal-trade-commission-testifies-antitrust-implications.

[32] FTC Policy Statement in Regard to Comparative Advertising, 16 C.F.R. 14.15(b) (2005).

[33] *See* Interface of Competition and Consumer Policies, Note by the United States Federal Trade Commission, *supra* note 23, at 20-23; Amended proposal for a Regulation concerning sales promotions in the Internal Market, COM (2002)585(01) _2 (Oct. 2002); R. Pitofsky, Beyond Nader: Consumer Protection and the Regulation of Advertising, 90 Harv. L. Rev. 661, 671 (1977) (discussing the advantages to consumers and competition that flow from comparative advertising).

competition and increased costs to consumers but did not affect average quality, which was the purported consumer protection justification for the rules.[34]

In response to evidence of restrictions on competition and choice, the FTC took action on three fronts. First, the FTC brought an administrative case against a state licensing board composed of practicing optometrists, charging that the Board unlawfully restricted advertising of truthful, non-deceptive information about the price and availability of eye care services. Significantly, the FTC complaint alleged that the Board's practices were both unfair methods of competition and unfair acts and practices. After a trial, the FTC ruled that the Board's ban on affiliation advertising affiliations between optometrists and optical retailers unlawfully impeded entry by retail optical stores and raised prices for eye care. The FTC prohibited the Board from restricting certain types of advertising and required it to repeal its prohibitions against such affiliation advertising.[35] Second, using its consumer protection jurisdiction, the FTC proposed to amend an existing Trade Regulation Rule by declaring certain state restrictions on the commercial practice of optometry to be unfair acts and practices in violation of the FTC Act.[36] Third, the FTC engaged in a vigorous campaign of competition advocacy to persuade state legislatures that anticompetitive regulations that excluded more efficient sellers of ophthalmic goods and services was bad public policy.

Most of the positions the FTC advocated ultimately prevailed. The courts struck down the restrictions on advertising by optometrists as infringing the commercial speech rights of non-traditional optometrists. Discount sellers of ophthalmic goods began to enter the marketplace and compete vigorously with more established sellers. In some cases, restrictions were repealed, and in others the sellers found ways to minimize their effects.

<u>Green Guides</u>

In 2012, the FTC issued a revised version of its guides for environmental marketing, popularly known as the "Green Guides."[37] The Green Guides were originally issued in response to concerns about firms making misleading representations regarding the environmental attributes of their products. Rather than prohibit broad classes of advertising claims about how a product affects the environment, the Green Guides encourage competition based on advertising truthful attributes. They inform sellers of the level of substantiation they need before they can make a claim. When firms are able to advertise those attributes, they have incentives to invest in making their products more environmentally friendly.

For example, some manufacturers advertise that their products are biodegradable. However, there are wide differences in how long it takes a product to biodegrade, whether all

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[34] FTC Bureau of Economics, Staff Report on Effects of Restrictions on Advertising and Commercial Practice in the Professions: The Case of Optometry (1980); FTC Bureaus of Economics and Consumer Protection, A Comparative Analysis of Cosmetic Contact Lens Fitting by Ophthalmologists, Optometrists, and Opticians (1983).
[35] *Mass. Bd. of Registration in Optometry*, 110 F.T.C. 549 (1988).
[36] Ophthalmic Practice Rules, 54 Fed. Reg. 10285 (1989). The rules were later invalidated by the courts on federalism grounds. California State Board of Optometry v. FTC, 910 F.2d 976 (D.C. Cir. 1990).
[37] Links to the Green Guides are at http://www.ftc.gov/news-events/press-releases/2012/10/ftc-issues-revised-green-guides.

components biodegrade, and the circumstances in which they will biodegrade. The Green Guides advise marketers not to make an unqualified degradable claim for a solid waste product unless they can prove that the entire product or package will completely break down and return to nature within one year after customary disposal, in light of evidence about how consumers perceive such claims. Rather than decreasing incentives to compete by restricting the flow of truthful information to consumers, which a more regulatory approach might do, the Green Guides encourage firms to compete on the basis of truthful information.[38]

Joint Work on Individual Law Enforcement Matters

Staffs from the BC and BCP occasionally work together, as appropriate, on individual matters that involve both competition and consumer protection claims. One such matter was the FTC's case against Intel, issued in December 2009, alleging that the company used anticompetitive tactics to cut off rivals' access to the marketplace and deprive consumers of choice and innovation in the microchips that comprise computers' central processing unit ("CPU"). The FTC alleged that Intel's practices violated Section 5 of the FTC Act, which in addition to prohibiting unfair methods of competition, prohibits deceptive acts and practices. The case addressed supply side (or competition) distortions of the market by addressing Intel's alleged use of threats, bundled prices, and other offers to exclude or hamper competition or otherwise unreasonably inhibit the sale of competitive CPUs or graphic processing units ("GPUs"). The case also addressed demand side (or consumer protection) market distortions by addressing Intel's alleged deception of computer manufacturers about the performance of non-Intel CPUs or GPUs.[39]

While competition enforcement traditionally considers consumer welfare and that consumer protection enforcement should consider the benefits of the market to consumers, combining the two missions makes the overall value of the FTC's work greater than the sum of its component parts. When consumer protection enforcers are institutionally informed by the value of competition and competition enforcers are similarly informed about the way markets affect consumers, both become better enforcers in their own spheres.

The FTC continues to consider ways to integrate its missions among the leaders and staff of the agency, and ways to improve such integration.

[38] The guides and cases alleging false and unsubstantiated environmental claims are collected at http://www.ftc.gov/news-events/media-resources/truth-advertising/green-guides.
[39] http://www.ftc.gov/news-events/press-releases/2010/08/ftc-settles-charges-anticompetitive-conduct-against-intel.