Roundtable Discussion Series on

Competition & Deregulation

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Antitrust Division

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Introduction and Executive Summary

The Roundtable Discussion Series on Competition and Deregulation provided an opportunity for the Antitrust Division to consider a wide variety of perspectives as it assesses harm to competition from many forms of regulation.[1] The insights gained from the roundtables will better equip the Division in its efforts to adopt and advocate for policies that remove impediments to free-market competition and, in turn, minimize harm to American consumers.

The Series brought together leading thinkers from a range of legal and advocacy organizations across the policy spectrum. It consisted of three roundtable discussions linked together by the premise that proper antitrust enforcement allows markets to thrive while requiring less regulatory intervention. Markets are best governed by competition, rather than by rules of conduct crafted and enforced by regulators, which often may be inefficient, outdated, and unresponsive to consumer demands.

Prior to serving as a distinguished Associate Justice on the U.S. Supreme Court, Robert Jackson made this point in 1937 when he gave a speech as the Assistant Attorney General for the Antitrust Division. He said: "The antitrust laws represent an effort to avoid detailed government regulation of business by keeping competition in control of prices. It was hoped to ... let [government] confine its responsibility to seeing that a true competitive economy functions."[2] This, he said, "is the lowest degree of government control that business can expect."[3]

This approach reflects a fundamental choice in the relationship between government and the economy. While some economies are centrally planned and others are highly regulated, in the United States our economy is premised on liberty. In the United States, through the give and take of the free market, the competitive process maximizes consumer welfare by favoring efficiency, innovation, choice and lower prices to the consumer.

The ideal of the free market is precisely what the antitrust laws were designed to protect. As Justice Black wrote in *Northern Pacific*[4], the Sherman Act is a "comprehensive charter of economic liberty," and antitrust enforcement "rests 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."[5]

The focus on economic liberty and consumer welfare serves our most cherished values. The economic liberty approach to industrial organization is also sound economic policy for a free nation. F. A. Hayek won the 1974 Nobel Prize in economics for his work on the problems of central planning and the benefits of a decentralized free market system. The price system of the

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[1] Participating organizations included: The American Antitrust Institute, the American Bar Association, Section of Antitrust Law, the American Enterprise Institution, the Association of Corporate Counsel, the Cato Institute, Consumers Union, the Heritage Foundation, the National Diversity Coalition, the Open Markets Institute, Public Knowledge, and the United States Chamber of Commerce.

[2] Robert H. Jackson, Assistant Att'y Gen., Antitrust Div., Dep't of Justice, Should the Antitrust Laws be Revised?, Address Before the Trade and Commerce Bar Association and Trade Association Executives (Sept. 17, 1937), in 71 U.S.L. REV. 575, 576 (1937), https://www.roberthjackson.org/speech-and-writing/should-the-antitrust-laws-be-revised.

[3] *Id.*

[4] *N. Pac. Rwy. Co. v. United States*, 356 U.S. 1 (1958).

[5] *Id.* at 4.

free market, he explained, operates as a mechanism that communicates diffuse information held by consumers and businesses throughout the economy.[6] He also explained that "[i]f we can agree that the economic problem of society is mainly one of rapid adaptation to changes in the particular circumstances of time and place, it would seem to follow that the ultimate decisions must be left to the people who are familiar with these circumstances."[7]

Economic regulation, by contrast, often handcuffs the free market's invisible hand. It introduces a decision maker who cannot possibly account for the wealth of information and dynamism that the free market incorporates. The Heritage Foundation, represented by Alden Abbot on the first roundtable, noted that regulation "is a breeding ground for anticompetitive activity," adding that "complex regulatory schemes, even when entirely well-intentioned, may seriously distort the competitive process."

Broad, bipartisan agreement has emerged over the past several decades that consumer welfare is the ultimate goal of the antitrust laws. Antitrust seeks to protect the competitive process to maximize consumer welfare, and it relies on economic analysis to effectively serve that goal. In so doing, it minimizes the need for regulatory intervention on issues of price, quality, choice, and investment.

The roundtables demonstrated an increasing consensus that timely and vigorous antitrust enforcement plays an important role in building a less regulated economy in which innovation and business can thrive, and ultimately the American consumer can benefit. Diana Moss, President of the American Antitrust Institute (AAI) noted during the first roundtable that while "there's a little bit of a tension in the consumer community, favoring certain types of regulatory approaches to achieve certain goals," AAI, echoed by other consumer perspectives, eagerly took the side of being "advocates of vigorous enforcement in promoting competitive markets, so that consumers can benefit. And that means not a lot of regulation between competition and the consumer."

The roundtables were an example of how seriously the Antitrust Division takes having the opportunity to have in depth conversations from a range of constituents and viewpoints and to get feedback on possible future initiatives that support pro-competitive deregulatory efforts and inform our policy positions. Jeffrey Eisenach, representing the American Enterprise Institute, remarked that the "great thing about antitrust is that we all gather here within a generally agreed upon framework of analysis and debate over points … and bring evidence to the table. That isn't necessarily the way policymaking works in other areas of government, so it's great to be able to sit with a group of thoughtful people and have a substantive discussion."

The roundtable series presented the Antitrust Division, and the public, with sessions organized around three broad topics.

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[6] Friedrich A. Hayek, *The Use of Knowledge In Society*, 35 AM. ECON. REV. 519, 526-27 (1945). Hayek argued that "those who clamor for 'conscious direction'—and who cannot believe that anything which has evolved without design (and even without our understanding it) should solve problems which we should not be able to solve consciously—should remember this: The problem is precisely how to extend the span of out utilization of resources beyond the span of the control of any one mind; and therefore, how to dispense with the need of conscious control, and how to provide inducements which will make the individuals do the desirable things without anyone having to tell them what to do." *Id.*

[7] *Id*. at 524.

I.
Exemptions and Immunities

The first roundtable covered regulatory exemptions and immunities from the antitrust laws. If we view antitrust as enabling markets with limited regulation, how should the Division think about exemptions to antitrust? The Antitrust Division (and the Federal Trade Commission) typically oppose exemptions from the antitrust laws, which often arise as adjuncts to industry-specific regulatory schemes. A variety of statutory exemptions and immunities nonetheless still exist in federal law. Congress can exempt certain types of conduct by particular actors from some or all of the antitrust laws through legislation. Some exemptions are vestiges of earlier antitrust enforcement policies that were deemed to be insufficiently sensitive to the benefits of certain types of conduct. Others have been characterized as special interest legislation that sacrifices general consumer welfare for the benefit of a particular group or industry.

The roundtable reflected a consensus that Congress should not enact future antitrust exemptions or immunities, and further that Congress also should explore actively studying and sunsetting or eliminating current statutory exemptions and immunities. John Roberti, representing the Antitrust Section of the American Bar Association (ABA), in particular noted that a key finding of the Antitrust Modernization Commission was that "many exemptions were justified originally under the theory that, in certain industries, regulation was preferable to competition," but "economic theory has evolved to reject this foundation." The American Antitrust Institute's Randy Stutz added that "our legal rules have become better and more precise," while AAI's Diana Moss observed that "immunities and exemptions shield certain types of anticompetitive conduct … without fully promoting the goals that they are intended to achieve." The Heritage Foundation's Alden Abbott argued that "antitrust exemptions tend to foster legal cartels; both economic theory and empirical research support the proposition that statutory antitrust exemptions do undermine competition and, most importantly, consumer welfare." Moss added that it is important to emphasize "all the ways in which consumer welfare can be harmed" beyond price effects, including effects on choice, variety, and innovation.

Some participants raised the issue of the use of exemptions to address imbalances in bargaining power. Lina Khan, representing the Open Markets Institute, noted that monopsony concerns "can be a situation that motivates and opens the door to discussion of exemptions." There was, however, consensus that "the best way to deal with market power on one side is not to create market power on the other side," as George Slover from Consumers Union put it, and that it is "best remedied through direct enforcement rather than through what would be effectively regulation or exemptions from the antitrust laws that would allow collusion," according to the ABA's John Roberti.

While most participants agreed that Congress should seek to "get rid of as many of them as we can," as George Slover argued, there were different perspectives on whether it is best to exercise caution when looking to eliminate an exemption or immunity so as to minimize potential disruption or uncertainties to private parties, including from Consumers Union and the Association of Corporate Counsel's Glynis Bell.

Recommendations to assist in eliminating exemptions and immunities included, for example, a four-pronged test from the American Bar Association, Diana Moss's framework focusing on those exemptions that adversely affect antitrust enforcement, and, as Lina Khan

said, "public education and connecting the dots, ensuring that consumers and the public are able to understand what the pocketbook impacts of some of these exemptions are."

Not all antitrust exemptions were created by Congress, however. Some have been created by the courts. The Supreme Court created the "implied immunity" doctrine to "reconcile the federal antitrust laws and federal regulatory statutes."[8] The first roundtable also discussed the related "implied repeal" doctrine in the Supreme Court's more recent holding in *Credit Suisse v. Billing*.[9] According to that decision, even where a regulatory statute does not explicitly repeal the antitrust laws, it might impliedly do so for certain conduct that the statute has empowered an agency to regulate and where the agency has at some times exercised that authority. That is the case even when enforcement of the antitrust laws is not in conflict with enforcement of the regulatory scheme. The *Credit Suisse* decision has led to significant concern about implied repeals of, or implied immunities from, the antitrust laws, not only in the financial services industry, but also more broadly. Roundtable participants supported a narrow reading of the decision, yet recognized that when two statutory schemes conflict, courts typically must read one or the other to give way in order to reconcile Congress's mandates. Alden Abbott noted that "Article I of the Constitution, we know from *Marbury v. Madison*, says quite clearly that the courts are to apply the laws … but it does not say that the courts can decide not to apply the laws except in very narrow circumstances—those circumstances should not be presented by a court on its own."

Randy Stutz warned that if there is "room for judges to use these doctrines to … free up dockets, that causes a lot of mischief." Craig Wolf, representing the U.S. Chamber of Commerce, and John Bergmayer, representing Public Knowledge, noted that the courts can read statutes so that they can both be effective or make decisions based on competing provisions, but Wolf argued "it would be disfavored to create out of whole cloth new types of immunities." Generally, the discussion supported broadly the premise that the courts should be reluctant to establish antitrust exemptions or immunities that Congress has not put into effect directly by statute.

The roundtable also assessed policies and regulations states are adopting that may be considered exempt from antitrust scrutiny, including the resultant harm to competition and consumers. In *Parker* v. *Brown*, the Supreme Court considered whether the Sherman Act prohibits a state from engaging in anticompetitive activity,[10] and found that the Sherman Act does not prevent a state, acting in its sovereign capacity, from displacing competition with regulation.[11] Because states often rely on actors below the state level, including agencies, municipalities, and private businesses or individuals, to implement their policies, the Supreme Court has refined the doctrine to ensure that those entities at least arguably reflect democratically accountable state policy in its sovereign capacity. For the state action doctrine to apply, the conduct generally must (1) be taken pursuant to a "clearly articulated and affirmatively expressed . . . state policy" to displace competition and (2) be "actively supervised by the state itself."[12] The "active supervision" requirement does not apply to local government

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[8] *Cantor v. Detroit Edison*, 428 U.S. 579, 598 (1976).
[9] 551 U.S. 264 (2007).
[10] 317 U.S. 341 (1943)
[11] *Id.* at 350-351 (finding that neither the text nor the history of the Sherman Act suggested an intent to restrain the acts of States as "sovereign[s],"). Further, *S. Motor Carriers Rate Conf. v. U.S.*, 471 U.S. 48, 56 (1985), held that the Sherman Act "did not intend to compromise the States' ability to regulate their domestic commerce."
[12] *Calif. Retail Liquor Dealers Ass'n v. Midcal Aluminum*, 445 U.S. 97, 105 (1980).

entities, but it does apply to "any nonsovereign entity—public or private—controlled by active market participants."[13] This focus on active market participants reflects a concern that there is a "structural risk" that they will pursue "their own interests" instead of "the State's policy goals."[14]

There was agreement at the roundtable that the state action doctrine "can shield anticompetitive regulation, which can lead to market distortions," as the U.S. Chamber of Commerce observed. There were, however, differing perspectives on the appropriateness of that outcome, including whether the "underlying concern about state action is not the authority of the state but more about issues of abuse that could stem from regulatory capture," according to Lina Khan, and that "full political accountability, when states do displace competition, is the most that we can aspire to under the existing framework," as Randy Stutz suggested. Most applauded the antitrust agencies' competition advocacy efforts in this area, and agreed that the agencies were an important source of guidance to the states. AAI's Diana Moss added that an additional policy approach could be to work with the states to populate regulatory boards with independent representatives, so that while not narrowing the scope of the doctrine, its use in a way that harms competition could be limited.

II.
Antitrust Consent Decrees

The second roundtable focused on antitrust consent decrees, and included an examination of the regulatory nature of these decrees. The roundtable was held in the wake of the previous day's announcement of the Antitrust Division's initiative to review nearly 1,300 "legacy" antitrust judgments, the previous week's establishment of the Division's Office of Decree Enforcement, and the recent introduction of a number of steps to improve the enforceability of its consent decrees. The timely discussion was intended to help guide the Division's implementation of these initiatives. It focused on a number of key issues, including the appropriate duration of consent decrees, whether perpetual decrees should ever be imposed, what role industry reliance on existing decrees should play in the decision to terminate decrees, and whether it is appropriate or effective to enter into decrees that merely constrain market power rather than restore the competition lost due to a violation.

The roundtable began with an inquiry into the regulatory nature of certain decree provisions. This is not a new debate. Judge Richard Posner and others in the 1970s characterized certain decrees as "regulatory" and began to identify their characteristics and problems. Posner defined regulatory decrees as those "whose terms are such as to establish a continuing supervisory relationship between the court in which the decree was entered and the defendant; more realistically, perhaps, between … the Antitrust Division and the defendant."[15]

At least by 1979, antitrust enforcers had identified a preference for structural relief. As stated in the *Report to the President and the Attorney General of the National Commission for the Review of the Antitrust Laws and Procedures* (January 22, 1979), a commission chaired by John Shenefield,

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[13] *N. C. State Bd. of Dental Exam'rs v. FTC*, 135 S. Ct. at 1113 (2015).
[14] *Id.* at 1114.
[15] Richard A. Posner, *A Statistical Study of Antitrust Enforcement*, 13 J. L. & ECON. 365, 386 (1970). Posner and Easterbrook identified a total of 117 regulatory decrees from 1906 to 1979 in the 1981 edition of their antitrust casebook.

then Assistant Attorney General for Antitrust, a "major reason for the preference for structural relief is that conduct or injunctive decrees have often proved to be ineffective and unwieldy."[16]

Professor Michael DeBow, who served as a counsel to then Assistant Attorney General Douglas Ginsburg in the Antitrust Division in 1986, cited in a 1987 article the problems with such regulatory decrees: "Many decrees restricted competition in otherwise open markets, often by favoring rivals of the defendant."[17] He went on to note that "even if a regulatory decree is substantively correct, well-considered, and well-drafted, it may still create formidable problems,"[18] such as the limited ability of the parties and the court to see into the future to anticipate changes in the market and the myriad costs involved in modification or termination.

Some commenters have noted that behavioral conditions are sometimes used by enforcers to obtain relief that is not justified by the competition concerns articulated in the complaint. An article by Judge Ginsburg and Joshua Wright claims that increasing "the frequency of consents relative to litigation is also likely to reduce the cost to the agency of straying from its core antitrust mission. This departure, in turn, risks harming consumers."[19]

Many of these viewpoints were discussed during the second roundtable. Some participants agreed that behavioral (also known as conduct) remedies should be strongly disfavored. The American Antitrust Institute's Diana Moss, drawing on her background as an economist, noted that "behavioral remedies articulate prohibited, permitted, and required conduct without changing the firm's incentives to exercise market power" Consumers Union's George Slover elaborated that "a behavioral remedy relies on the merged company to ignore new profit-maximizing opportunities created by the merger, to act against its incentives and abilities to increase profits, to defy its basic business DNA." Dr. Moss also noted that behavioral remedies tie up the antitrust agencies "in a monitoring and regulatory function," and laid out a number of ways in which decrees may no longer serve their intended purposes.

On the other hand, the American Bar Association Section of Antitrust Law's Jonathan Jacobson argued that "there are a number of transactions with massive efficiencies that do pose potential competitive problems. And those, I think, we still need to be open to the possibility … [that] there is a behavioral fix that actually has a good potential to work." The American Enterprise Institute's Jeff Eisenach added that "issues in vertical matters are both harder to assess than horizontal matters and also more likely to implicate dynamic competition and innovation than horizontal mergers, and thus have larger implications for our economic welfare." Nonetheless, several participants admonished that, as the U.S. Chamber of Commerce's David Wales put it, it is important "that the remedy doesn't go beyond fixing the anticompetitive conduct and allows parties to continue to engage in lawful and otherwise procompetitive conduct," and to be mindful of the power contained within the statutory mandate that Congress established. Dr. Eisenach said that "regulatory humility means keeping in mind the limits of government's ability to improve market outcomes through regulatory interventions."

The effect that regulatory decrees can have, in particular, on innovation and experimentation in the marketplace was discussed with respect to the appropriate duration of decrees, including

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[16] REPORT TO THE PRESIDENT AND THE ATTORNEY GENERAL OF THE NATIONAL COMMISSION FOR THE REVIEW OF ANTITRUST LAWS AND PROCEDURES, 80 F.R.D. 509, 603 (1979).

[17] Michael E. DeBow, *Judicial Regulation of Industry: An Analysis of Antitrust Consent Decrees*, University of Chicago Legal Forum: Vol. 1987: Iss. 1, Article 14.

[18] *Id.*

[19] Douglas H. Ginsburg and Joshua Wright, *The Costs and Benefits of Antitrust Consents*, OECD Competition Comm. DAF/COMP/WD (2016)81 (2016).

a discussion of how to address the many perpetual antitrust consent decrees still on the books. During a prior Antitrust Division effort, in 1982, to review still-extant perpetual decrees, Assistant Attorney General William Baxter remarked in an article that old decrees could, over time, create anticompetitive effects in the markets to which they applied: "[J]udgments, whether entered after trial or by consent, may have anticompetitive effects today for two reasons. First, decree provisions that were perfectly sensible and desirable when entered can be unreasonable today if they have been successful in promoting competition where there previously was none. … Second, a decree may unreasonably restrain competition today if its provisions were a mistake from the outset."[20]

Some participants agreed that consent decrees should have an end date, but perspectives differed on how to determine it. Diverse views such as those of Consumers Union, the American Antitrust Institute, and the American Enterprise Institute coalesced in agreement that the optimal term should be determined on a case-by-case basis. Jonathan Jacobson noted that many of the perpetual decrees still in effect "simply say 'stop violating the antitrust laws, don't do it anymore,' and there's no reason for that to be perpetual, and certainly five years is a pretty good presumption for that length." He added that many other decrees that were more common in the past with "fencing-in" provisions, many structural, where after the provision has been executed by the parties, "there's no reason why … that decree needs to continue further than that."

The participants at the second roundtable also discussed some of the recent decree improvements—including lowering the standard for establishing a decree violation, allowing the Antitrust Division to extend the term of a decree and allowing the Division to seek termination of decrees where appropriate—and conducting retrospectives. Most participants praised the improvements, though some provided caveats. With regard to equating the standards for a decree violation and the underlying antitrust violation, David Wales noted the possibility for unintended consequences, both that the "unanticipated positives of the change in the standard is that people are more focused on what they're actually agreeing to," and the unintended negative that where "the interpretation [of the decree] was really out of bounds from what was negotiated … if there were a lower legal standard, it would be easier for the agency to bring that case." Regarding retrospectives, participants provided a range of advice. Jonathan Jacobson suggested "that the data should be available for … entry, so look at post-conduct or post-merger effects on entry." Diana Moss suggested looking at merger cases that occurred "in industries where there's been successive consolidation." Jeffrey Eisenach proposed that "one place to start would be to look at the Competitive Impact Statement—what did it predict and what happened?" David Wales added that it is important to consider the costs to companies of employing some of these ideas.

III.
Competition and Anticompetitive Regulations

The third roundtable focused on what may be the most important and relevant question on the topic of competition and deregulation to the average American: What are the consumer costs of anticompetitive regulations? This roundtable engendered a discussion of how government can do a better job of ensuring that government action supports, rather than

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[20] William F. Baxter, *Separation of Powers, Prosecutorial Discretion, and the Common Law Nature of Antitrust Law*, 60 TEX. L. REV. 661, 699 (1982).

impairs, the operation of free markets. Participants examined whether state and federal agencies have appropriately factored in the consumer costs of their regulations, queried which tools are best for minimizing regulation, and delved into how federal and state regulators should balance harm to consumers and competition against perceived public benefits of proposed regulation.

An early, useful focus of the roundtable was an inquiry into what is actually meant by "regulation". Because there was consensus that regulations aimed at issues such as health and safety are important for the smooth functioning of society, Professor Yoo noted that "in most cases the remedies for health and safety regulation are informational. … Informational remedies actually don't conflict with antitrust laws in the same way as price regulation and don't raise the same sort of problems," so that for the purpose of this roundtable, "we can narrow the scope of potential conflicts between regulation and antitrust considerably."

The participants were asked to identify the circumstances that would make regulation appropriate. Several participants stressed that a market failure should be a necessary condition for regulation. The Cato Institute's Ryan Bourne noted that "most regulations are justified in economic terms as efforts to correct perceived market failures." He advised, in examining a regulation, to start with "a robustly defended accusation of market failure," and ask "does the regulation in question actually deliver in solving that market failure?"

The ABA Antitrust Section's Thomas Zych also urged caution in defining market failure properly. Nonetheless, AAI's Richard Brunell believed "there would be a general consensus that most market failures for which there is a regulatory justification don't justify eliminating competition as the solution to the market failure." Ryan Bourne likewise thought "across a number of industries and in many cases these concerns about market failure tend to be overblown, and as such, most regulation tends to be more redistributive and lowers economic efficiency rather than being market-failure correcting."

The group expressed some consensus that many types of regulation are unquestionably harmful to competition and consumers.[21] For example, Christopher Yoo referred to "an enormous literature on how price regulation facilitates collusion, … it standardizes products, it makes price visible, it limits firms' ability to engage in unsystematic price discrimination, which breaks down cartels." He added that "traditional price regulation raised huge problems by creating disincentives to conserve on expenses … Simply put, all regulatory schemes create biases."

Building on the discussion in the first roundtable on the state action doctrine, Gail Levine, representing the U.S. Chamber of Commerce, argued that "local government restrictions on competition are especially pernicious. … The benefits to consumers from removing regulatory competition barriers are huge." Mary Blatch of the Association of Corporate Counsel also cited state restrictions on entry into legal services that "stifle competition and increase the cost of providing legal services." She added that such regulations have "not adjusted to the realities of

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[21] Indeed, the importance of reviewing laws and regulations for potential anticompetitive effects is recognized worldwide. Reflecting that consensus, the OECD released a paper in June 2018 that outlined steps governments should take in performing a "competition assessment," which is defined as "the evaluation of the impact on competition of laws, regulations and policies and the design of regulations that are more favourable to beneficial market forces." Working Party No. 2 on Competition and Regulation, Competition Assessment in Light of Digitalisation: A Synthesis, at 2, OECD Competition Comm. DAF/COMP/WP2(2018)3 (2018), http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP/WP2(2018)3&docLanguage=En.

the modern world." Demonstrating the consensus on the clear harm caused by governmental barriers to entry, Richard Brunell noted that "the *North Carolina Dental* decision articulates a view of suspicion of incumbents using regulation to feather their own nests, and I think that's a view that Cato shares with AAI."

Many over the years have made the argument that dynamic competition (or as Professor Yoo put it, the "old fight between [economists Joseph] Schumpeter and [Kenneth] Arrow" on the "relationship between scale and innovation") is more important to consumer welfare than static competition (that is, the forces of rivalry between competitors in the short run directed at cost, prices, or output). Judge Learned Hand wrote in 1916 that "the consumer's interest in the long run is quite different from an immediate fall in prices," and spoke of competition as a "proper stimulus to maintenance of industrial advance."[22] Christopher Yoo said the "bigger problem I think we're going to have, in terms of regulation, is whether [it] allows us to invest in innovations where competition is not so much about price and quantity but about out-investing each other." Relating her experience in dynamic markets, Gail Levine said that antitrust "advocacy and enforcement is particularly important because we are just at the beginning here of new markets. We are seeing an extraordinary pace of innovation…." The Cato Institute's Bourne said Cato "believe[s] that markets tend to be incredibly dynamic, and entrepreneurs and market forces work overtime to undo monopoly or cartel-like behavior, but anticompetitive interventions imposed by the force of law can prove much more enduring."

While there was agreement that "changes in technology and business models require that regulations periodically be rethought," as Public Knowledge's John Bergmayer noted, there were different perspectives on the extent to which that should happen, and how much the antitrust agencies should get involved.

The National Diversity Coalition, represented by Steven Sugarman, advocated that "the voice of consumers must, as part of oversight and enforcement, be inalienable from an assessment of consumer welfare," while Ryan Bourne pointed out that a shortcoming of regulation is that "regulators tend to define a market in terms of the nature of the producers [rather than consumers], that leads to quite often overregulation of the formal sector, which raises prices to consumers, who then opt for more of the informal sector, which in some cases can be lower quality." There was wide consensus that deregulation must be accompanied by vigorous and effective antitrust enforcement, for as Richard Brunell put it, "one of the lessons of deregulation is that deregulation without vigorous antitrust enforcement fritters away the gains to consumers."

George Slover argued that the agencies should focus their advocacy resources on new regulations "that would implicate the Antitrust Division's enforcement mission," The ABA's Thomas Zych expressly disagreed, thinking it appropriate "to not only look at de novo attempts at regulation, [but also to review] old regulatory schemes that either were poorly thought out at the beginning, or time has made them completely obsolete … as technology has caught up, whether or not it ever had a good justification." Finally, Gail Levine, representing the U.S. Chamber of Commerce, recommended that the antitrust agencies carry their deregulatory advocacy to foreign policymakers as well, offering "the learnings that you've gained in the American context about the importance of competition, the importance of innovation, and the role of regulation when there's market failure, and the risk of overregulation and its costs. If

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[22] *United States v. Corn Prods. Ref. Co.*, 234 F. 964, 1012 (S.D.N.Y. 1916). See also Michael L. Katz and Howard A. Shelanski, *'Schumpeterian' Competition and Antitrust Policy in High-Tech Markets*, 14 COMPETITION 50 (2005).

you are able to bring that message overseas, I think that will be very helpful for the global economy."

Conclusion and Acknowledgements

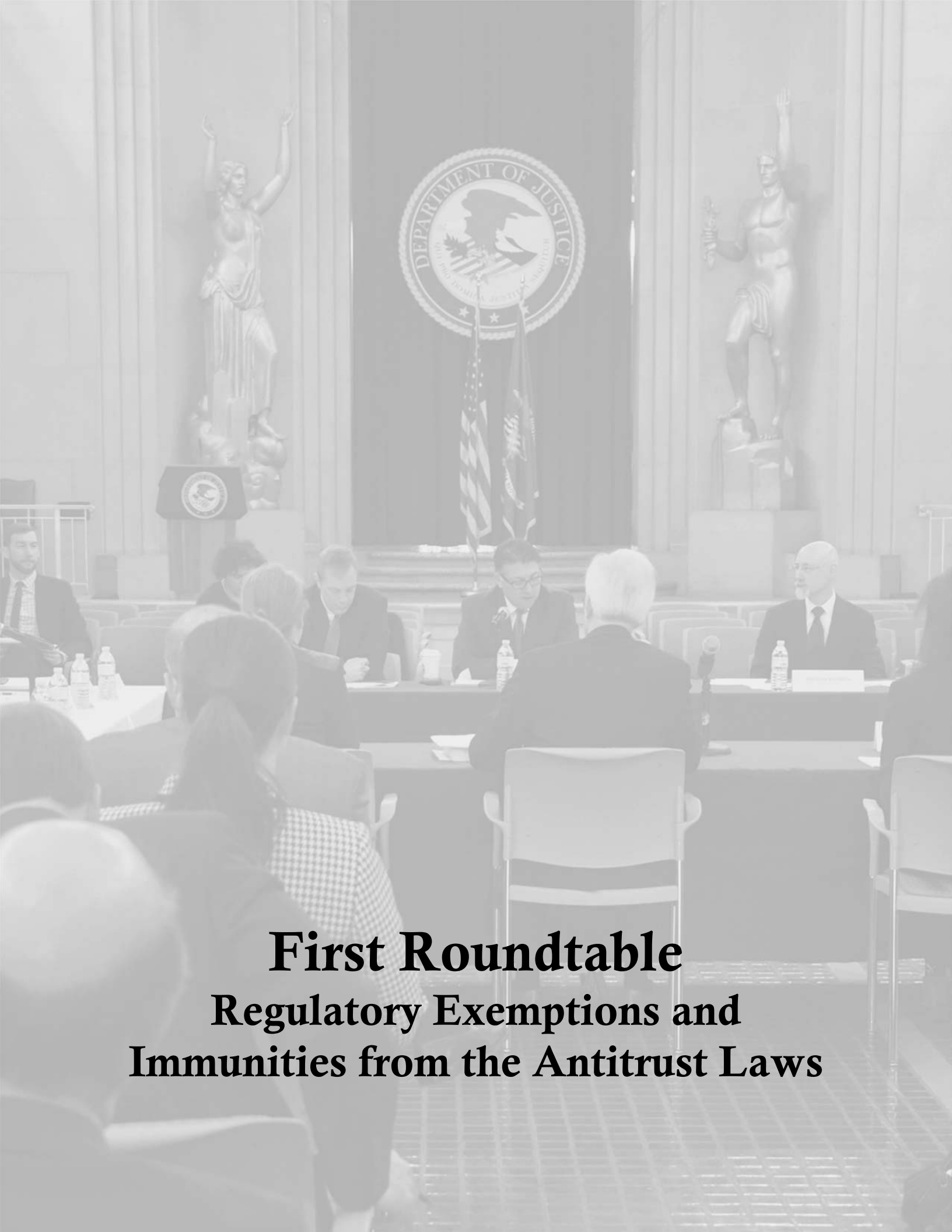
This series of roundtables has brought our nation's thought leaders together for discussion of an important issue for our economy: The proper role of our government's intervention in it. Specifically, these roundtables have reminded us that prior assumptions that regulators can do a better job than free market competition has burdened many key industries with centralized control, oversight, and involvement that has imposed significant costs and hampered innovation—all to the detriment of American consumers.

These discussions have demonstrated that there is wide consensus on a number of points. Regulations can be harmful, whether they are carried out by a regulatory body created by Congress or state legislatures, or through specific adoption of rules or policies by enforcement agencies, including the use of certain approaches to settling lawsuits, as we explored in the second roundtable on antitrust consent decrees. As participants in the first and third roundtable pointed out, the competitive problems from regulatory approaches can be made worse with statutory and doctrinal exemptions and immunities from the antitrust laws, especially where deregulation—if it is to benefit consumers—must be accompanied by effective antitrust enforcement.

In addition to continued support for identifying anticompetitive regulations still on the books, the first roundtable demonstrated a wide consensus that Congress should be very hesitant to enact future antitrust exemptions or immunities and should actively explore sunsetting or eliminating current ones. In addition, the courts should not establish antitrust exemptions or immunities that Congress has not put into effect directly by statute, and the states should displace competition much more infrequently than they currently do by according greater deference to the important role that competition should play in the state economies.

Similarly, the second roundtable reinforced the Antitrust Division's initiatives to ensure that antitrust consent decrees are effective and enforceable, including a continued preference for structural remedies over behavioral ones. There was also general agreement that decrees should be time limited, and that perpetual decrees should be terminated in many instances.

The Antitrust Division acknowledges with gratitude all of our participants in this roundtable series and the organizations they represent. Each has made valuable contributions to this discussion through thoughtful comments and written submissions, and has given us much to think about, and valuable guidance for addressing a host of complex competition issues.



First Roundtable

Regulatory Exemptions and Immunities from the Antitrust Laws

Roundtable Agenda

Opening Remarks: Assistant Attorney General Makan Delrahim

Introductions and Statements from Roundtable Participants

Session 1: **The Impact of Express Statutory Exemptions and Implied Immunities from the Antitrust Laws**
Explores how segments of the economy with express exemptions may be unique, review justifications for those exemptions, and consider whether they are, and continue to be, warranted. Evaluates whether statutory exemptions harm consumer welfare.

Session 2: How Implied Immunities and Exemptions Have Affected Antitrust Enforcement
Examines the appropriate roles of Congress and the courts in creating immunities and exemptions from antitrust laws. Discusses of whether the "implied repeal" doctrine in *Credit Suisse v. Billing*, 551 U.S. 264 (2007), helps or hampers competition.

Session 3: Whether The State Action Doctrine in its Current Form Strikes the Appropriate Balance Between State Sovereignty and The Federal Policy Favoring Competition in Interstate Commerce
Assesses policies and regulations states are adopting that may be considered exempt from antitrust scrutiny, and consider the resultant harm to competition and consumers. Queries whether the dormant Commerce Clause could provide a meaningful limit on states' ability to reduce competition involving interstate commerce.

Closing Statements from Roundtable Participants

Roundtable Participants

American Bar Association, Section of Antitrust Law – John Roberti
American Antitrust Institute – Diana Moss
Association of Corporate Counsel – Glynis Bell
Consumers Union – George Slover
Heritage Foundation – Alden F. Abbott
Open Markets Institute – Lina Khan
Public Knowledge – John Bergmayer
U.S. Chamber of Commerce – Craig Wolf

Biographies of Roundtable Participants

John Roberti (American Bar Association, Section of Antitrust Law) is a partner in Allen and Overy, where he focuses on civil antitrust litigation and investigations. He serves on the Council of the ABA's Antitrust Section. He previously worked at the Federal Trade Commission in the Anticompetitive Practices Division of the Bureau of Competition from 2001 to 2005.

Diana Moss (American Antitrust Institute) has been the President of the American Antitrust Institute since 2015. Before joining AAI in 2001, Dr. Moss worked in private practice and coordinated competition analysis for electricity mergers at the Federal Energy Regulatory Commission from 1989 to 1994.

Randy Stutz (American Antitrust Institute) is the Associate General Counsel of AAI. He previously worked on antitrust issues in private practice.

Glynis Bell (Association of Corporate Counsel) has been the Senior Corporate Counsel at Cisco Systems for the past ten years. Prior to working at Cisco, Ms. Bell was the Assistant General Counsel at the U.S. General Services Administration.

George Slover (Consumers Union) is a senior policy counsel in the Washington Office of Consumers Union, the advocacy division of Consumer Reports, Washington office. He has three decades of federal government policy experience, including nine years at the House Judiciary Committee, two years at the House Energy and Commerce Committee, and eleven years in the Antitrust Division.

Alden F. Abbott (Heritage Foundation) was the Senior Legal Fellow and the Deputy Director of the Heritage Foundation at the time of the roundtable. He previously served as the Director of Patent and Antitrust Strategy for BlackBerry Corporation, and served as the Federal Trade Commission Associate Director of the Bureau of Competition, Deputy Director of the Office of International Affairs, and is currently its General Counsel At the Department of Commerce, he served as the Acting General Counsel and Chief Counsel for the National Telecommunications Information Administration. He also worked at the Department of Justice in the Office of Legal Counsel, as well as in the Antitrust Division as a Special Assistant to the Assistant Attorney General.

Lina Khan (Open Markets Institute) is the Director of Legal Policy at the Open Markets Institute. She is a Visiting Fellow with the Information Society Project at Yale Law School.

John Bergmayer (Public Knowledge) is the Senior Counsel at Public Knowledge, specializing in telecommunications, media, Internet, and intellectual property issues.

Craig Wolf (U.S. Chamber of Commerce) has been the President and CEO of the Wine & Spirits Wholesalers of America since 2006, previously its General Counsel. Prior to, Mr. Wolf worked at the Senate Judiciary Committee and the Department of Justice's Criminal Division, and served as an Assistant State's Attorney.

FIRST ROUNDTABLE:
Regulatory Exemptions and Immunities from the Antitrust Laws

Wednesday, March 14, 2018
Department of Justice ⇝ Great Hall

MAKAN DELRAHIM: Good morning. Thank you all for being here today. I am Makan Delrahim. I have the great privilege of being the Assistant Attorney General for the Antitrust Division. And welcome to the Great Hall of the Justice Department. We are launching today, as you know, the Division's series of roundtables on competition and deregulation.

I am starting out by asking for some leniency from my friends at the Federal Trade Commission. I hear they come down pretty hard on deceptive claims in advertising, and I see that our first so-called "round"-table discussion is being held at an unmistakably square table here.

I'm joined at the table by several attorneys from the Antitrust Division here at the Justice Department. Seated to my left is Douglas Rathbun, an Attorney Advisor in our policy section, and Bob Potter, who is our Chief for the Competition Policy and Advocacy Section. We also have Rene Augustine, Senior Counsel in the Front Office, and the great Daniel Haar, who is the Assistant Section Chief for the Competition Policy Section, formerly with our Appellate Section.

I would like to thank all of our participants and their organizations for their participation on the panels today. It is an honor to see so many great thinkers in the areas of antitrust, competition, and regulation here today. Let me also thank everyone who has made a written submission for the record to add great value to these discussions.

[The prepared statement of Assistant Attorney General Makan Delrahim follows:]

Today's roundtable will focus on antitrust exemptions and immunities. The next roundtable, to be held on April 26th, will examine antitrust consent decrees. The third roundtable, on May 31st, will assess the consumer costs of anticompetitive regulations. I invite everyone in attendance today to join us for as many sessions in these series of roundtables as possible, because I anticipate a very productive discussion of these important topics that affect all of us.

If you take a moment to look at the cast aluminum statue of Lady Justice behind me in this room, do you notice something unique about her as compared with most representations of Lady Justice? She has no blindfold. This reminds us that today, we should keep our eyes open and remain vigilant in continuing to assess the appropriate application of our nation's antitrust laws.

In the antitrust world, we are fortunate to have durable laws along with a great body of legal precedent. Over the years, we have seen advancements in our economic analysis as applied to antitrust cases. We also have an ever-changing landscape in business and innovation. Today, we are here to evaluate circumstances when our antitrust laws should, or should not, be applied.

Free market competition is, of course, fundamental to the success of the American economy. As Justice Thurgood Marshall said, antitrust laws "are the Magna Carta of free enterprise. They are as important to the preservation of economic freedom and our free-enterprise system as the Bill of Rights is to the protection of our fundamental personal freedoms."[1] The enforcement of antitrust law is, at its core, intended to ensure competition in the marketplace to promote consumer welfare.

Not long ago I saw a news story about a pet boa constrictor that escaped from its cage. The neighbors were terrorized by the roving yet elusive boa constrictor, whose exact whereabouts were unknown. This scenario reminded me a bit of where we find ourselves today. When

[1] *United States v. Topco Associates, Inc.*, 405 U.S. 596, 610 (1972).

regulation replaces antitrust enforcement, the regulations — and regulators — become stealthy and disruptive forces that can interfere with the competitive marketplace. And, like the boa constrictor, they can slowly, and painfully, squeeze competition from the free market. I will stop short of pointing out that boa constrictors, in the end, swallow their prey whole!

With this in mind, it is my view that we should proceed with heavy skepticism whenever we see regulation replacing vigorous enforcement of the antitrust laws. Sound competitive analysis, not special treatment for particular industries or entities, should take precedence. Much as private restraints on competition can be harmful to consumers, government limitations on competition are equally harmful to consumers.

This series of roundtables will allow us to explore the relationship between competition and regulation, and its implications for antitrust enforcement policy. These conversations will help the Department pursue effective and appropriate competition policy and identify related regulatory burdens on the American economy. Without a doubt, early and appropriate enforcement of antitrust laws should protect the competitive process and minimize the need for regulatory intervention.

Today, we will discuss restraints in the form of exemptions and immunities from our antitrust laws today in certain sectors of the economy. The exemptions from the antitrust laws have a real cost to consumers where they're not needed or no longer appropriate.

When I served on the Antitrust Modernization Commission back in 2007, we concluded that "[a]s a practical matter, an exemption from all or part of the antitrust laws means firms can avoid the tough discipline of competition. When the beneficiaries of an exemption likely appreciate reduced market pressures, consumers … and the U.S. economy generally bear the harm."[2]

When an industry is given an antitrust exemption or immunity, competition is replaced by government regulation. This notion, despite an accumulation of exemptions and immunities in the law over the years, goes back many decades. One of my legal heroes, the great Justice Jackson, who previously served as the Assistant Attorney General of the Antitrust Division here at the Justice Department, had this insight over eighty years ago: "Every step to weaken antitrust laws or to suspend them in any field, or to permit price fixing, is a certain, even if unknowing, step to government control."[3]

In the first discussion session, we will examine the impact of express statutory exemptions from the antitrust laws. We will explore how segments of the economy with express exemptions may be unique, review justifications for those exemptions, and determine whether they are, and continue to be, warranted. We will also evaluate whether such exemptions harm consumers.

In the second session, we will look at how implied immunities and exemptions have affected antitrust enforcement. We will examine the appropriate roles of the courts in creating immunities and exemptions from the antitrust laws, as opposed to Congress doing them. We will discuss whether the "implied repeal" doctrine in *Credit Suisse*[4] helps or hampers competition.

And finally, we will examine whether the state action doctrine in its current form strikes the appropriate balance between state sovereignty and the federal policy favoring competition in interstate commerce. We will assess policies and regulations states are adopting that may be considered exempt from antitrust scrutiny, and consider the resultant harm to competition and consumers. We will also query whether the dormant Commerce Clause can or should provide a meaningful limit on states' ability to reduce competition involving interstate commerce.

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[2] ANTITRUST MODERNIZATION COMM'N, REPORT AND RECOMMENDATIONS 334-35 (Apr. 2007), http://govinfo.library.unt.edu/amc/report_recommendation/amc_final_report.pdf.

[3] Robert H. Jackson, Assistant Att'y Gen., Antitrust Div., Dep't of Justice, Should the Antitrust Laws be Revised?, Address Before the Trade and Commerce Bar Association and Trade Association Executives (Sept. 17, 1937), in 71 U.S.L. REV. 575, 576 (1937), https://www.roberthjackson.org/speech-and-writing/should-the-antitrust-laws-be-revised.

[4] *Credit Suisse v. Billing*, 551 U.S. 264 (2007).

[End of the prepared statement. The roundtable transcript continues:]

And now for the logistics. I will ask each of our panelists to provide a brief opening statement immediately after I introduce them. At the conclusion of the opening statements, we will begin with our series of three 30 minute discussion sessions. After the first session, we will have a ten minute break. The next two sessions will be followed by a brief wrap-up.

Now, let me turn to our panelists. Thank you once again for your willingness to participate today and to share your views on these important issues. We appreciate your time and your views. And as you know, from the organizations that were invited today, we covered almost the whole spectrum, or the whole circle of spectrum, of antitrust and regulatory views, all of whom we value, and we believe this will lead to a better result. Should there be recommendations for changes down the road, we will incorporate a lot of the comments that have been provided to us in these roundtables.

Let me first begin on my left. We will hear from John Roberti, who is representing the American Bar Association's Section of Antitrust Law. He is a partner at the law firm Allen and Overy. He focuses on civil antitrust litigation and investigations. He serves on the counsel of the ABA's Antitrust Section. He worked at the Federal Trade Commission, in the Anticompetitive Practices Division of the Bureau of Competition from 2001 to 2005, and earned his JD from NYU, and his bachelor's from Brown. John.

JOHN ROBERTI: Mr. Assistant Attorney General, it's really a great honor to be here. Thank you for inviting me in, and the Section is delighted to participate. Before I begin, I just want to say, the comments and views that I'm going to express are my own, and don't necessarily represent the views of the Section, or my firm.

I'm going to confine my remarks largely to discussion of statutory exemptions, although I'm looking forward to a very robust discussion on panels two and three today. In general, antitrust exemptions arise for three main reasons, and Assistant Attorney General Delrahim's remarks touched on these points, I think.

First, many organizations or industries seeking to obtain or maintain an exemption argue that an exemption is warranted because facially anticompetitive activity is actually pro-competitive, or otherwise beneficial. This is an old and antiquated justification. Antitrust jurisprudence, in the wake of *Continental TV v. GTE Sylvania* has undermined much of this justification.

Over the last 30 years or longer, courts have widened the use of the rule of reason in antitrust cases, opening the door for many restraints on trade, that could be justified on pro-competitive grounds, to be analyzed on their merits, rather than be found to be, per se, unlawful. Thus, if we look at any new exemptions, I think this justification will not be valid.

Second, we often hear that anticompetitive conduct will be exempted when a value greater than competition is in play. For example, there are exemptions for petitioning the legislation, courts, or administrative bodies to change or interpret laws, or to allow for activity that would violate the antitrust laws if done by private actors alone. This is protected by the *Noerr-Pennington* doctrine, for example. The state action doctrine, of which we'll have a robust discussion, is also another example. The basis is relatively uncontroversial. The key issue there is the scope, and how it's enforced.

Third, and I think most importantly, many exemptions were justified originally under the theory that, in certain industries, regulation was preferable to competition, or there were natural monopolies that needed to be controlled. Take the example of the railroads, the insurance industry, the ocean shippers, and certain agricultural cooperatives, which have all been granted statutory immunities to do things like set prices, agree to common terms of service, and form joint ventures in industry. In large part, these exemptions arose out of late 19th and early 20th century economic theories about the benevolent cartel. Economic theory has evolved to reject this foundation. I believe the consensus view is that consumers benefit more when competitors freely compete, and that economic regulation is better suited to preserving a competitive marketplace than to structuring the market around deliberately anticompetitive cartels.

So, regardless of the original justifications for giving an exemption, antitrust exemptions are here to stay, or they seem to be. But there are a few common problems. First, we find that exemptions are often broader than they need to be — again, Assistant Attorney General Delrahim referenced the AMC report. I think that was a key finding, and I think we'll hear others speak to that today — but there's also a problem of stickiness, meaning that, when exemptions are ill-considered, they're very difficult to remove. Antitrust exemptions create a classic public choice problem. They create a concentrated group of industry beneficiaries who benefit greatly from their special privileges, while consumers suffer higher prices diffusely, so they may be harmed individually, only in small amounts. Therefore, these individuals are unlikely to exert much effort for the repeal of existing laws even if the law's macroeconomic harm is significant.

On the other hand, to be fair to the exempt industries, removing the exemption would require a fundamental change in the way that they have built their businesses and made their expenditures, making a rapid removal of exemptions very difficult to implement. This problem of stickiness is evidenced by the fact that many of the existing exemptions were passed nearly 100 years ago, and still exist today even after economic theory has moved away from the theoretical foundations on which they were originally built.

Turning to the ABA Antitrust Section. The Section has offered a four-prong test to determine whether exemptions are appropriate. First, Congress should grant antitrust exemptions and immunities rarely, and only after rigorous consideration of the impact of the proposed exemption or immunity on consumer welfare. Second, Congress should only grant those exemptions and immunities that are drafted narrowly, so that competition is reduced only to the minimum extent necessary to achieve the intended goal. Third, Congress should enact antitrust exemptions and immunities only when the proposed exemption or immunity achieves a congressional goal that significantly outweighs the aims of the antitrust laws in a particular situation. And finally, no exemption or immunity should be granted unless it contains a sunset provision.

The four prongs have consistently guided the section's analysis of proposed antitrust exemptions in recent years, and this Section has weighed in on several occasions using this analysis. We believe the prongs also provide important policy guidance.

However well-intentioned antitrust exemptions may be, most of them threaten to institutionalize anticompetitive conduct, often in sweeping ways that could be addressed better through more narrowly tailored reforms that do not otherwise conflict with the modern pro-competitive thrust of the antitrust laws. As such, my view is most of the existing exemptions run afoul of at least one of the Section's four parts, but because exemptions are sticky and difficult to remove — and particularly so, because exemptions are difficult to remove — we believe any new proposals for exemptions should be treated with great caution.

Again, I very much appreciate the opportunity to participate today. Thank you.

MAKAN DELRAHIM: Thank you, Mr. Roberti. Representing the American Antitrust Institute is Diana Moss, the President of the AAI since 2015. Dr. Moss's work spans both antitrust regulation, with antitrust expertise in electricity, petroleum, agriculture, airlines, telecommunications, and health care. Before joining AAI in 2001, Dr. Moss was at the Federal Energy Regulatory Commission from 1989 to 1994, and previously in private practice. She holds a master's degree from the University of Denver, and a PhD from the Colorado School of Mines. In addition to Dr. Moss, Randy Stutz, who was the associate general counsel of AAI, will also be joining us. He joined the AAI after some time in private practice, holds a law degree from Catholic University, and a bachelor's degree from Washington University in St. Louis. Diana, are you ready?

DIANA MOSS: Ready. Thank you very much, Assistant Attorney General Delrahim, and thanks to the Division staff for your foresight and your hard work in putting these roundtables together. It's a pleasure and an honor to be here.

AAI's 20-year history of research, education, and advocacy highlights our organization's position that many immunities and exemptions from the antitrust laws are either unnecessary or harmful to competition. We have consistently supported and defended the Supreme Court's

admonition that exemptions and immunities should be strictly construed, disfavored, with a heavy emphasis on the importance and indispensable role of antitrust policy in the maintenance of a free economy.

We would like to note for the record the thoughtful and enduring recommendations from the Antitrust Modernization Commission report, which identified 30 statutory and implied immunities and exemptions that were on the books.

With that said, I'd like to run through a list of what we think are very good reasons to be very skeptical of immunities and exemptions. I think, first and foremost, the concern is that immunities and exemptions shield certain types of anticompetitive conduct, such as exclusionary behavior or collusive behavior, without fully promoting the goals that they are intended to achieve, whether that be a public interest benefit or a public benefits type of target.

And, I would put an exclamation point next to the notion that the anticompetitive conduct that immunities and exemptions may be shielding should be evaluated fully under a consumer welfare standard. That includes price effects, but also non-price effects, such as quality, service, innovation, and choice.

The second takeaway is that many immunities and exemptions are outdated. They are based on the goals and the values of a bygone era, where there were different trading models in place. There were different market structures, technologies, incentives. Examples would be the immunization of export cartels under Webb-Pomerene and the immunization of large, vertically integrated cooperatives under Capper-Volstead. That is a bygone era.

Third, many immunities and exemptions are really not based on clear market failures, such as natural monopoly, or regulatory regimes that have foresworn competition, which is really the ultimate test of whether an immunity or an exemption is called for. And I would add that many of the effects of immunities and exemptions have been exacerbated by consolidation and high levels of concentration in some of the industries that we see today. For example, we see immunity for airline alliances and rail shipping rate agreements.

Another takeaway is that immunities and exemptions disrupt the very important natural complementarity between antitrust and regulation. There are things that antitrust can reach to, that regulation cannot, and vice versa — there are types of conduct that regulation can reach to that antitrust cannot. We see complementarity in antitrust and regulatory remedies.

But perhaps most important, the role of antitrust serves very much in the capacity of law enforcement to deter anticompetitive behavior. That's a very, very different animal than regulation, which is designed to promote a public interest standard under a set of rule makings and initiatives that are designed to implement the underlying laws. They're very, very different, but they serve in a complimentary capacity. Immunities and exemptions can disrupt that.

I would also add that judicially created immunities have very much been at odds, in some cases, with market developments. The filed rate doctrine, for example, in the wholesale electricity markets, is very much at odds with what is now a market based system, where the Commission does not review rates and does not oversee the rates that are charged. Same thing on the *Trinko* immunity, where the nascent development of local competition in telecom markets was really disrupted by a finding that the FCC was an effective steward of the antitrust function.

I would close by saying that there has never been any systematic analysis of how immunities and exemptions have created conflicts, gaps, or chilled pro-competitive incentives. There has been no harmonization of the various implied immunities, express immunities, and exemptions, to determine which are really necessary, which conflict, and which create perverse incentives.

And then, I would close by saying, the record on sunset provisions has been very poor. Sunset provisions are vitally important, but have been largely overlooked in the construction of various immunities and exemptions, particularly the express exemptions. And that is something that we believe public policy should be paying very close attention to. With that, I will turn it over to Randy on my left.

MAKAN DELRAHIM: Let me just say that there might be some different views on whether *Trinko* actually provides any immunities, or it was an interpretation under Section 2 of whether or not violations of the FCC create any liability under Section 2, because Congress had a savings

clause in there. That was actually somewhat careful drafting that. I don't know if I would call *Trinko* an immunity from the antitrust laws, but we'll leave that for debate later. Randy.

RANDY STUTZ: Thank you. Let me echo Diana's thanks, and reiterate our appreciation for the opportunity to be here, and commend the Antitrust Division for hosting this event.

I'm going to focus narrowly on state action. And I think it was a wise decision to single out that topic for this as a separate discussion. There's been a lot happening there. AAI's basic view is that the Supreme Court has really taken us in the right direction in its two most recent Supreme Court cases, *Phoebe Putney* and *Dental Examiners*, which require strict application of the *Midcal* factors, clear articulation and active supervision.

The court has really fine-tuned its core distinctions in the state action context, which have come to revolve around the public or private character of conduct being challenged, rather than any formalistic labels given to the agency that happens to be the defendant. The *Midcal* test, as it's now formulated, in light of these cases, really goes a long way, or perhaps all of the way, to ensuring that states can be held fully politically accountable when they make the sovereign decision to impose the anticompetitive regulation. And it does that by removing any doubt about the state's intent to displace competition, in favor of anticompetitive regulation, and about the state's responsibility in terms of how its regulatory regime is actually executed.

I think, unless we're willing to alter the basic calculus, in terms of how much respect we're willing to afford to each of the competing values that are at stake in the state action context, which are our values in honoring federalism, while also promoting competition. I think full political accountability, when states do displace competition, is really the most that we can aspire to under the existing framework.

And I think in light of the Supreme Court's recent cases, the lower courts really are better positioned than ever before to parse the public-private distinction correctly and accurately.

But one thing I think we need to pay attention to, in our new environment, as our legal rules have become better and more precise, I think we're going to encounter more administrative problems in actually applying the state action doctrine in practice. I want to focus on two points in that respect.

Number one, the *Midcal* inquiry has always been heavily fact driven. But after *Phoebe Putney* and *Dental Examiners*, both, it's going to be even more fact driven. In litigating state action questions, it's inevitably going to require discovery. It might have to be revisited at successive stages of litigation, whether on a motion to dismiss and summary judgment and trial, and so forth. And so our new system is going to add cost and delay on both sides.

And the second point, which is related to the first, the fact driven nature of the *Midcal* test, and the contingent nature, in terms of knowing whether immunity will actually apply, whether a court will ultimately hold conduct immune, creates a lot of uncertainty before the fact. And I think that uncertainty is something that policymakers are going to need to pay attention to. It also affects both sides. It affects states when they're making a decision whether to impose anticompetitive regulation, and it also affects plaintiffs deciding whether to bring even a meritorious case when there's going to be, perhaps, a protracted immunity defense before one ever gets to the merits. So I think for now, I'll stop there. Hopefully, we can discuss more of this later this afternoon. Thank you again for the opportunity to be here.

MAKAN DELRAHIM: Thank you very much. Next, we have, representing Public Knowledge, Mr. John Bergmayer. He is a senior counsel who specializes in telecommunications, internet, and intellectual property issues at Public Knowledge. His work includes advocating on behalf of diverse stakeholders on shaping emerging digital policies. He holds a J.D. from the University of Colorado, and a bachelor's from Colorado State University.

JOHN BERGMAYER: Thank you all for having me. It's an honor. Sometimes, antitrust and regulation are seen as two different ways of achieving the same or similar goals. But this is an incomplete understanding, and a proper grasp of the complementary role these approaches play can help us understand why antitrust should only step aside in case of a clear incompatibility.

In short, antitrust seeks to protect consumers by preserving competition within a given marketplace. But it is regulation that helps structure those markets to begin with, and it pushes markets to achieve outcomes that even vigorous competition alone would not provide.

At the most basic level, regulations define the existence and scope of property rights, which contractual terms courts will or will not enforce, and the possible corporate forms a business may take. Even tax and monetary policies shape what activities a business might find profitable. But of course, these are not what people typically think of when they think of regulation. Most people think of government rules that are designed to promote safety, such as aviation and food safety rules, or that are designed to require businesses to internalize externalities, such as various proposals for a carbon tax.

At Public Knowledge, we have a lot of experience with the FCC. And there are FCC rules that manage almost every category of regulation. There are FCC rules designed to protect aviation safety, by requiring that radio towers be properly marked. In deciding whether to grant satellite communication licenses, the FCC considers whether licensees would contribute to the problem of orbital debris. The FCC administers exclusive spectrum licenses, which while not fully property, share some characteristics of property, such as excludability and transferability.

The FCC also helps promote values that, in the minds of the drafters of the Communications Act, the market alone would not provide. The FCC's broadcast rules promote localism in the creation of children's programming. And broadcasters are required to provide certain public service messages, such as weather emergency alerts, and participate in the emergency broadcast system. Telephone companies are required to provide 911 service, and universal service policies promote access to low-income families in areas that might be uneconomical to otherwise provide service to.

In video, FCC rules govern broadcast coverage by cable systems and limit programming exclusives. And the FCC's common carrier rules for networks, now applicable only to the telephone network, unfortunately, in Public Knowledge's view, not only protect network users from monopolistic network operators, but promote other goals, such as the free flow of information.

And seen in this way, both regulation and antitrust enforcement promote the general welfare, but in different ways. One by preserving the benefits of markets. The other by creating markets, defining rules, and promoting non-market outcomes.

That is not to say that regulatory agencies do not have the promotion of competition in their mandates. The FCC incorporates competition principles into its public interest standard, for instance. Regulators may have a mandate to promote new competition. For instance, not only does the Department of Transportation pursue public interest goals, like air service to smaller markets, but it is charged with, and I quote from the statute, "Encouraging entry into air transportation markets by new and existing air carriers, and the continued strengthening of small air carriers to ensure a more effective and competitive airline industry." And competition principles similarly inform drugs, securities, and other areas of regulation.

At times, however, the methods of antitrust and the methods of regulation can be orthogonal. It can be easier to regulate a highly-concentrated market. Or regulation might actually require that competitors work together on certain initiatives, in ways that otherwise might be seen as collusive. At times antitrust authorities may even be called on to provide their competition expertise to help regulatory agencies improve the rules when they're no longer serving their intended purpose.

But in general, only when there are genuine conflicts between regulatory duties and antitrust should antitrust step aside. Given the different purposes and methods of antitrust regulation, we support reading cases like *Credit Suisse* and *Trinko* narrowly. The fact that an industry is regulated does not provide it with a general immunity from antitrust laws. And even when an agency has the authority to prohibit a certain activity, using its regulatory power, but expressly chooses not to, antitrust authorities should intervene if necessary.

Where Congress itself has created the potential for an enforcement gap, such as with the common carrier exemption that limits FTC oversight of some entities, we would advocate for

repeal. And we're also skeptical of creating antitrust exemptions or immunities to accomplish public interest goals, especially when there are better means to achieve the same ends.

These issues should be settled by the law, and by what best protects consumers, and not informal notions of which agency has dibs, or fear of treading on someone else's turf. A gun-shy application of the antitrust laws can allow a regulated company to slip through the cracks. The FCC's recent reversals on business data services and net neutrality policies, and other matters, illustrate the potential for a regulatory gap. The FCC has justified its de-regulatory policies, in part, by pointing to antitrust. FCC Chairman Ajit Pai has said that, "I think the antitrust and consumer protection authorities stand at the vanguard, to make sure that consumers and competition are protected."

Especially when regulators point to antitrust, antitrust authorities must not read doctrines like those articulated in *Credit Suisse* as standing in the way of protecting consumers and competition. Thank you.

MAKAN DELRAHIM: Thank you very much, Mr. Bergmayer. Continuing on, and representing the Open Markets Institute, is Ms. Lina Kahn, Director of Legal Policy at OMI. She researches antitrust law, competition policy, and identifies potential legal reforms, with a recent focus on technology platforms. She received a BA *magna cum laude* from Williams College, and a JD from Yale Law School. Ms. Kahn.

LINA KAHN: Thank you to you, AAG Delrahim, and your staff for putting this together. OMI is thoroughly honored to be part of this discussion on antitrust exemptions and immunities. Like many others here, we think they should be disfavored, and granted rarely, in narrow cases, following close study and analysis. In many instances, exemptions serve concentrated private interests, at the expense of the public interests, which generally, we believe, is best protected through robust competition. The fact that exemptions have concentrated private benefits and diffused public costs means that they are very sticky, and very difficult to repeal.

Statutes like the McCarran-Ferguson Act exemplify overly broad exemptions that are undermining the public and competition, and should be repealed. We agree with several of the AMC recommendations, including the need for Congress to create a full public record on any existing or proposed immunity that it considers. That said, we think it's important to acknowledge that exemptions, in select and narrow instances, can promote the broader public interest, especially when it comes to enabling players with no significant market power to engage in collective activity, as a way of creating countervailing power, and of enabling forms of organization the Congress has sought to protect. Two exemptions that I'll be discussing in that vein are the Capper-Volstead Act and the exemption for collective activity by labor, as defined under Section Six of the Clayton Act. We think, in both of these instances, certain industry trends have undermined the original purpose of these exemptions, and that they should be revisited to ensure that they are protecting the intended populations.

The Capper-Volstead Act was passed by Congress in 1922, to empower farmers to organize ag cooperatives. Efforts to organize operatives took off in the late 1800s, as farmers confronted the rise of local railroad monopolies, and growing consolidation among food processors. By immunizing certain activities undertaken by farmers collectively, Capper-Volstead enabled farmers to bargain, and sought to redress the effects of monopsony power. As the House report stated at the time, instead of granting a class privilege, the act aims to equalize existing privileges by changing the law applicable to the ordinary business corporation, so the farmers can take advantage of it. And for decades, the law helped level the playing field between farmers and concentrated middlemen, and ultimately helped secure the food supply.

Today, however, that co-op landscape looks very different. In recent decades, the cooperative movement has been co-opted by dominant companies that prey off of the very small scale producers that they're meant to protect. One example has occurred in the dairy industry, where we've seen the Dairy Farmers of America morph into an agribusiness giant in its own right, which has become vertically integrated, and is not able to faithfully bargain on behalf of the members it sought to protect. So we think Capper-Volstead is a good example of a case where an exemption that was passed in good faith, and could have a lot of benefits to still provide, is no longer providing those benefits, due to certain changes in industries.

The other instance that I'll be focusing on is the labor exemption. In this case, we've seen a dramatic shift in employment practices, the rise of the fissured economy, and increased reliance on independent contracting arrangements over traditional forms of employment, has given rise to a whole class of workers that are no longer protected. This has resulted in instances where organizing efforts by, for example, low income truck drivers, has been the target of antitrust action.

So in both these instances, industry trends have rendered these exemptions inadequate, and we think that facts should guide both enforcement, and should be a basis for revisiting the scope of these exemptions.

On implied immunities and exemptions, we're concerned about the potential scope of *Trinko*. We believe that it should be read narrowly, as a limit to refusal to deal claims under Section 2. We believe there's a good reason to doubt the Court's suggested assumption that agencies can adequately police antitrust problems, and we think it's not sufficient to consider whether Congress provided for a particular activity to be governed by a regulatory framework. We think it's really vital to also consider the goals of that regulatory framework, and whether that framework is compatible with, or even seeks to promote, competition. So I'll leave it there, and I really look forward to the rest of the discussion.

MAKAN DELRAHIM: Thank you very much, Ms. Kahn. Representing Consumers Union, the Advocacy Division of Consumer Reports, we have our good friend and former alumnus from the Antitrust Division, George Slover. George serves as the Senior Policy Counsel at the Consumer Union, where he works on competition policy, regulatory policy, and other consumer protection policy issues. Previously, he spent 11 years in our Competition Policy and Advocacy Section at the Antitrust Division. I had the great pleasure of serving with him, the last tour I had here as a Deputy, and he had two stints at the House Judiciary Committee. He holds a J.D. and a Master's in public administration from the University of Texas at Austin. Mr. Slover.

GEORGE SLOVER: Thank you. Very pleased to be here, and honored. At Consumers Union, we value the antitrust laws, first and foremost, for what they do for consumers. Competition gives us choice, which gives us leverage, which makes businesses pay more attention, and all the benefits that flow from that, for quality, variety, affordability, innovation. We need choice, up and down the supply chain — for everyone to have a chance to make a living, by contributing products, services, ideas, and labor.

Antitrust can't solve everything. Some protections won't be delivered by competition, like safety. Competition and regulation need to work hand in hand. As the AMC put it, the antitrust laws stand as a bulwark to protect free market competition. But a bulwark loses its strength if it becomes riddled with gaps.

There are some who'd like a gap for their own activities, although they don't want one for anyone they do business with. The courts have been strong about protecting this bulwark on their end. In fact, the law is well-settled in this area. It has not changed since the AMC restated and endorsed it. For federal regulation to create implied immunity, there has to be clear repugnancy with antitrust — so that it's essentially impossible to apply both without creating chaos. And we're only even asking this question where Congress has decided that comprehensive and detailed market regulation is needed to cure a dysfunctional marketplace — right down to pricing and terms-of-service minutia.

There's some free-wheeling dicta in *Trinko* about whether the 1996 Telecom Act might have created implied immunity, were it not for that antitrust savings clause. I was antitrust counsel at House Judiciary when that savings clause was written, and I was here at the Division, in an office right off that balcony, to help see it through. The history leading up to the Telecom Act, eight decades, back to the first Sherman Act case against Ma Bell, gave us a sense that a savings clause might be a good idea, just in case. But we don't want one everywhere.

The bedrock standard should remain "demonstrated clear repugnancy." The standard *Credit Suisse* exactingly followed. So we mostly just need the courts to stay the course and continue to follow well-established law.

The greater risk of new gaps comes from Congress. I've spent most of my career helping try to stop them. Sometimes, they *were* stopped. Sometimes, reined in, so they wouldn't shield conduct that might actually violate the antitrust laws. And sometimes they got through.

These exemptions came in two kinds. The first kind came from industry: Our noble efforts to improve the world are being thwarted by a wrong-headed antitrust persecution. The second kind was born in a Congressional office: We'd like to enlist industry as our partner, in an urgent national endeavor, and we need to guarantee they can combine their ideas and talents without being punished.

As a general matter, neither rationale holds up. The exemption is not needed to achieve the laudable or urgent goals, and it risks giving cover to some extraneous scheme.

The effort to scale back the insurance exemption had been underway for years well before I got to the committee in 1990, and still is today. There it stands, as it did in 1945. Its main justification, then and now, is so the insurance industry can continue to act as if the antitrust laws don't exist, subject to the boycott exception.

Keeping out new exemptions requires constant vigilance. We need a champion in Congress with leverage to stop them. In the House, that's the chair of the Judiciary Committee, with support from committee members in both parties and from House leadership. In the Senate, it's generally the chair and ranking member of the Antitrust Subcommittee, though in the Senate, it's easier for someone else to step up and also be a champion.

We've been fortunate, over the years, to have those champions. But we can't take that for granted. We all need to help build public awareness of the importance of antitrust, and to explain it in plain English. And we need to stay constructively engaged with Congress, with our champions, and with others we can help educate. Thank you.

MAKAN DELRAHIM: Thank you very much, Mr. Slover. Next, representing the Association of Corporate Counsel, is Ms. Glynis Lloyd Bell, Senior Corporate Counsel at Cisco Systems for the past 10 years. She is responsible for multibillion global sales agreements with U.S. service providers. Prior to Cisco, she was Assistant General Counsel at the U.S. General Services Administration. She holds a J.D. from Duke University, and a bachelor's from University of Illinois. Thank you very much for being here, Ms. Bell.

GLYNIS LLOYD-BELL: Thank you. Thank you for inviting us to share our views. Please note at the beginning, the views I'm expressing here today are not the view of Cisco Systems.

The Association of Corporate Counsel is a global Bar Association for in-house counsel. It has more than 40,000 members, who work for more than 10,000 organizations in 85 countries. Our members work for businesses of all sizes, across all industries. So when it comes to antitrust matters, our members and their employers have been on both sides of the issues. As in-house counsel, our members are often charged with maintaining corporate compliance with antitrust rules, and providing proactive advice on business transactions and acquisitions, in order to avoid antitrust violations.

With respect to antitrust exemptions and immunities, the Association takes no express position on continuing or discontinuing any industry specific exemptions or immunities. Many of our members work in industries that are currently exempt, while others work in industries that might stand to benefit from the termination of exemptions.

However, all of our members do have a common interest in preventing disruptive regulatory changes that leave companies guessing as to what is legal and what is not. If we are examining the immunities and exemptions, with a view to potentially eliminating some, we do urge that any process be undertaken deliberately and cautiously. Any changes should be enacted with enough transition time to permit companies to develop compliance processes that address antitrust requirements.

Turning to the state action doctrine, we do have an interest in how the antitrust immunity is applied to the state regulatory boards, going forward from the *North Carolina State Board of Dental Examiners* decision. We strongly reject any suggestion that the state action doctrine's active supervision requirement should be eliminated, with the view that if anything, it might benefit from being strengthened.

For in-house counsel, the limits that many state bar associations put on the practice of law by out-of-state attorneys can be onerous, and have an anticompetitive tendency. These regulations do limit in-house attorneys' ability to move easily between jobs in different jurisdictions, without greatly contributing to the protection of the public interest.

While self-regulation of the legal industry is generally beneficial, we do think the states display some anticompetitive tendencies against attorneys licensed in other states. We are concerned by the state bar associations' reluctance to allow innovative legal services that may not fit the traditional mold of services provided by a law firm. This can affect consumer access to legal services in general,

We believe the requirements enunciated in *North Carolina State Board of Dental Examiners* should be consistently enforced against state regulatory boards that are comprised of market participants. We would like to see more guidance on what constitutes active state supervision.

In the context of state bar associations, the state Supreme Court is generally charged with supervising the regulatory functions of the state bar. But it's unclear to what degree the state supreme courts supervise the decisions of the bar associations.

It would be beneficial to the legal industry overall if there were additional guidance on the meaning of active supervision in the Bar Association state supreme court context. There have been various proposals for reform of occupational licensing in nonprofessional industries. But we would urge the federal government not to overlook the potential issues within the legal industry itself. We really appreciate the opportunity to participate in the roundtable, and we look forward to continuing the dialogue on these and other antitrust issues. Thank you.

MAKAN DELRAHIM: Thank you, Ms. Bell. Isn't it interesting that some of the seminal antitrust cases we've had have involved bar associations and attorneys, and restraints by them? We've recently filed an amicus, or statement of interest, in a Florida Bar Association case, in what's called the TIKD case, where the Bar Association was trying to restrain certain folks from being able to engage in the business as an unauthorized practice of law, and we expressed some view on that second prong of the state action doctrine in that case. But it continues to be a challenge, and my guess is not only for lawyers, but other professional organizations who try to limit competition by new entrants, whether it's new technology entrants, or new market players. We are going to be vigilantly looking at those for exactly the reasons that you mentioned.

Next, representing the United States Chamber of Commerce is Mr. Craig Wolf, President and CEO of the Wine and Spirit Wholesalers of America since 2006. Mr. Wolf advocates for wholesalers' interests with state and federal elected officials, media regulators, and the law enforcement community. Previously, he held the position of that same organization's General Counsel, and before that, I had the great privilege of working with him at the Senate Judiciary Committee. Prior to that, he was here at the Justice Department's Criminal Division and was an Assistant State's Attorney. He received his law degree from the University of Baltimore and his bachelor's from Dickinson College. Mr. Wolf.

CRAIG WOLF: Thank you very much, Assistant Attorney General Delrahim and the Antitrust Division for putting this together. I believe the most effective government policies are those that are informed by careful consideration of the competing perspectives of those who will be directly impacted by those policies, so we appreciate the opportunity to be here.

My name is Craig Wolf. I'm the President of the Wine and Spirits Wholesalers, which is a trade association whose members distribute more than 80% of all wine and spirits sold at wholesale in the United States. WSWA is a member of the Chamber of Commerce, and I will be presenting the views of the Chamber, as well as those of my association, which has a unique perspective on the issues to be discussed today.

The Chamber believes in market competition that yields self-regulated markets, and is generally not supportive of immunities or exemptions from antitrust law. It recognizes that exemptions exist, has no expressed interest in reviewing those exemptions, but is hesitant to support additional exemptions.

With respect to immunities, the Chamber recognizes that the state action doctrine can shield anticompetitive regulation, which can lead to market distortions. So it is generally supportive of

the narrowing of its interpretation to permit excessive regulation, which could lead to fewer market participants and pre-determined market outcomes.

The Chamber also has raised concerns with the interface between U.S. antitrust laws, the Foreign Sovereign Immunity Act, the act of state doctrine, and claims of foreign sovereign compulsion, and generally believes companies operating in foreign markets should be subject to the laws and regulations of the countries in which they operate.

The Chamber believes that U.S. antitrust authorities should investigate, and where appropriate, bring cases against any commercial competitor in the market, state owned, supported, or private, and that the courts need to limit the application of the act of state doctrine, granting of comity where deference results in immunity.

For companies finding themselves under scrutiny in a foreign market, the foreign sovereign compulsion defense may arise, and while the Chamber has sympathies for companies caught trying to comply with potentially conflicting legal regimes, the courts must evaluate the assertion of such events very carefully.

The Chamber also believes that the Foreign Trade and Antitrust Improvements Act is in need of clarity. Import commerce should fall within the scope of U.S. antitrust laws, and the harmed U.S. consumers should be within the reach of remedy.

Like the Chamber, WSWA generally supports the longstanding presumption that competition yields the best allocation of economic resources, the lowest prices, the highest quality, and the most innovation.

However, we believe alcohol — and I think historic history has held out that alcohol is unique, and the goal of unrestrained competitive forces to achieve the lowest prices must be balanced with competing public safety concerns. We believe that the state-based regulatory system successfully and effectively balances regulation with competition, promoting a dynamic and diverse purchasing environment, while protecting citizens from the potentially harmful effects of alcohol.

The laws and regulations governing the production, distribution, and sale of beverage alcohol do not benefit from any expressed statutory exemption, nor do they enjoy implied immunities from the antitrust laws.

But the fundamental tenet of primacy of state regulation is strengthened in the context of state beverage alcohol regulations. The adoption of the 21st Amendment reflected recognition by Congress and the states that the difficult problem of regulating alcohol, a socially controversial product that could be misused, required that states be granted sweeping authority to develop comprehensive, manageable solutions to protect their citizens. As a result, many state beverage alcohol laws and regulations promote a level playing field, by prohibiting below cost pricing, predatory pricing, and price discrimination. Those policy goals are consistent, and do not conflict with the principles embedded in the federal antitrust laws.

When a state's regulatory requirements directly conflict with expressed federal policies, those regulations will only prevail when the interests implicated by the state regulation are closely related to the interest reserved for the states under the 21st Amendment.

The state action immunity doctrine, which also rests on principles of federalism and state sovereignty, functions to ensure that state imposed constraints on competition are the subject of clearly articulated state policies, supervised by state officials who are not themselves market participants, which I think you just talked about in the Florida case.

The Dormant Commerce Clause limits the state's ability to discriminate between in-state and out-of-state producers. However, the Supreme Court has made it clear that the 21st Amendment grants the states virtually complete control over how to structure the liquor distribution system, and that a state mandated three tier system of distribution is unquestionably legitimate.

The regulatory systems developed in the states to manage beverage alcohol have created the most innovative, dynamic, and competitive alcohol marketplace in the world today, offering consumers a wide array of brands from across the world. This demonstrates how strong state laws governing production, distribution, and retail can provide benefits to consumers while

satisfying important policy interests of the state in ensuring a level playing field for market participants.

We encourage the Department of Justice to recognize that beverage alcohol is historically and constitutionally unique, and requires a balancing of interests between competition and public safety. Thank you.

MAKAN DELRAHIM: Thank you. Representing the Heritage Foundation is Mr. Alden Abbott, Senior Legal Fellow, and the Deputy Director since 2014. He previously served as the Director of Patent and Antitrust Strategy for BlackBerry Corporation, and served as the Federal Trade Commission Associate Director of the Bureau of Competition and Deputy Director of the Office of International Affairs. At the Department of Commerce, he served as the Acting General Counsel and Chief Counsel for the National Telecommunications Information Administration, and he was here at the Justice Department, in the Office of Legal Counsel, as well as the Antitrust Division Special Assistant to the Assistant Attorney General. Mr. Abbott holds a law degree from Harvard Law School, a master's in economics from Georgetown University, and a BA from the University of Virginia. Mr. Abbott.

ALDEN ABBOTT: Thank you very much, Assistant Attorney General Delrahim. Great to be back at the Main Justice Building. Thanks for inviting me again to speak today. Views I express today are solely attributable to me, and do not necessarily represent the views of the Heritage Foundation.

As has already been discussed, an economy based on vigorous competition, protected by our antitrust laws, does the best job of promoting consumer welfare in a vibrant, growing economy. This conclusion is supported by expert economic studies, both domestic and international, and most of our economy is based on such a competitive model.

Antitrust is a key component of a competitive, free market system. As Assistant Attorney General Delrahim already mentioned, quoting the famous line by the Supreme Court Justice Thurgood Marshall, the antitrust laws are the Magna Carta of free enterprise. I certainly subscribe to that. Therefore, laws or regulations authorizing departures from the competitive model and antitrust laws should generally be disfavored, and proponents of such departures should bear a heavy burden of demonstrating, with robust empirical support, why such a regime is necessary.

Congress over the years has adopted a wide range of measures that partially or fully immunize certain sectors of the American economy from antitrust review. Collectively, these sectors cover a substantial volume of commerce.

Heavy regulations, state and federal, may, in certain circumstances, have public interest justifications. However, it is a breeding ground for anticompetitive activity. Indeed, complex regulatory schemes, even when entirely well-intentioned, may seriously distort the competitive process. In particular, antitrust exemptions tend to foster legal cartels; both economic theory and empirical research support the proposition that statutory antitrust exemptions do undermine competition, and most importantly, consumer welfare.

As already mentioned, antitrust law today takes into account economic efficiency, and should not be viewed as an impediment to economically desirable forms of collaboration by firms in exempt industries.

Finally, foreign jurisdictions are broadening the scope of their antitrust laws and subjecting to antitrust scrutiny formerly exempt sectors. This should help invigorate the competitive process overseas. It would be quite ironic if the U.S. government, which has argued strenuously, in multiple forms, about the benefits of antitrust to foreign economies, should, like the physician who fails to take the medicine he or she prescribes, fail to heed the implications of the argument for American law.

I might add, for example, that the European Commission aggressively pursues anticompetitive activity by regulated entities and by state owned entities. Whether development of a market participant exception to the American state action doctrine would be advisable is something that may merit consideration.

So in sum, I believe it's important to consider whether to continue the existence of individual antitrust exemptions, in their current form, fosters a goal of a strong, innovative American economy, or instead undermines it. Thank you very much.

MAKAN DELRAHIM: Thank you. And of course you and Mr. Wolf both mentioned the foreign compulsion doctrine, which is the subject of the Supreme Court's review of the Vitamin C case that the Division and Department have been involved in. I believe that the arguments are April 24th, so next month, and hopefully later this year, we'll have some further narrowing of that doctrine.

Thank you, everybody, for participating, and for those opening statements. We look forward to the robust discussions throughout the day. We'll have some of my other colleagues following the instructions of Bob here. Among those is Barry Nigro, one of our Deputy Assistant Attorneys General; Andrew Finch, who is our Principal Deputy Assistant Attorney General; and Roger Alford, who's our Deputy for International, in the Front Office. We'll rotate through — we have a couple of minor matters, some of which are going to trial next week, that we have to attend to, but this is important, and we'll rotate through here throughout the day.

So with that, if I could introduce to you Barry Nigro, who is one of our Civil Deputies, and I'll excuse myself briefly, and I'll see you guys later. Thank you so much, for those statements, and for the discussion.

[First Session:]

BARRY NIGRO: Thank you, Makan. This will begin our first discussion session — should I call it a square table, not a roundtable? — that will focus on statutory exemptions from the antitrust laws. We'll want to talk about what the impact of these exemptions is. Are they justified? And what's the effect on consumer welfare? Is it positive or negative? So with that, I invite our participants to start the discussion.

BOB POTTER: Why don't I just kick it off with the first question? A number of people have mentioned the problem of the stickiness of antitrust exemptions. Does anybody have a solution to that that they want to proffer? John, I know that was a concern of yours.

JOHN ROBERTI: Bob, it is, I think, a really, very difficult problem. Because I think, as I've listened to all the remarks today, there seemed to be many areas where we're in wide agreement, and I think the problem comes in when you start practically applying these principles. We submitted a statement that's a little longer than what I've read. As part of that, we tried to find an exemption that we liked, that would fit all four of the ABA's prongs, and we couldn't do it.

So, I think we've set up a nice regime to talk about, well, new exemptions shouldn't be coming in. The problem that you have when you take something away, when people have planned and invested, is that you create very significant market disruptions; business practices fundamentally have to change.

I think, and I'll defer a little bit to my colleague from the Association of Corporate Counsel. But as a lawyer who counsels clients on compliance, I will tell you, it is very, very difficult. You can't stop on a dime and change business practices. So if you are going to pull out exemptions, there does have to be a very deliberate process. I think the solution has to be a reduction of, I think time is important. Setting sunsets, but setting them sufficiently far in the future, so people can plan, is important.

I think there also has to be some scaling back. Where you have a full exemption, maybe you can define areas where you would have safe harbors, and again, I would refer folks to comments the ABA has done on the McCarran-Ferguson Act, which talks about how to scale back that exemption.

BARRY NIGRO: George.

GEORGE SLOVER: So I think the goal should be to ultimately get rid of as many of them as we can. But I do think there is a problem, the potential disruption and uncertainty which comes up. Particularly, we saw it with the insurance exemption, which has been around for three quarters of a century, and one of the initial things that the Judiciary Committee tried to do there was to

create a transition period for the sort of cutting-edge issue, which was trending, projecting the actual real data into the future, and using joint predictions of what the future would look like to set rates based on those predictions.

And so there was, I believe it was a three-year transition period. It was not satisfactory to the industry. That exemption is still around. But I think a transition period like that makes sense, which I think John has essentially suggested as a possibility.

Another thing that I think might be useful — and I wanted to preface my remarks, now that I'm off the page, I would like to make the same disclaimer that everybody else has made, that I'm not necessarily talking for Consumers Union, although my views are certainly informed by my mission there — one of the other things that I think might be useful is a period of injunction only, where you're fully subject to the antitrust laws, but you can't be sued except for injunctive relief. Both the enforcement actions and private actions would be limited that way, and then maybe a vigorous period of business reviews to try to sort things out. You know, come one, come all, give us your concerns, let us help you figure them out, where the lines might be under the antitrust laws, an education process for the industry, and I think if everybody undertook that in good faith it wouldn't have to be that long of a period.

BARRY NIGRO: Diana.

DIANA MOSS: Just a quick comment. These are great. It's a great question, and good comments from John and from George. I wanted to make the point that on the stickiness issue, technical coordination is really important, and I would give two examples of the importance of working with sector regulators. So obviously, DOJ puts in comments on requests for immunity for the airline alliances, and we just saw the Delta Aeromexico case go through, where it was conditionally, immunity was conditionally approved, but subject to a sunset provision, as they all are, but are rarely enforced by the DOT.

But a five year period, which clearly, from a sector regulator's technical knowledge, was enough time to provide the ability for the parties involved to plan capacity expansion, and that sort of thing.

The other example I would offer is FERC's granting of market-based rates, which are presumably immunized under the filed rate doctrine. Those rate reviews should occur every three years, and FERC does these rate reviews to determine whether those parties possess market power or not, and whether they should be granted market based authority again.

So some of these are very technical issues, and so coordination with the sector regulators is important.

BARRY NIGRO: You mentioned the DOT example, and the five year sunset. Do people have thoughts on legislation that would sunset all, or most, existing antitrust exemptions, with a provision that allows them to be re-instituted in some form in five years? So there wouldn't be an instant sunset, but there'd be a five year lag, and then allow Congress to reconsider whether an exemption is appropriate, or necessary. Because I think, Diana, in your original comments, you mentioned how many of these exemptions have outlived their useful life. What about a global sunset provision, or legislation?

CRAIG WOLF: Wouldn't that be painting with a pretty broad brush? I mean, if you're saying something about every one of them getting a sunset provision, how do you individually look at each of different provisions and exemptions, make a decision about whether it's appropriate in this case for that case? Obviously, there's a lot of cynicism about the exemptions at this table. I understand that. But I think, if you don't have a chance to look at each industry separately, or each exemption separately, I think you're going to be potentially painting with too broad a brush.

GEORGE SLOVER: I think, for the reasons just stated, I think it would be very difficult, in practice, to harness the resources of Congress and everybody else to look at every exemption at one time. But I think starting down that road is a good idea.

BARRY NIGRO: So one of the challenges, I imagine, would be identifying a vehicle for giving consumers a greater voice. Industry, obviously, is always well represented when exemptions are at stake. But sometimes, the consumer voice can be diffuse and more difficult to organize. Do you have any thoughts on how to better represent the consumers? I know a number of the

organizations here do that. But is there more that can be done to give them a greater voice in this process?

JOHN BERGMAYER: Sure. I guess I can deal with that. What we find is, a lot of times, the consumer groups — on some issues in particular, it's hard to be taken as seriously as some of the industry groups. We don't have a lot of campaign contributions, and we don't have the same level of lobbying muscle. We might have two public interest advocates walking the halls on the hill, versus two per member of Congress for the industry on the other side. So I would say that the most effective strategy has typically been for public interest groups to work in coalition with as many partners as possible, with groups like the American Antitrust Institute, or something like that. Because that way, at least we can have a force magnification effect. I think, with some of these issues, where you have this classic concentrated benefit/diffuse costs scenario, the diffuse costs are felt by consumers, very often. Ultimately, they're paying higher prices or what have you.

But very often, you have trade associations that have an interest in this, and it's just a matter of getting the trade associations willing to spend the political capital necessary to put their reputation on the line, and perhaps make a few enemies, over an issue which might not be that material a difference.

And you hope that that's one thing where the reputation economy, and the repeating players aspect of Washington DC, makes it sort of worthwhile for those alliances to happen, so that can continue to be a beneficial alliance.

DIANA MOSS: Just a couple of thoughts on this. I really think there are three important things here. One is what John just referenced, which is coalition building in the consumer community. We're finding that to be a very effective way to amplify the voices of the consumer.

But I also think it's important, when reaching out and getting the consumer perspective, to emphasize all the ways in which consumer welfare can be harmed by the shields that are put up by immunities and exemptions. And that's not just price effects, but as I said earlier, it's non-price effects. It's choice. It's variety. It's innovation. I think the consumer voice can be really effectively harnessed by connecting the dots on all of the aspects of consumer welfare that are potentially affected.

And then, finally, I would add, sometimes, not always, sometimes, there's a little bit of a tension in the consumer community, favoring certain types of regulatory approaches to achieve certain goals. AAI, as a competition advocacy organization, is obviously, our sights are set, ultimately, on the consumer. But we're very much advocates of vigorous enforcement in promoting competitive markets, so that consumers can benefit. And that means not a lot of regulation between competition and the consumer.

BARRY NIGRO: Lina.

LINA KAHN: Sure. I'll mostly echo what John and Diana said. Our group really focuses on public education and connecting the dots, ensuring that consumers and the public are able to understand what the pocketbook impacts of some of these exemptions are. So we do a lot of advocacy and storytelling, and also engage with other advocacy groups in this space, who are in the consumer protection space, who are not as attuned to, or familiar with antitrust issues. So I think a lot more coalition building, which we've started to see in the last couple of years more, should hopefully help in this vain, too.

GEORGE SLOVER: I would just echo what everybody has said, but also add that for consumer groups, particularly one like ours, we're involved in a lot of different issues, as they affect consumers in the marketplace, and just to pick one that I mentioned, safety. We have to sort of, like you all do, figure out how you're going to allocate your resources, and what's the hottest fire that needs to be put out? And so it can be a challenge to talk about having a free market economy, supported by a set of laws that most people don't really understand that as one of those top priorities. So the challenge for us is to look for opportunities where the impact on consumers is clear, and to talk about it clearly, and in plain English, and to get the word out to as many people as we can, in Congress, in the press, with other coalition groups, and so that's a constant effort.

But I would echo what Lina just said, too, which is that there is a new reawakening of appreciation for the importance of the antitrust laws, and the importance of competition, and why we need to have them strong and vigorously enforced, and I think we need to take advantage of where we find ourselves now, and use that.

BOB POTTER: Lina, we've been- there's been a lot of agreement around the table. But I think you suggested something that I don't know that a lot of other people around the table necessarily agree with, which is, you pointed out that countervailing power, in your view, would be appropriate as a rationale for enacting antitrust exemptions. I think, is that accurate?

LINA KAHN: Yes. Generally, we very much disfavor exemptions. But I do think there could be select instances, I think, in the labor context, we would support that. I think Capper-Volstead, when it was passed, was potentially justified. But I think it is no longer serving its purposes. So I think there should be an inquiry looking at whether it should be modified to ensure it is protecting the right population, or done away with. But I think that's an example of an instance where countervailing power was a justification. But it's no longer serving that purpose.

There was actually an exemption introduced last week, by Representative Cicilline, in the context of the news and media space, where publishers would be able to potentially join together when negotiating with advertisers, and I think that situation has arisen, in part, because there is a feeling among publishers that the current marketplace is not really competitive.

And so I think understanding that monopsony concerns and buyer power concerns can be a situation that motivates and opens the door to discussion of exemptions. It's just worth recognizing, if only to, then, ensure that monopsony and buyer power concerns are being addressed. Because I think that often is a jumping point for more lobbying and organizing for these kinds of exemptions. So I think it's just something to be aware of.

BOB POTTER: John, as I read your written submission, I think that you disagree with that.

JOHN ROBERTI: I think that's accurate. I guess, again, speaking just for myself, my view on this would be, if there is some sort of dysfunction in the market, which is causing too much power, concentrated in one place, that's best remedied through direct enforcement rather than through what would be effectively regulation or some exemptions from the antitrust laws that would allow collusion to balance that countervailing power. If there is countervailing power, let's bring a Section Two suit, and let's get that countervailing power fixed.

LINA KAHN: Just to clarify: We agree that enforcement is the best way to address this. I'm just pointing out that this is often a way that these things get introduced, and so I think they should be targeted through enforcement, rather than, say, allowing new exemptions.

BARRY NIGRO: George.

GEORGE SLOVER: So, I think Lina has identified a problem that we agree with, too, and in our written statement, we flagged it as well. I also agree with what seems to be the consensus, that the best way to deal with the market power on one side is not to create market power on the other side. Because then you have a term that I think was coined here someplace, many years ago, the "sumo wrestler" situation, where you have one big guy, and you want to do battle against that big guy with another big guy, and then they end up shaking hands and figuring out a way to work together, and everybody else gets sat on instead.

So I think, hopefully, the, for example, the gig economy, and the movement to rendering people independent contractors, or telling them they're independent contractors, when they're really not, is a problem that hopefully can be addressed in the labor laws, and won't have to be addressed in the antitrust laws.

BARRY NIGRO: The sumo wrestler argument is one we hear a lot, when people are trying to justify mergers. So, we need to get bigger in order to compete with our bigger competitor. So it's something that's familiar to us.

JOHN BERGMAYER: Yeah. That was my point, exactly, which is that it's not just in, "Hey, please create an exemption for me, because there's all this market power on the other side." Even when my problems might not actually be caused by the market power on the other side. There might be more, other fundamental issues to be addressed. But in merger after merger that

Public Knowledge has worked on, that comes up as an example. And it might even actually, technically, be true in a narrow sense, that it will help the new, merged company strike better deals with these other big parties. I think one problem with that is not only the sumo wrestler problem. But it's a principle that has no end to it. It's just an argument, essentially, for continuing to have concentration on all sides, until there's just one big company.

DIANA MOSS: Can I just make one comment, just from a broader policy perspective? I don't think you can have it both ways. If we're going to explore policy initiatives and approaches to dealing with 30 immunities and exemptions sitting on the books, then you don't get to say, at the same time, "Here's a carve out. We need an immunity here. Here's a carve-out. We need an immunity here" for two reasons.

One is, it's a carve-out, and it disrupts a coherent, holistic, policy approach to dealing with what are too many immunities and exemptions on the book.

Number two, if the litmus test is, you've got to have a market failure, a clear market failure, or you have a regime which has a societal goal that is not promoting consumer welfare, then you're thinking about immunities and exemptions. But I can't, sitting here today, really think of that many examples, where those two conditions hold. Market failure are clearly a societal goal that trumps consumer welfare.

So to have a coherent policy approach, I think those are important metrics or factors to follow. And of course, you don't want the sumo wrestler thing happening on immunities and exemptions. Much like you guys at DOJ and at FTC don't accept those rationales for merging companies, that we need to get bigger so we can compete more with our bigger competitors. Nor would you give out an immunity and exemption to create countervailing market power, to deal with what should be an enforcement problem, and more vigorous enforcement.

BARRY NIGRO: Lina, and then John.

LINA KAHN: So, just to quickly follow up, to repeat, we disfavor exemptions and immunities. We don't think that the proposal that was offered last week is something that is, by any means, an ideal scenario, and we don't think that's the way to go.

But I think the reality on the ground is that many members of Congress are also now new to antitrust, and they're newly starting to pay attention to these issues, and the issues that they hear are often times in response to concentration problems. And so to them, they might be sympathetic to kinds of exemptions and immunities that instead should be targeted through enforcement. But, if they don't feel like they have the tools to force that to happen, then I can see a situation where they increasingly go down this road. I think it's good to be aware of that, and to maybe use that to then make sure that we focus on enforcement and situations where we're seeing these kinds of inequalities.

JOHN BERGMAYER: Thank you. And Bob, when I spoke before, I talked about one side of the equation, which is, if you see a market failure, let's enforce. There's also another side of the equation, which is, there actually are ways to fix the countervailing power, short of an exemption. And just thinking about the monopsony point, just listening to others and thinking about the monopsony point, there are really good guidelines on joint buying, in the health care context, that, frankly, I think a lot of practitioners are using to advise their clients in other industries as well. We're not telling them that there's an immunity. But we're saying, "Look. The agencies have said, this is what a safe harbor will look like in the health care context. They're likely to think about it in the same way, and if you set yourselves up in a way that falls within those guidelines, your risk is going to be pretty low."

So, you can solve it, I think, on both sides.

BARRY NIGRO: Any other thoughts? I think now is a good time to transition. So we'll take a 10 minute break. Roger will come up, and he will moderate the second session. So let's break for 10 minutes, and re-gather at 11:40.

[Second session:]

ROGER ALFORD: So welcome back. It's a thrill to be moderating this second discussion of the specific issue on implied immunities. I think this is the first day where I completely feel like I'm a fish in water in this job. Because this feels like a colloquium that you would have at a university, with a whole diverse range of viewpoints. So I'm especially comfortable today, doing this, and so I welcome all of you and the chance to be here.

So today, in this session, we're going to be talking about implied immunities. Thank you for your contributions thus far. Obviously, implied immunities are especially disfavored. So we went from a session discussing exemptions as disfavored to implied immunities as especially disfavored. So I guess the discussion today is, why are they especially disfavored, instead of just disfavored with a particular focus on the relationship between Congress and the courts and the relationship between them, in terms of how they articulate these immunities?

So with that, I will open it up. And if we want to start with a general question: Is it appropriate for courts to create exemptions that Congress has not expressly enacted? That would be the meta-question, I think, of the session.

GEORGE SLOVER: Probably not. Maybe in an extreme case, if there is one that really satisfies all the tests that *Credit Suisse* put there that basically it's impossible for a business to follow this comprehensive, detailed, regulatory regime, full of minutiae that get into pricing and all of the other terms of service. And then we also have to worry about the antitrust laws, and there are going to be two law enforcers bearing down on us and giving us contradictory directions, under penalty of prison or substantial fines, if we can't figure out a way to do both, and we're diverting all of these resources for that."

But I think, in most cases, you can figure out a way to make the antitrust laws compatible with the regulatory regime.

And so I think that should be what's tried first. And I don't know how to say it any more specifically, but there should be just a really high burden to say that Congress intended for the antitrust laws to be displaced in enacting this comprehensive regulatory regime. And as a practical matter, there are probably not going to be that many comprehensive regulatory regimes that get into pricing and other market decision minutiae.

JOHN BERGMAYER: I would say, in almost the way it's framed — and obviously, it's the way that the courts frame it — is, I think, a little bit misleading. Because if you have two different statutes, one might just be a statute granting the agency power, and then, this other statute, the antitrust laws — and they're in conflict.

Laws come into conflict, and courts have to deal with that all the time. And it's not a matter of the courts, or looking at this situation and using their common-law powers, inventing an immunity. They're just reconciling statutory language from statutes that are passed at different times.

So I think, just framing it as the court constructing a doctrine and then having tests — obviously, that's the way it has worked — is just not the right way to look at it. It's just the way of, how do courts deal with sets of statutes that are incompatible all the time? You either try to find a way to read them so that they both can be effective, and if that doesn't work, you figure out which one wins.

CRAIG WOLF: So obviously, the alcohol beverage industry — which I also represent, obviously, today — does not have any immunities. But to John's point, when you deal with analysis of a state law that's challenged, you do have to then go over and see what is the implication under the 21st Amendment? And there's a balancing test on it at that point to see whether the interests served are intertwined with the core powers of the 21st Amendment.

So I would agree with John to the extent that, in certain situations, the courts — simply making decisions based on competing either statutory or constitutional, in this case, provisions — that's a necessary thing, but certainly, I think it would be disfavored to create out of whole cloth new types of immunities.

JOHN ROBERTI: I think, if the question is: Should courts develop a doctrine of implied immunity? Is that sort of the question that's —

ROGER ALFORD: Sure, absolutely.

JOHN ROBERTI: And so, I think, what I heard John saying is — I think I agree with it, I just want to, maybe, take it from the perspective of somebody who counsels clients — there is a client that is trying to comply with two different statutory schemes, they have to know what they can and can't do.

I'll throw out an example. Imagine a scenario where you have a CFO who's on an analyst call and is asked the question about what are the company's plans for pricing in the next quarter? The SEC would tell you, disclose. The antitrust laws would imply that you shouldn't. That CFO needs some guidance, and I think that's why I get paid, is to try to help them.

But the courts need to step in and give guidance on that point. So I think the answer to the question is actually, yeah. I think the courts do need to do that.

RANDY STUTZ: So I agree with John's point that, on a basic level, courts really do need to do that, and oftentimes, there are, at the root of these implied exemptions, higher constitutional values, like free speech and federalism. But usually, where the difficulty arises is instances where these values are just implicated, maybe, in a vague sense or a narrow sense, rather than really deeply imperiled. And the room for judges to use these doctrines to get rid of cases to free up dockets, that causes a lot of mischief.

DANIEL HAAR: I'd just like to ask a follow-up question, which I'll throw out to anyone. It seems like there is general agreement that, when two statutes apply to a particular type of conduct, courts play some role in reconciling the two statutes or figuring out how to apply both. Some previous cases articulated that it was required for there to be clear repugnancy in order for a later-in-time statute to impliedly repeal the antitrust laws in regards to a particular conduct, which might imply that a particular party couldn't comply with the terms of both laws.

Credit Suisse does seem to broaden that, in terms of where two statutes might give conflicting guidance or differing standards of conduct but not requiring repugnancy in the sense that it was impossible to follow the dictates of both statutes at the same time for the parties whose conduct has been challenged. So what I'd like to open up to the panel is a more specific question about whether *Credit Suisse* got it right, in terms of that responsibility of courts to determine how to reconcile the statutes.

GEORGE SLOVER: Yeah, I have probably not read *Credit Suisse* as many times as some others in this room. I've read it a number of times though, for that point, and I read it differently. I read it as just re-affirming the standard that's been there, and applying it exactingly. Impossible might be a little bit further than you need to go, but practically impossible, or more than just, "Hey, we're a business. We'd like to comply with as few legal regimes as possible. These two sort of operate in the same space. We'd like to just pick one, and this is the one we prefer."

I think it could degenerate that way, if you allow some of the rationales to be read more loosely and to be taken that way. I think the actual holding was one that said that it would create chaos or confusion to such an extent that it would divert undue resources to the lawyers trying to figure out, "how can you comply with both of these?"

DIANA MOSS: Can I ask just a follow-up question? It's a really good question you're asking. But might it also apply to merger review, where you've got a regulatory agency with a public interest standard looking at a merger? But you also have the antitrust agencies looking at a merger. We've seen lots of points of conflict there as well, with or without exemptions, where the agencies are applying different standards and, potentially, getting to different outcomes and using different remedies.

Doing a lot of work in mergers myself, that has always fascinated me as a potential point of tension or point of conflict. But I just don't know if you were thinking about it that broadly.

DANIEL HAAR: Do you have an answer to help courts reconcile?

DIANA MOSS: It depends, obviously, on the disposition of the case. But AAI has a long history of giving a lot of deference to the antitrust agencies on evaluating the effects on competition whereas, the regulatory agencies provide really, really important institutional and technical expertise and insight into the industries that they regulate. But I think it's an on-going debate.

JOHN ROBERTI: I was just going to weigh in with the following thought: As people who live and breathe antitrust, we always think antitrust ought to win, and I think that's part of what bothers us about the implied immunities is it sort of suggests there's something that should push antitrust to the side, and the principles that we really believe in, in terms of free competition. And I think, again, it touches on some of the principles we talked about in the earlier session, which is, are we in a place where Congress has directed us to put aside the values of competition, which we think are really, really important, in deference to a regulatory scheme? So how should courts weigh it? I think, just as a matter of policy, probably, the regulatory scheme comes first and the antitrust comes second, and just being practical, I think that's probably how courts will come out. It's just, how far does the regulatory scheme go in displacing that competition?

ROGER ALFORD: Alden.

ALDEN ABBOTT: Yeah, let me raise a slightly different issue. I certainly agree, courts — they're in the job of having to construe and harmonize statutes to the extent possible. But what happens when a court fails to follow the dictates of the statute? What if there is subject matter jurisdiction, clearly you have personal jurisdiction, and there is clear antitrust harm to American consumers?

I'm thinking of a case being teed up before the Supreme Court, the *Animal Science Products* case, where you have, admittedly, say, a foreign price-fixing cartel exporting directly into the United States, and without any finding of Foreign Sovereign Compulsion — that's a separate doctrine I don't want to get into, nor act of state, also an established doctrine, although, when I studied public international law, it's not a doctrine of public international law, it's a doctrine created by the courts, although recognized in the restating of the Foreign Relations law — but what happens if a court, just on its own, says, we want to engage in comity balancing? Based on one letter or one submission, by some instrumentality of a foreign government, we are going to give that presumptive weight and say we're not going to apply the antitrust laws, despite the fact that you have clear harm?

To me, that's inconsistent with the separation of powers. Article I of the Constitution, we know from *Marbury v. Madison*, says quite clearly that the courts are to apply the laws, say what laws mean, but it does not say that the courts can decide not to apply the laws, except in very narrow circumstances — those circumstances should not be presented by a court on its own, engaging in foreign policy, by deciding whether or not to weight a foreign interest.

That is not an authority committed to Article III. Foreign policy is committed to the Article I and Article II branches. So without knowing what the court is going to decide, I'd find a whole Mannington-Mills-Timberlane doctrine of potential implied immunity, based on balancing, as being very problematic.

ROGER ALFORD: That's interesting, the foreign sovereign compulsion as a variation on an implied immunity, right?

ALDEN ABBOTT: Right, although I think, Roger, correct me if I'm wrong, but for foreign sovereign compulsion you really have some tight standards to show. Indeed, I think sometimes it's raised by parties who claim foreign sovereign compulsion, but it's not really applicable.

ROGER ALFORD: Right. Randy.

RANDY STUTZ: I was thinking of the same analogy between *Credit Suisse* and the *Vitamin C* case, and in further support of the point you're making, the Foreign Sovereign Compulsion doctrine is well-developed in common law, the requirement of the impossibility of complying with both the foreign law and domestic U.S. antitrust law, and so there's also an administrability component to thinking about sound rules, as opposed to this sort of free-floating comity analysis that the Second Circuit undertook in that case. I think there's a more principled approach that relies on the common law.

CRAIG WOLF: So the Chamber, obviously, was engaged in the *Vitamin C* cartel case. It involved an amicus brief. They too have the same concerns, and that is that you don't want to have, essentially, a blanket immunity given without a proper consideration for the factors involved, whether it be a direct control or some lesser degree of control. But you have to at least

be able to evaluate that and not just say that comity is going to allow them to walk away without any type of scrutiny of that relationship.

ROGER ALFORD: A couple other questions I wanted to highlight. One is, does displacing antitrust actually help consumers? And then a second question that I'd just like to throw out — you mentioned the idea of stickiness as a problem with express immunities — does the same stickiness problem exist with implied immunities?

JOHN BERGMAYER: It seems, when the stickiest problem is with a statutory exemption, you have a very difficult political problem to solve to get out of that. I think, in cases of, perhaps, reading *Credit Suisse* or similar doctrines too broadly, there can be just challenge through enforcement actions that then get upheld. If courts create a doctrine, courts can take it away, if the right cases are brought before them, where it becomes apparent that reading an implied immunity too broadly would not be the right outcome.

So that's where your opening statement, to some extent — I get to say this, because I don't have to be a litigator — it means sometimes bringing cases which can seem hard in light of the arguments that are going to be made as to why there's an immunity and just bringing them anyway, and just hoping that the court will come to its senses and read the implied immunity narrowly.

DIANA MOSS: I think, generally, the answer is no, but it's definitely worth going through a process of unpacking the different venues where consumers are close to an exemption or an immunity versus farther away. I would point out — and this is more likely to arise in the case of statutory exemptions — that consumers are, probably, more victimized by regulatory capture in the event the antitrust laws are precluded from applying. And we see it all the time. A lot of regulatory regimes are constructed and evolve over time in a way that really protects the industry and creates rent seeking and all sorts of other distortions, and that's very harmful to consumers. That harms them in terms of choice and quality and getting better products faster to market. So I think that's a really important issue.

Whereas, antitrust, by virtue of how it acts in terms of promoting consumer welfare, is going to address, much more directly and effectively, the effects of anticompetitive behavior on consumers.

DANIEL HAAR: One issue that commentators often bring up is that of the Supreme Court's decision in *Trinko*. In particular, they often lump it in with a discussion of *Credit Suisse* and other cases on implied immunities and implied repeal. So I just wanted to open up to discussion, is that case properly considered one about an exemption from the antitrust laws? Or is it simply about the proper reach of Section 2 of the Sherman Act?

GEORGE SLOVER: So I deal with that a little bit more in my written statement. I think, the latter. I think it really just said, in a nutshell, you can't get a shortcut to a Section 2 violation by proving noncompliance with the Telecom Act. And there was a lot of free-wheeling discussion in Justice Scalia's opinion about whether this might be an industry where the regulatory regime would displace antitrust, except for the savings clause. I'm glad we got the savings clause in there.

But I think, first and foremost, it's a case about keeping the antitrust laws separate from other laws, in terms of how you prove a violation.

ALDEN ABBOTT: I agree with George. I think it's really, what is the Section 2 standard to apply? It's not about immunity, in my view.

DIANA MOSS: I think we would tend to agree with George on that. I think *Trinko* is in sort of a gray area, given the existence of a savings clause, given no duty to deal, from an antitrust perspective. I actually think the major impact of *Trinko* was — and I was at the FERC, as a federal regulator at the time *Trinko* came out, and I remember the day the decision was coming out, because we were all sitting at our desks, holding our breath, wondering if the court's reasoning in *Trinko* would pour over to other industries, for example, like electricity — we were all just sort of panicking in advance about whether there would be that portability. That was really one of the major impacts. I also think the decision came out at a time when there was that whole cluster of cases. There was *Credit Suisse*. There was *Link Line*, I think, and then there was the *Trinko* case. They were just in relatively close proximity to each other.

BOB POTTER: So one of the things we've been talking about is how Congress and the courts are used to reconcile these things. I assume, in the first instance, we'd agree that the problem here, arguably, starts in Congress, because they've written two statutes which appear to be incompatible. Is there anything we can do, when Congress is drafting statutes that might be incompatible with the antitrust laws, other than an antitrust savings clause, that would take some of these questions off the table?

GEORGE SLOVER: So I was going to reply to the last question with this. But I think it also applies here. Which is that, in a way, *Trinko* actually helps answer the question that we've been discussing with regard to *Credit Suisse* and implied immunity, which is that, if you have to, you can find a way to reconcile them. The antitrust savings clause said, no, the antitrust laws are not going to be displaced. You need to figure out a way to make them compatible.

And things have moved on. And the two laws are still on the books. And we're still using them. So I think, in a way, that's an answer to an antitrust savings clause — as long as it's not used too often, and it cheapens the coin of the realm — we don't want courts, every time they hear the words uttered "implied immunity," to say, "Oh, well, that's going to be answered by whether there's an antitrust exemption in this statute or not. Oh, there's not one. Well, there must be implied immunity."

So one of the things that, when I was on the Judiciary Committee staff, when I would come and say, do we need to clarify this with an antitrust savings clause? The professional drafters up there would push back and say, no, you don't want too many of these. You want to first decide if there's really a confusion there.

And I think, to the extent that we have *Trinko* as an example, one, it can be helpful to have an antitrust savings clause if you really think there's going to be doubt, and two, it shows that there may not really be as much of an implied immunity problem, as long as you keep the bar high.

BOB POTTER: Would you recommend that, in Senate or House reports, this specific language that says, we considered whether to include an antitrust savings clause, but decided not to, since it wasn't necessary? Since we didn't see a conflict.

GEORGE SLOVER: I would love to think that the courts are going to read legislative history carefully, particularly the Committee reports, which have a lot of deliberative input into them. I don't think we can rely on that always.

ROGER ALFORD: Others? Just a few more minutes on implied immunity.

DANIEL HAAR: One more question: Roger kicked off the discussion with the proposition that express immunities are disfavored, implied immunities are especially disfavored. I just want to see, is there consensus around the table on that?

BOB POTTER: Anyone who disagrees, how about you speak up now.

GEORGE SLOVER: I would say totally agree, as to both.

ALDEN ABBOTT: They're both disfavored.

ROGER ALFORD: Any question about implied immunities, as applied to the foreign context? So, is there an argument to be made that there have been immunities under the Foreign Sovereign Immunities Act, for example, that, obviously, absolute immunity has been modified to be, sort of, a limited immunity, with specific exceptions? And one of the exceptions is, of course, the exception of the Foreign Sovereign Immunities Act.

So it's essentially, there's an immunity. But then it's subject to an exception, under the Commercial Activity exception. Any thoughts on that, in the antitrust context? Because there's not a lot of litigation on that question.

ALDEN ABBOTT: I think, as Roger noted, of course, we do have in effect a market operator exception, and my own view would be you'd want to read the Foreign Sovereign Immunity Act correctly but narrowly, and not read it broadly to create implied immunities.

But I think it's interesting. It does point to the way foreign market operators, which can be subject to U.S. antitrust law if there's jurisdiction harm and effects on U.S. commerce are met, why not subject market operators to the antitrust laws, if they're subject to state ownership or control or, we know, municipalities obviously raise the deference to federalism issue. They're

more clearly subject to antitrust laws, but why not state-owned or controlled, or departments, if they are acting in a purely commercial phase or manner?

RANDY STUTZ: So in addition to foreign sovereign immunity, the FTAIA and principles of international comity can also act much like exemptions, narrowing the reach of the antitrust laws. And you think about export cartels in particular — the United States has the Webb-Pomerene Act — we exempt export cartels.

And now, if we're going to rely on principles of comity, to stay the U.S. courts' hand when foreign export cartels harm the United States, you're creating, among other things, deterrence gaps. You're creating a lack of redress for domestic consumers. But you're also failing to deter the most harmful international cartels, and the host country doesn't have an incentive to prosecute them.

JOHN ROBERTI: Yeah, just to respond to that, I want to draw a distinction between an immunity and an interpretation of the antitrust laws. Because an immunity says, you do whatever you want, and we don't care, because you can do whatever you want. An interpretation of the antitrust laws means that, as a matter of policy, we think that the antitrust laws are not going to reach this conduct or that conduct.

Taking the FTAIA and FTIA as examples, there are foreign businesses that conduct their operations with the expectations that they are not going to be drawn into U.S. courts, and they should be — that's not creating an immunity, that's just, how far do we want to expand the antitrust laws? I probably have a different view than most of the people on the *Vitamin C* case.

Because I think it is very difficult for a U.S. business, or any business operating abroad, being directed by a foreign sovereign to do something, to say, "I'm sorry, I'm not going to do what you ask because some plaintiff may drag me into court in the United States." So I would draw a distinction between the two. We've been talking about implied immunities, which are super disfavored. I think you added, what was it, "very" disfavored —

ROGER ALFORD: "Especially."

JOHN ROBERTI: "Especially," but courts should, as just a matter of practice, decide the scope of the antitrust laws, and of course, if they get it wrong, Congress should fix it.

ROGER ALFORD: We'll stop there, and I invite Andrew Finch to do the next session. Thanks very much.

[Third Session:]

ANDREW FINCH: Thanks, Roger. That was very interesting. And I'll say, when I was sitting here, I was flipping through Justice Kennedy's decision, since we're going to talk about the state action doctrine, *North Carolina State Board of Dental Examiners*, which I hadn't really spent a lot of time looking at all the way through since it came out, but one phrase — parts of it are beautifully written — is particularly apt. He says, "There is a long tradition of citizens esteemed by their professional colleagues, devoting time, energy, and talent to enhancing the dignity of their calling." And I thought that was particularly nice, as I was sitting there watching all of you who have come to talk today about the topics that are covered by this roundtable. Because it really does reflect what's going on here today and the quality of the submissions and the thoughtfulness that you've all brought to that, and it's much appreciated.

So this particular part of the roundtable is about the state of the state action doctrine. And so we have a lot of questions that we'd like to throw out there for people to think about in terms of the state action doctrine, how it's evolving. Is it now, in its current form, striking the proper balance between state sovereignty on the one hand and the federal commitment to competition in interstate commerce? When should states be adopting regulations that limit competition? And I'm particularly interested in this issue brought to the forefront by the *North Carolina Board* decision: When are regulated or state entities permitted to do that, and what sorts of active supervision should be required? What form should that actually take in order for them to come within the narrow confines of the state action doctrine? We also have a question about, what can or should the Dormant Commerce Clause do in the state action context? It provides some additional guidelines, or rails, for state conduct, with regard to infringing on competition in

interstate commerce. So those are just some starting points. I'd like to open the floor and welcome comments from the participants about where we think the state action doctrine is, where it's going, where it should be going.

RANDY STUTZ: Just to reiterate some of what I said in my opening remarks, I think both *Phoebe Putney* and *Dental Examiners* have taken us to a point where the legal policy underlying the doctrine is now coherent and makes a lot of sense. Justice Kennedy, in the *Dental Examiners* opinion, cited law review articles by Einer Elhauge and Judge Merrick Garland that really reflect the thinking in that opinion.

And the basic policy underlying the doctrine now seems to be that what federalism allows is for states to substitute regulation for competition, not to declare action lawful, not to declare the antitrust laws don't apply. So I think now there's a square recognition of the goal of the doctrine, which is to reconcile federalism policy and competition policy.

Whether in practice, whether it's going to create additional costs and difficulties, both for states and for plaintiffs, maybe still remains to be seen, given the nascency of those decisions.

LINA KAHN: Generally, we think that *Dental Examiners* did strike the appropriate balance, and we think that the courts move away from considering the formal relationship between the entities towards looking at what are the potential incentives to self-deal or serve private interests.

We think that kind of inquiry is very appropriate, given that it seems like an underlying concern about state action is not the authority of the state but more about issues of abuse that could stem from regulatory capture. And so we think the inquiry, as structured in that case, gets to those underlying concerns in a way that's appropriate.

GEORGE SLOVER: One potentially missing piece in the state action doctrine, as it's laid out now — and it's probably not something that the courts can or should deal with — is whether the regulatory purpose that the state has decided is more important than antitrust really is more important than antitrust, and whether the state should be enacting this policy that displaces antitrust.

And that's why — and I think you touched on this, as you were laying out the question — it's not just something for the courts. It's also something before the courts would ever get involved, which is engaging with the legislatures and saying, have you thought this through? Is this really something you want to do? Do you realize what the harms are? Is there a way that you can do this that doesn't require setting up a regime that's going to make it harder to enforce the antitrust laws?

And I know the Antitrust Division is very active in that area, and the FTC is, too. And that's maybe something that more of us can help with.

DIANA MOSS: Can I just bring up a broader policy point? And I speak as an economist, because I see the state action problem from the perspective of an economist. And I would just note that, particularly in the context of state licensing boards, a lot of these problems are occurring because the state licensing boards are populated with entrenched incumbents in the industry, whether it's dentists in North Carolina or doctors in Texas.

So if you think about the *Teledoc* case, the *North Carolina Dental* case, one policy approach to that is to work with the states more carefully to populate their boards with representatives that don't just reflect entrenched incumbent interests in the market. In other words, bring in, onto the boards, practicing professionals who represent the new market entrants that are actually being foreclosed by the decisions of the state licensing boards.

And that's a whole different policy prong kind of a way to deal with the state action problem, at least in that context. But it doesn't go to narrowing the state action interpretation of the doctrine or what we can do there. But it does go to a different policy approach to fixing this problem, so that state action isn't used as a way to harm competition.

ANDREW FINCH: And that's useful in an economic perspective. From the legal perspective, are there thoughts about how we might operationalize that? Because that's, I think, one of the challenges, and there's room for creativity, in terms of how you actually implement those sorts of requirements. Any thoughts on that?

JOHN ROBERTI: I'll share some private conversations that I've had with various members of the Antitrust Section who work in state attorney generals' offices, who believe in antitrust and, at the same time, have clients they're trying to counsel. It's putting the states in a very tough spot. What the states really need, I think, is clearer guidance from someone about what they should and should not do.

I think it's going to be hard to get that clear guidance through the courts. So maybe, getting that guidance through the enforcement agency would be helpful. But I think, some bright lines would be along the lines of what Diana talked about and others. I think some bright lines would be very, very helpful in trying to establish that.

ANDREW FINCH: There may be different types of mechanisms that would be useful, and they may need to be tested and evolve in different ways. But it's hard to know what would be the one right way to do it and to just sort of announce, this is the way to establish oversight for a board or to populate the members of a board. So it may be the case that there needs to be some trial and error possibly.

JOHN ROBERTI: Agreed, but until there is, it's going to put a strain on the states.

ANDREW FINCH: Do you have a sense of how states are going about it? And variations and different ways that they're doing it and a view on what might be a good way versus a not-so-successful way?

JOHN ROBERTI: At a very high level, I think the antitrusters in the room are having more influence across the state AG's offices to try to help their colleagues counsel the base of the various licensing boards. Beyond that, I don't think I'd have any great insight into how the states are restructuring themselves.

BOB POTTER: Alden, I think you said, in your opening statement, that you were tossing out the question. I just wanted to follow up on it. I have it written down. There should be a market participant exemption to the state action doctrine? Do you want to follow up on that and see if other participants have any views?

ALDEN ABBOTT: Right. I think the interesting thing about the market — in some respects, I would argue that a market participant exemption may be an easier situation to deal with than the issue of state boards — the state board raises a question about whom are we going to get to serve on the state boards. I've heard state officials say that the Market Participant exception really is aimed at a situation when you have something that looks like a duck, quacks like a duck — looks like a profit-making enterprise or private business, acts like a private business in all respects, and should a mere fact that — the formalistic fact that it is, say, part of a statutory department of a state, as opposed to just being regulated by the state, suddenly prevent it from being considered as a private actor?

And I think the argument there is really, implicitly, that you can tease out of some Supreme Court decisions that they're really looking at the function. Functionally, is this party really acting not in a sovereign capacity? Is it acting like a private party? A state governor's office, a state commerce department, sitting making policy statements, even a state bar with making some ethics rulings may be acting in a sovereign capacity.

But if a company is engaging in pricing policies to drive out other utility companies, the mere fact it's part of a state department by statute, is it really acting in a sovereign capacity? So I think that should be the key question. If the answer is no, it's engaging in sales or commercial transactions or services that are quintessentially private sector.

They're engaged in by the private sector. It's really engaged in a private capacity, and therefore, it should not use a special statute as a shield to liability. And that's particularly, because that sort of special statute is precisely the sort of special statute that, likely, was engendered through rent seeking, so a special rent seeking.

I think there's procedural grounds that this Arizona utilities case coming before the Supreme Court — it's really on, as I say, a procedural posture, not a substantive posture, it's interlocutory appeals — if it is the case that you have a company that lobbied to be made a state department as a matter of state statute but it still acts like a purely private party, should be waving the magic wand and say it's shielded by state action.

I think there's a strong argument the answer to that is no, and I think, in some respects, it's, as I said, a much easier question than this question of state boards.

CRAIG WOLF: So in the beverage alcohol industry, there are a number of states that are called Control States, and they are engaged in the business of distributing and sometimes retailing wine and spirits. So the question, I guess, Alden, are you suggesting they should be susceptible then to antitrust laws? Or you're saying there should be an exemption to that? Or it should be removed, because they're engaging in the commerce?

ALDEN ABBOTT: Craig, I think you raise a good point. The 21st Amendment — it's part of our Constitution. So it raises some specific issues. Obviously, there was a discussion in the interstate wines case — the interplay between the Dormant Commerce Clause and the 21st Amendment — how you should read that. I have not given a lot of thought to that situation. Wouldn't want to comment on it.

I'm just saying, as a general matter, again, the 21st Amendment raises specific issues. But if you're not really given special federal constitutional status and you're clearly acting in a purely private capacity, by any sort of classic objective test, I would argue that you probably should be subject to federal antitrust laws.

RANDY STUTZ: So my understanding of the Market Participant exception is it's just the idea that a state entity that participates commercially in a market has to satisfy both of the *Midcal* prongs. It has to be actively supervised, in addition to acting pursuant to a clearly-articulated state interest. So it's just treated more like a private party than like a municipality, for example, which only has to satisfy the first prong.

So that's really the zone of disagreement, regarding governmental market participants. My own view is it seems like the logic and the rationale of the *North Carolina Dental* case seems to go a really long way towards suggesting we should have a market participant exception. If entities that are controlled by private market participants need to be actively supervised, entities that are themselves active market participants seem like they should be supervised as well, coupled with — Justice Kennedy made the point — that it's not denigrating the motives of volunteer board members, who are experts in their own profession, who serve on boards, to require active supervision. It's a natural risk that people will confuse the best interests of the profession for the public interest, and that same risk seems to be in play when you have a governmental market participant. So I think the market participant exception is a good idea.

BILL RINNER: I have a question I want to throw out there: Someone touched on the federalism justification for the state action doctrine, and of course, we know this comes from *Parker*, which said that the state action doctrine — you need to understand it as deriving from the structure of federal power versus state power in 1890, when the Sherman Act was passed, because of course, much of the economic regulation at the time was really happening at the state level, and so that's where it comes from; but at the same time, we also understand the Sherman Act as a common law statute, in other words, a delegation from Congress to the courts, to give meaning to the text of Section 1 and Section 2 based on economic wisdom. I think the Supreme Court recognized this in the *Leegin* case, among others. So I guess, the question I have is whether there's an actual tension between the two. In other words, we think about Congress's intent and the fixed meaning of the Sherman Act, in 1890, for purposes of the state action doctrine. But for all the purposes, we have a common law understanding of the Sherman Act, for purposes of justifying our treatment of restraints. Is there a tension there? And if so, what does that mean? And how would we resolve that tension? Would it mean that we need to think through the theoretical underpinnings of the state action doctrine entirely? Or we can just pass.

GEORGE SLOVER: I think it's a good question, and it sort of brings everything together that we've been talking about, with respect to state action. Just thinking it through myself, I think it's kind of answered in the two prongs that are there. Which is that the Sherman Act is able to adapt and fit itself into the legal framework that is everything else, and still be overarching in its basic requirements to have a free-market-based economy.

So I think, as long as you work through the analysis for the two prongs, you've satisfied the demands of giving due deference to federalism and making the antitrust laws apply where they can and will.

BOB POTTER: As, I think, the last question for the session, can I maybe throw a bombshell into it and see what people react to? I still find it a little hard to understand why California could have a policy that requires consumers in the 49 other states to, essentially, pay more for raisins. That seems to me to be a wrong-headed decision by the courts.

So I guess I'm asking, the fundamental premise of *Parker v. Brown*, did the court adequately take into account the costs on consumers in the rest of the United States in favoring California and raisin producers? Does anybody have a view on that?

ALDEN ABBOTT: I'd just point out, and anyone correct me if I'm wrong, but as a historical matter the Dormant Commerce Clause jurisprudence had not been well-developed at the time *Parker v. Brown* was handed down. I think it's arguable that, given some of the facts there, a couple decades later — 20, 30 years later — the scheme might have been struck down under the Dormant Commerce Clause. I'm not saying it would have. But I'm just saying that I think one needs to see that in its historical perspective.

DANIEL HAAR: I think a logical follow-on question to your comment, Alden, is, at the present moment, does the doctrine of the Dormant Commerce Clause provide a separate limitation on states' ability to displace competition with regulation? We've been talking about the appropriate reach of the state action doctrine. And a number of the participants said, in its current form, it roughly has reached the right place, which gives states the ability to displace competition with regulation.

It does not necessarily mean, therefore, that displacing competition with regulation is a good idea, a wise idea, or is beneficial to consumers. So the question is, are there other legal limitations on states' ability to displace competition with regulation? Is the Dormant Commerce Clause one of them? Is it an appropriate vehicle to reign in some anticompetitive actions of states?

GEORGE SLOVER: So catching the bomb that's been thrown: There was a House Committee Chairman, he was Chairman of the Commerce Committee, who said, "if it moves, it's commerce, and it's in my jurisdiction." And I think, the Dormant Commerce Clause, as I've understood it, has been more about the moving kinds of commerce than the localized actions, which can still have implications for the world.

I mean, any product that is manufactured and sold in one area could be resold in another area and could, ultimately, have an effect anywhere in the world. But I'm not sure that the Dormant Commerce Clause is the best way to get at anticompetitive pricing schemes.

JOHN BERGMAYER: Yeah, I would just say, I'm skeptical of reading the Dormant Commerce Clause too broadly, because it can be sometimes applied in ways where it's just sort of saying, states can't regulate in a way that has an effect outside of their borders. Which is not really what it says. It's more about discrimination — a state discriminating in favor of itself or its own companies against out-of-state entities.

But to say, for instance, that a particular state can't enact a regulation if it raises prices around the country, well what if it was a health and safety regulation? And if California passes some rule and manufacturers find it easier to just comply with California's rule nationwide and prices go up for everyone, that's just a consequence of the fact that we have a federal system, and California is a large and important state.

And there might be people who disagree substantively with what a state does. But I wouldn't look, necessarily, to the Dormant Commerce Clause as a way of fighting a policy you disagree with, unless it was designed to be discriminatory against out-of-state commerce.

ALDEN ABBOTT: I think John raised a good point. I think the case of *Parker* is an awfully stark one because there it looked like a private cartel that controlled 80% or 90% of sale of raisins in the United States, basically in California, it was affecting — so that's an unusual case. But I agree that a lot of regulation, really implicitly — and usually the tests have been, as already mentioned some actual effect on discriminatory effect on movement.

So I'm not saying even the stark facts of *Parker* would have led to a Dormant Commerce Clause violation. I'd say it's clearly something to think about. And of course, as we know, Justice Thomas doesn't believe in Dormant Commerce Clause. I don't know if any other Justices have that opinion, but the majority does. But it clearly is a cabin doctrine.

And there are real risks of applying it too broadly. I certainly agree.

DOUGLAS RATHBUN: Any reactions to Congress considering whether to get into this area? An example being the Restoring Board Immunity Act to clarify exactly how "active supervision" should operate. Or any other ideas on how Congress should approach this?

RANDY STUTZ: So the Restoring Board Immunity Act is interesting, because it trades off a substantive legislative reform for antitrust immunity, which is pretty different than what the state action doctrine does. One of state action's defining features is that it's agnostic on the merits of state regulation. It can be entirely the product of capture, woefully inefficient. It's rooted in federalism, and it's the freedom of the states to do what they see fit, as long as they clearly articulate and actively supervise.

So in principle, the RBI Act seems like a pretty big departure. But at the same time, if states value the certainty of immunity that would come with that kind of trade-off more than their freedom to experiment, that seems like a perfectly legitimate trade-off. But I think, for it to be successful, it's going to need — and any legislation is going to need — buy-in from the states, in that respect.

ANDREW FINCH: And I guess, that's because, in some sense, we have a decision to make. A decision needs to be made. Should this be done by Congress? Would it be the states that need to fill the void? Or are federal courts, under the guise of antitrust law, going to become the regulators of how state boards are structured and their members are operated to create a whole other layer to state action defense litigation?

BOB POTTER: Any other thoughts about the state action doctrine that the participants would like to share? Or the Dormant Commerce Clause?

ANDREW FINCH: With that, why don't we go around and ask all the participants if they have any specific observations on any topic that was discussed today, in the nature of, sort of, a brief closing remark. If you have them, I welcome those.

JOHN ROBERTI: Yeah, and I think we're over time. So I promise to be brief. I think this has been really very interesting. Thank you, honored to have been asked to participate. It's been a very interesting discussion. I guess, my takeaway on this is something I commented on earlier. It seems like we really agree on a lot of this.

None of us like exemptions. And I think the key question becomes, really, not so much, should we add new ones? Because I don't think we all want to do that. I think we all agree we don't do any more of that. But how do we deal with the ones that are here? And how do we make sure they're the right size and shape?

So I think that's going to be the challenge. And again, I would urge the agencies to share as much guidance as they possibly can. Because that really does help the private bar to counsel their clients. Thank you.

DIANA MOSS: Thanks, and thank you, again, for inviting us here today. I thought it was a very productive discussion. Certainly helps us in our thinking at the American Antitrust Institute. My final comment would really be about framing an approach moving forward, to harnessing all of this great conversation and knowledge here today, but developing some sort of tractable framework for going about unpacking the project of getting rid of immunities and exemptions.

And one idea might be to focus on areas of enforcement. We've talked a little bit about cartel enforcement and how immunities and exemptions — and there are many, as we've heard, that really undermine cartel deterrence, and cartels are incredibly damaging, in terms of extracting harm from consumers — and then do the same for exclusionary conduct. For example, in rolling back the net neutrality laws and the Ninth Circuit decision on the common carrier exemption from Section 5, that has created an enormous vacuum for different types of exclusionary conduct involving the Internet. So approaching it by attacking different areas of

enforcement — and then, certainly, on the merger front, you have a whole other set of issues — that might be one way to organize thinking moving forward. Thank you.

RANDY STUTZ: I think, I'll just let that be the last word on behalf of AAI, but just offer my thanks, again, for hosting a great program and for having us.

JOHN BERGMAYER: Yep, same. Thanks for the vision and the other participants, because I learned a lot today.

LINA KAHN: I echo others' thanks, specifically for me, for inviting Open Markets. Just to go back to what I said earlier, I think the fact that, as a descriptive matter, energy for exemptions and immunities can come in response to a feeling that there are already existing market failures or distortions, I think ensuring that that is a way to flag where there may be a reason to focus on certain areas could be a way to forestall exemptions going forward.

GEORGE SLOVER: I want to also thank you for inviting me and Consumers Union here today. I think this is a great demonstration of the Antitrust Division's commitment here. I hope that will continue. I think you all can provide great leadership. There needs to be an authoritative voice who can speak on the importance of the antitrust laws. Congress needs to hear that, and the rest of the country needs to hear that, and this is an important place for that message to come from.

GLYNIS LLOYD-BELL: Yes, I agree with everybody. Thank you very much for inviting the Association of Corporate Council to offer our opinion. It's a very valuable discussion, and we look forward to being a resource, as you continue to build this framework.

CRAIG WOLF: Same thing, thanks you for inviting the Chamber to be here and allowing me to speak on their behalf today. Certainly, I think the concerns were all expressed today with opening further exemptions, further immunities, and certainly, from the Chamber's perspective, the concern about immunity when operating foreign markets or foreign companies coming here as well. I think that needs to be stressed, from the Chamber's perspective.

From my perspective, from the Wine and Spirits Wholesalers of America perspective, just making sure that, as you move forward with your discussions in the next two rounds, that there's a balance between consumer protection and competition.

ALDEN ABBOTT: Thank you, again. Thank you very much for the invitation. Great job the Antitrust Division is doing hosting these roundtables — or square-tables. I disagree, I think it's clearly important to be concerned about antitrust immunities that foster anticompetitive behavior cartelization. Very important. At the same time, as has been pointed out, there are other statutes out there — state statutes, consumer protection statutes, federal regulatory statutes — and you're dealing with a complex world, where the goals of competition need to be advanced. But you have to read the antitrust laws consistent with other statutes and, obviously, be appropriately concerned about federalism while, at the same time, I think, not ever forgetting, once again, the point that the antitrust laws are the, sort of, Magna Carta of American free enterprise system. As a general matter, I think that was true and remains true.

ANDREW FINCH: I just want to thank everybody. We've really accomplished what we intended to accomplish. Part of Makan's inspiration in the idea behind having these roundtables was the recognition that, as an antitrust enforcer, a lot of what you do is a function of the cases that come in the door, the mergers that you get, the opportunities that you see in cases to participate as an amicus, but this kind of forum gives us a way to broaden that perspective and help shape our enforcement priorities and goals in broader ways. Your input is all very helpful and appreciated, and we thank you, again, for your written submissions. The written submissions will be available on the Department's website, and there will also be details about the upcoming roundtables. The next roundtable is on April 26th, and that will focus on antitrust consent decrees. So thanks for coming. Thanks for making this a success. We're very appreciative. Thank you. [APPLAUSE]

[Roundtable One Submissions Follow]

The Role and Relevance of Exemptions and Immunities in U.S. Antitrust Law

by John Roberti, Kelse Moen, and Jana Steenholdt

Antitrust practitioners that believe that competition results in the best outcomes for consumers have long taken a skeptical view of the exemptions and immunities that shield certain sectors of the economy from antitrust law. The American Bar Association's Section of Antitrust Law has analyzed the place of exemptions and immunities in U.S. competition law.[1] This paper will explain the positions that the Section has expressed in the past, and will then apply the logic of those positions to determine how other, as yet unaddressed, exemptions and immunities should be treated.

I. Introduction to Exemptions

In general, antitrust exemptions arise for three main reasons.

First, it is widely accepted that the purpose of the antitrust laws is to protect and preserve competition in the free market. For the most part, protecting competition will mean preventing competitors from acting collectively to raise prices and suppress competition. However, many organizations or industries seeking to obtain or maintain an exemption argue that an exemption is warranted because facially anticompetitive activity is actually procompetitive or otherwise beneficial. But antitrust jurisprudence in the wake of the Supreme Court's ruling in *Continental T.V. v. GTE Sylvania*[2] has undermined much of the justification for these exemptions. The courts have widened the use of the rule of reason in antitrust cases, opening the door for many restraints on trade that could be justified on other procompetitive grounds to be analyzed on their merits, rather than being found *per se* unlawful. Thus, it is unlikely that exemptions are necessary to protect procompetitive behavior. Indeed, even the classic example of a procompetitive restraint—a sports league, where otherwise competitive teams join together to create a common organization that sets rules, organizes events, and excludes other potential entrants—is now subject to a more sophisticated analyses of joint conduct than simply being declared exempt from antitrust enforcement. In *American Needle v. NFL*, the Supreme Court found that, though the NFL itself may be a legitimate joint venture that protects individual teams from liability when they work in the common interest of the league, the teams can still be found to

[1] John Roberti is a member of the Council of the American Bar Association's Section of Antitrust Law, and, in part, this article will consider the Section's approach to exemptions and immunities. Although he serves in a leadership position within the ABA Antitrust Law Section, Mr. Roberti submits this paper in his individual capacity. The views expressed here reflect the views of Mr. Roberti and his co-authors only and do not necessarily reflect the views of the Section.

[2] 433 U.S. 36 (1977).

violate the antitrust laws in other areas where no such common interest exists, such as in licensing their intellectual property.[3]

Second, anticompetitive conduct will be exempted when a value deemed greater than antitrust is at play. For example, petitioning the legislature, courts, or administrative bodies to change or interpret the laws to allow for activity that would violate the antitrust laws if done by private actors alone is protected from antitrust liability under the *Noerr-Pennington* doctrine. For instance, it would not be illegal for an industry group to lobby Congress to create a new exemption allowing competitors within the industry to agree on common prices, even though it would clearly be illegal for these entities to form such agreements themselves. This immunity lies in the citizens' constitutional rights to petition their government to change its laws under the First Amendment. As such, its basis is relatively uncontroversial, though issues arise as to its proper scope, which we discuss in more detail below.

Third and most importantly, many exemptions exist that were originally justified under the theory that, in certain industries, regulation was preferable to competition or that there were natural monopolies that needed to be controlled. For instance, the railroads, insurance companies, ocean shippers, and certain agricultural cooperatives have been granted special statutory immunities to do things like set prices, agree to common terms of service, and form joint ventures as an industry. In large part, these exemptions arose out of the late nineteenth and early twentieth century economic theories of the "benevolent cartel," whereby prominent economists and regulators believed that organizing industries into highly regulated cartels that would orient their collective industry decisions in light of the common good would be most beneficial to the national economy.[4] Since then, economic theory has evolved to reject this foundation. The consensus view now holds that consumers benefit most when competitors freely compete, and that economic regulation is better suited to preserving a competitive marketplace than to structuring the market around deliberately anticompetitive cartels. For these and other reasons, the ABA Section on Antitrust Law generally opposes this type of exemption, unless it can be justified on a few narrow grounds.

II. Problems with Exemptions

Regardless of the original justification for a given exemption, antitrust exemptions are subject to a few common problems. The most obvious problem is that they frequently distort competition in ways that may hurt consumers. Allowing certain industries the power to jointly set prices or other competitive terms will tend to increase the prices for services beyond what they would otherwise be in the presence of competition, as well as give the industries more power vis-à-vis the consumers than they would otherwise have. In 2002, Congress established the Antitrust Modernization Commission ("AMC") to conduct a full-scale appraisal of the antitrust laws and determine whether

[3] *See American Needle, Inc. v. NFL*, 560 U.S. 183, 195-197 (2010).

[4] *See, e.g.*, ABA SECTION OF ANTITRUST LAW, FEDERAL STATUTORY EXEMPTIONS FROM ANTITRUST LAW 9-10 (2007).

and to what extent those laws need to be updated.[5] The section of the AMC's final Report that discussed exemptions noted that

> [n]umerous studies of sectoral deregulation in the United States show that the unleashing of market forces has greatly increased efficiency and provided substantial benefits to consumer welfare. One comprehensive survey of empirical evidence on the U.S. deregulation experience concluded that the U.S. economy has gained at least $36 to $46 billion annually (in 1990 dollars) from deregulation, primarily in the transportation industries. On a more specific level, an econometric analysis of trucking rates in states that continued to regulate trucking found that in the less-than-truckload (LTL) segment, regulation of entry increased rates by more than 20 percent, rate regulation increased those rates by 5 percent, and antitrust immunity for certain conduct increased rates by about 12 percent above what they would be absent regulation.
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> These data give a sense of the order of magnitude of the costs imposed on U.S. consumers and the U.S. economy by government restraints on competition.[6]

Accordingly, the Commission concluded that "Congress should not displace free-market competition absent extensive, careful analysis and strong evidence that either (1) competition cannot achieve societal goals that outweigh consumer welfare, or (2) a market failure requires the regulation of prices, costs, and entry in place of competition."[7] Yet many of the existing exemptions are not based on this careful analysis, but rather rely on old theories in need of modernization. There is no reason to assume, for instance, that deregulation of the railroads would lead to markedly different results than occurred in the deregulation of the trucking industry. Thus, if trucking rate regulation deserved to be repealed, railroad rate regulation does too.

Moreover, exemptions are often broader than they need to be. The McCarran-Ferguson Act of 1945, for instance, provides insurance companies with a sweeping and total exemption from the antitrust laws, so long as they do not agree to boycott, coerce, or intimidate[8] and so long as the insurance business is already regulated by state law.[9] But to

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[5] *See* ANTITRUST MODERNIZATION COMMISSION, REPORT & RECOMMENDATION 1 (2007). The AMC's membership included both the Antitrust Division's Assistant Attorney General Makan Delrahim and members of the ABA Section on Antitrust Law.

[6] *Id.* at 334.

[7] *Id.*

[8] 15 U.S.C. § 1013(a)-(b) ("[The Sherman Act, Clayton Act, Federal Trade Commission Act, and Robinson-Patman Act] shall not apply to the business of insurance or to acts in the conduct thereof. Nothing contained in this chapter shall render the said Sherman Act inapplicable to any agreement to boycott, coerce, or intimidate, or act of boycott, coercion, or intimidation.").

[9] *Id.* at § 1012(b).

the extent that insurance companies find themselves in similar positions to a sports league, where they need to be able to organize collectively to bring about certain unique procompetitive results, those results could be facilitated through less sweeping means. In testimony before Congress regarding proposed antitrust reform legislation for the health insurance industry, then-ABA Antitrust Section Chair Ilene Knable Gotts emphasized that the ABA has long supported wholesale repeal of the McCarran-Ferguson Act, to be replaced with a few narrowly-tailored safe harbor provisions to allow insurers to do things like develop standardized policy forms and enter joint underwriting agreements.[10] Given the harm to consumers that will likely flow from anticompetitive regulations, it makes sense that exemptions should be drawn as narrowly as possible. Unfortunately, that is not the case for many existing exemptions.

Finally, even when exemptions are ill-considered, they are difficult to remove. Exemptions create a classic public-choice problem: they create a concentrated group of industry beneficiaries who benefit greatly from their special privileges, while the consumers who suffer higher prices are diffuse, are harmed individually only in small amounts, and therefore are unlikely to exert much effort for the repeal of existing laws, even if the laws' macroeconomic harm is great. To be fair to the exempt industries, removing the exemption would require a fundamental change in the way that they have built their business and expectations, making a rapid removal of the exemption difficult to implement. The corresponding "stickiness" of these exemptions is evidenced by the fact that many of the existing exemptions were passed nearly a hundred years ago and still exist today, even after economic theory has moved away from the theoretical foundations on which they were originally built.

III. The ABA Section's Approach

Due to these problems, the ABA Section of Antitrust Law has expressed skepticism about antitrust exemptions. The most recent statement of the Section's position was outlined in its Statement in Opposition to three proposed healthcare reform bills of 2011, which sought to allow health care providers to join together to agree on price and service terms.[11] The bills were intended to grant healthcare *providers* the same power of collective action that healthcare *insurers* already enjoyed under the McCarran-Ferguson Act. In opposition to this expansion of anticompetitive activity, the Section offered Congress a four-part test to determine when exemptions are appropriate:

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[10] Statement of Ilene Knable Gotts, Before the Subcommittee on Courts and Competition Policy Judiciary Committee, Concerning H.R. 3596, "The Health Insurance Industry Antitrust Enforcement Act of 2009" (Oct. 8, 2009), at 2, 4-5, https://www.americanbar.org/content/dam/aba/administrative/antitrust_law/statement_2009oct8_gottstestimonyh_t.authcheckdam.pdf.

[11] The Acts were the Quality Health Care Coalition Act of 2011, H.R. 1409; the Preserving Our Hometown Independent Pharmacies Act of 2011, H.R. 1946; and the Community Pharmacy Fairness Act of 2011, H.R. 1839.

> *First*, Congress should grant antitrust exemptions and immunities rarely and only after rigorous consideration of the impact of the proposed exemption or immunity on consumer welfare. *Second*, Congress should only grant those exemptions and immunities that are drafted narrowly, so that competition is reduced only to the minimum extent necessary to achieve the intended goal. *Third*, Congress should enact antitrust exemptions and immunities only when the proposed exemption or immunity achieves a Congressional goal that significantly outweighs the aims of the antitrust laws in a particular situation. *Finally*, the Section proposes that no exemption or immunity should be granted or renewed unless it contains a sunset provision.[12]

By requiring Congress to pass new exemptions only after "rigorous consideration," this test would discourage the passage of most new exemptions in the first place. It also would sharply cabin the scope of any new exemption that Congress did pass, by insisting that new exemptions are "drafted narrowly," that they achieve significant non-antitrust goals, and that they contain sunset provisions. This is in keeping with the ABA's general position that, aside from being economically unjustified, many antitrust exemptions do not serve procompetitive purposes that are not already protected through the existing and much simpler Sherman Act.[13]

When the ABA laid these principles out in response to the three healthcare reform proposals, it took a hard stand against the proposed bills. For one reason, the bills did reflect adequate consideration for consumer welfare, thus violating prong 1. Their express goal was to increase the bargaining power of healthcare providers such as doctors and hospitals as against health insurance companies. But nowhere did Congress explain how allowing new price-fixing to counteract the effects of old price-fixing would benefit consumers. Just as in the case of insurance cartels, the ABA noted that

> provider cartels lead to higher reimbursement rates and higher insurance premiums for consumers. This result is just as likely in those markets in which payor [i.e., insurer] market power is a genuine problem, as in markets in which payors lack market power: legalized collusion can introduce bilateral monopoly. Where a market is dominated on each side by a powerful seller and a powerful purchaser, there is little incentive to reduce prices for consumers. Rather, the seller and

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[12] Letter from Richard M. Steuer, Chair, Section of Antitrust Law, to the House Judiciary Committee, "Re: H.R. 1409, H.R. 1839, and H.R. 1946: Antitrust Exemptions to Legalize Collusion Among Health Care Providers" (Oct. 20, 2011), at 2, https://www.americanbar.org/content/dam/aba/administrative/antitrust_law/at_comments_20111020.authcheckdam.pdf (emphases added).

[13] *Cf.* Statement of Ilene Knable Gotts, *supra* note 10, at 1.

> purchaser can simply divide between them whatever surplus can be extracted from consumers through their combined market power.[14]

Likewise, the bills were not narrowly tailored in that they applied to large swaths of healthcare providers, regardless of market power; allowed for anticompetitive activity like joint boycotts and price-fixing that lacked any procompetitive justification; and—as is often the case in similar bills—lacked a sunset provision.[15] Thus, the Acts contravened essentially all of the ABA's prongs and presented an easy case of opposition.

Even when the ABA has not specifically enumerated its principles, the four prongs have consistently guided the ABA's analysis of proposed antitrust exemptions in recent years. The Chair of the Section testified before Congress in favor of reforming the McCarran-Ferguson Act in 2006 and 2009. As discussed above, McCarran-Ferguson provides a sweeping exemption from the antitrust laws for all insurance providers, with barely any limitation on activity, scope, market power, or time, thus contravening at least the ABA's prongs 2 – 4. Moreover, as the Chair recognized, the impetus for the McCarran-Ferguson Act stemmed from the specific historical circumstances of the late nineteenth century, wherein the Supreme Court acted to assert the individual states' regulatory power over insurance companies that were then trying to resist state regulation on the grounds that insurance is inherently interstate commerce.[16] The post-New Deal Court later changed course and brought insurance regulation under federal purview via the Commerce Clause; McCarran-Ferguson was an attempt to overrule the Court and reimpose the *status quo ante*.[17] But whatever the merits of each side in these old disputes, the antitrust laws have significantly evolved since then, most notably in the principle that antitrust protects "competition not competitors" and that it should always be oriented toward protecting consumer through low prices, not through imposing regulatory schemes for extraneous goals. Therefore, McCarran-Ferguson likely violates the ABA's prong 1 (on consideration of consumer welfare) as well.

The ABA also publicly supported[18] removing the limited immunity for the railroad industry that the Supreme Court created in *Keogh v. Chicago & Northwestern Railway*.[19] The *Keogh* Court created a new doctrine that exempted railroads from certain antitrust damages if allegedly collusive tariff rates were filed and approved with the appropriate regulatory board. Again, this doctrine is a "legac[y] of a

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[14] Letter from Richard M. Steur, *supra* note 12, at 6.

[15] *Id.*

[16] Statement of Ilene Knable Gotts, *supra* note 10 at 3 (citing *Paul v. Virginia*, 75 U.S. (8 Wall.) 168 (1868)).

[17] *Id.*

[18] *See* ABA Section of Antitrust Law, Comments on the Railroad Antitrust Enforcement Act, https://www.americanbar.org/content/dam/aba/administrative/antitrust_law/comments_hr1650_s772.authcheckdam.pdf.

[19] 260 U.S. 156 (1922).

bygone era" insofar as it understood competition regulation to involve creating regulatory cartels to control and monitor competition, which is no longer the accepted view.[20] As evidence of how far economic thinking on these issues has changed, even the original regulatory body to which *Keogh* required railroads to file their rates—the Interstate Commerce Commission—was dissolved as part of the Congressional trend toward transportation deregulation in the 1970s.[21] Thus, the Railroad Antitrust Enforcement Act sought to harmonize the railroad industry with the general deregulatory recommendations of the Antitrust Modernization Commission by treating railroads much like other industries under the antitrust laws and abolishing the *Keogh* doctrine.[22] As an—ultimately unsuccessful—effort to undo an old legislative imprimatur on price-fixing cartels, the railroad reform earned the ABA's approval.[23] The Act was revived most recently in 2015, but has still not broken through the inertia surrounding many of these exemptions.

Finally, and most recently, the ABA Antitrust Section had cause to opine on similar developments in the European Union, in a November 17, 2017 comment on the European Commission's "initiatives to improve the food supply chain." Among these initiatives was a proposal to allow competitors in certain agricultural sectors to secure their supplies by sharing profit and cost information with each other. While recognizing a lack of expertise in certain uniquely European matters, the Section nonetheless noted that such an exemption would be disfavored in the United States, and recommended that the European Commission treat proposed exemptions skeptically and insist on all proper safeguards.[24]

IV. Application of the ABA's Section's Analysis

The above positions may be used to imply the proper analysis of other exemptions, which the Section has not addressed publicly. We provide a few examples below.

First, the Sports Broadcasting Act of 1961 ("SBA") allows exclusive television agreements in professional sports, which grant individual television networks like NBC or CBS the exclusive rights to broadcast professional football, basketball, baseball, and hockey games.[25] This law was passed at a time when broadcasting was dominated by a few big networks with large monopoly power, whereas sports leagues were relatively weak and did not generate large amounts of revenue from television broadcasts. Granting the exclusive sale of

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[20] ABA Comments on Railroad Antitrust Enforcement Act, *supra* note 18, at 5.
[21] *See id.* at 6.
[22] *See, e.g.*, *id.* at 10.
[23] *See id.* at 13.
[24] Comments of the American Bar Association Section of Antitrust Law on the European Commission's Initiative to Improve the Food Supply Chain (Nov. 17, 2017), at 1, 4-5, https://www.americanbar.org/content/dam/aba/administrative/antitrust_law/at_comments_20171117.authcheckdam.pdf.
[25] *See* FEDERAL STATUTORY EXEMPTIONS FROM ANTITRUST LAW, *supra* note 4, at 217.

broadcast rights would allow the weak leagues to compete at greater parity with the strong networks.[26]

Today, the law has changed. The collective negotiation of a broadcast agreement by a sports league would likely be viewed under the rule of reason and seems unlikely to be found unlawful.[27] Likewise, the sports broadcasting market and the technologies underlying it have changed in dramatic ways since Congress passed the 1961 Act. Now, the same sports leagues make hundreds of millions—if not billions—of dollars in media income every year, so that any "protection" from competition that they once needed is clearly needed no longer.[28] At the same time, broadcasting has followed any inverse trend, where the big networks have been weakened and decentralized into many competing cable networks and online streaming services, which could get the same content to consumers much more cheaply than the old monopolies. Streaming services in particular have shaken the traditional cable networks framework, providing customers more services and at lower prices, yet these changes have had a much smaller effect on sports broadcasting, as a result of these longstanding exclusivity agreements with the large network providers. This in particular shows the importance of ABA's prong 4 ("the sunset provision"), which, had it been in place in the original Act, would have afforded the opportunity to re-evaluate the cable network landscape and make necessary adjustments as the competitive market changed. Even if we accept that Congress gave rigorous consideration to the need for this exemption in 1961, the factors it considered are unlikely to apply in any market decades later. Moreover, it is unlikely that the SBA would satisfy ABA's prong 3 (achieving a goal that "significantly outweighs" the antitrust laws) because its chief aim—even at the time it was passed—was to protect certain market actors. It does not serve any higher purpose like free speech or federalism, but simply intends to create artificial conditions that allow sports leagues to obtain higher profits. Since, as discussed above, the goal of competition law is to protect consumers, these kind of anticompetitive restrictions go against the grain of existing law.

To take another example, several federal laws—most notably the Capper-Volstead Act of 1922—allow limited exemptions for certain farm cooperatives.[29] In its relevant part, the Capper-Volstead Act allows farmers to form cooperatives to act in concert to raise prices, specifically, by exempting cooperatives from antitrust liability when they work collaboratively for the purpose of producing, handling, and marketing farm products. This was meant to improve the position of farmers relative to buyers, under the belief that buyers had undue power to pressure the price of agricultural products down.[30]

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[26] *Id.* at 225 – 231.

[27] *NCAA v. Board of Regents*, 468 U.S. 85 (1984).

[28] *Id.* at 217-225.

[29] *See id.* at 88 – 89. The other relevant provisions are Section 6 of the Clayton Act, the Cooperative Marketing Act, and the Agricultural Marketing Agreement Act.

[30] *Id.* at 91.

A recent Section publication studied the effects of Capper-Volstead cooperatives and concluded that, notwithstanding their legal protections, farm cooperatives have been unable to exert significant monopoly power and thus have had little effect on the prices that consumers actually pay.[31] Of course, this is not by itself enough to justify the Capper-Volstead Act. Even if the Act has not been able to achieve its intended effects, it is still clear those effects were intended to be anticompetitive; the entire justification for the Act was to raise the power of producers as against consumers. Thus, the Act is flawed for the same reasons as the railroad or sports broadcasting exemptions and is likely in need of serious reform, if not outright repeal.

Capper-Volstead has several other flaws too. Many of its beneficial effects for farmers could likely be achieved through more narrowly-tailored means, such as joint ventures that are already permitted under the existing antitrust laws. Thus, even if repeal occurred, solutions would exist that would satisfy the ABA's criteria and cause little disruption to farmers. Moreover, the existing statutorily-created cooperatives have also been found to suffer from poor oversight and lack of transparency.[32] It is likely that private joint ventures would eliminate many of these bureaucratic problems, just as they have in other deregulated industries.

The shortcomings in Capper-Volstead, notably its failure to satisfy prongs 1 ("benefiting consumer welfare") and 4 ("the sunset provision"), are mirrored in the concerns that the Antitrust Section expressed regarding the food supply chain proposals in the European Union. The food supply chain is integral to the livelihood of nations and, as such, receives special attention from legislatures globally. Agriculture is vulnerable to production volatility, being subject to such uncontrollable variables as the whims of the weather. Therefore, on the surface, it would seem that policy should favor collective procurement and storage that can help to ease farming instability. Nonetheless, these goals are not realized through providing antitrust exemptions, but rather in letting competition flourish. Many of the U.S. farm exemptions gained prominence during the Great Depression, when falling prices for agricultural goods was a national concern.[33] Now, when low consumer prices are seen as the express purpose of competition law, it seems that the original basis for Capper-Volstead has been vitiated. Similar concerns can explain why the Section advised the European Commission against allowing similar types of price-sharing in its own agricultural sectors. To the extent additional kinds of agricultural regulation are necessary, they should come from other authorities; the object of competition law should only be to promote competition.

Lastly, the *Noerr-Pennington* doctrine[34] protects people who petition the legislature, courts, administrative bodies, or other organs of the government from antitrust liability if their petition would be

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[31] *Id.* at 125-26.
[32] *Id.* at 129-30.
[33] *Id.* at 93.
[34] *See E.R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961); *United Mine Workers of Am. v. Pennington*, 381 U.S. 657 (1965).

anticompetitive. This is typically justified on the grounds that the First Amendment right to petition the government is more fundamental than antitrust law, or, alternatively, on the ground that the government is not bound by existing law and can modify it as it sees fit.

In *Professional Real Estate Investors, Inc. v. Columbia Pictures Industries, Inc.*[35] the Supreme Court unanimously limited the *Noerr-Pennington* doctrine to exclude sham litigation. "Objectively baseless" litigation that was initiated only in an attempt to interfere in a competitors' business would not be exempt from antitrust liability. Additionally, in *Allied Tube & Conduit Corp. v. Indian Head, Inc.*,[36] the Supreme Court drew a line separating restraint resulting from private conduct (or even quasi-legislature conduct) from that of government conduct. In order for *Noerr* immunity to apply, the restraint must result from government conduct. Quasi-legislative bodies to which authority has not been conferred cannot provide *Noerr* immunity. These cases help illustrate examples of the judiciary's attempt to cabin an abuse of *Noerr's* application.

But such narrow application has not always been the case. Indeed, many other questionable extensions exist. In one enforcement action that the FTC initiated[37] against the oil company Unocal, the FTC alleged that Unocal engaged in unfair trade practices by misleading a California regulatory body in proceedings related to auto emissions. It claimed that Unocal knowingly misrepresented itself to the California board by falsely claiming that it lacked patent rights in certain emissions research, in order to induce the board to adopt regulations that would benefit Unocal by requiring oil refineries to reconfigure themselves in ways that would be subject to Unocal's undisclosed patent claims.[38] Unocal resisted the FTC in part on the grounds that its statements to the regulatory board were petitions to the government that are protected under *Noerr*.[39] The case ended in a consent decree, so the merits of this position were never definitively established.[40] In *FTC v. Superior Court Trial Lawyers Ass'n (SCTLA)*,[41] a group of Washington, D.C, court-appointed lawyers for indigent clients formed a joint boycott to refuse additional clients until the D.C. government increased their compensation.[42] Against allegations that their boycott was a classic anticompetitive restraint on trade, they claimed that they were protected antitrust enforcement by *Noerr*'s immunity in petitioning the

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[35] 508 U.S. 49 (1993).

[36] 486 U.S. 492 (1988).

[37] Author John Roberti served as one of the FTC lawyers on the trial team.

[38] In the Matter of Union Oil Company of California, FTC Dkt. No. 9305, Opinion of the Commission, at 1, https://www.ftc.gov/sites/default/files/documents/cases/2004/07/040706commissionopinion.pdf.

[39] *Id.*

[40] *See* ABA SECTION OF ANTITRUST LAW, MONOGRAPH 25, THE *NOERR-PENNINGTON DOCTRINE* 103 (2009).

[41] 493 U.S. 411 (1990).

[42] *Noerr-Pennington Doctrine*, *supra* note 40, at 100.

government.[43] Ultimately, the Supreme Court held that even though the conduct in question "plainly was undertaken with the goal of influencing the government" *Noerr* immunity is not available when the outcome is intended to garner higher prices or other economic advantages from the government.[44] Another example of attempts to expand *Noerr* in an overreaching manner is seen in suggestions that applying for a patent is enough to confer *Noerr* immunity.[45] Distorting *Noerr* into these other areas, which are far afield from the intended "petitioning the government" justification threatens to violate the ABA's prong 2 ("drafted narrowly") and allows immunity for a wide range of conduct not directly tied to the original justification for *Noerr-Pennington*.

These case studies indicate that the proper application of the ABA's test would likely preclude most existing exemptions. However, this is not to imply that all exemptions would necessarily violate the test. In 1998, Congress passed the Year 2000 Information and Readiness Disclosure Act.[46] The Act was passed under the then-prevalent belief that large numbers of computer systems would be unable to read dates in the year 2000, which would incapacitate large segments of the economy, as well as expose important software companies to extensive legal liability.[47] Accordingly, Congress created a temporary immunity for businesses to share with each other their year 2000 readiness information, as a means of preparing for and better counteracting the perceived threat. The law was narrowly tailored to achieve an important goal—avoiding disaster for the technology industry—and specifically limited the antitrust exemption to cover the narrow category of information-sharing intended to avoid or correct year 2000 systems failures.[48] Indeed, avoiding all ambiguity, section 5(d) of the Act set forth a "Rule of Construction" which provided that "[t]he exemption granted by this section shall be construed narrowly." Equally importantly, the Act also contained a sunset provision specifying that its exemptions would lapse on July 14, 2001.[49] The Act thus represents a paradigmatic case of Congress creating a limited, reasonable exemption to address a clearly delineated problem, which then expires once the problem has been solved. Such exemptions may be rare, but they are not impossible.

V. Conclusion

However well-intentioned antitrust exemptions may be, most of them threaten to institutionalize anticompetitive conduct, often in sweeping ways that could be better addressed through more narrowly-tailored reforms that do not otherwise conflict with the modern, procompetitive thrust of the antitrust laws. As such, most of the existing

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[43] *Id.*
[44] *SCTLA*, 493 U.S. at 422, 424-25.
[45] *See Noerr-Pennington Doctrine*, *supra* note 40, at 98.
[46] Pub. L. No. 105-271, 112 Stat. 2386.
[47] *See id.* at § 2(a).
[48] *Id.* at § 5(a).
[49] *Id.* at § 5(b).

exemptions run afoul of at least one of the Section's strictures, which has caused the ABA Section of Antitrust Law to publicly recommend that many of them be altered or abolished.

Moreover, as shown in the examples above, exemptions are sticky and difficult to remove, so any proposals for new exemptions should be treated with great caution. The authors believe that this Section's four prong test provides an appropriately cautious, skeptical, and narrow lens through which to view both existing and proposed exemptions. Going forward, viewing antitrust exemptions through this lens will help to mitigate ill-conceived loopholes that fail to promote competition or to benefit consumers.



PUBLIC COMMENTS OF THE AMERICAN ANTITRUST INSTITUTE
PREPARED FOR THE ANTITRUST DIVISION ROUNDTABLE
EXAMINING EXEMPTIONS AND IMMUNITIES FROM THE ANTITRUST LAWS

The American Antitrust Institute (AAI) is pleased to participate in the Antitrust Division's Public Roundtable Discussion Series on Regulation & Antitrust Law, to be held in Washington, D.C. on March 14, 2018. AAI is an independent, nonprofit organization devoted to promoting competition that protects consumers, businesses, and society. We serve the public through research, education, and advocacy on the benefits of competition and the use of antitrust enforcement as a vital component of national and international competition policy.[1]

AAI's 20-year history of research, education, and advocacy highlights the position that many exemptions and immunities from the antitrust laws are unnecessary or harmful to competition. AAI has therefore consistently supported and defended the Supreme Court's admonition that exemptions and immunities should be "strictly construed" and "disfavored." *Southern Motor Carriers Rate Conference, Inc. v. U.S.*, 471 U.S. 48, 68 (1985); *see Union Labor Life Ins. Co. v. Pireno*, 458 U.S. 119, 126 (1982) (narrow construction principle "applies not only to implicit exemptions . . . but also to express statutory exemptions"). As the Court has explained, "These 'canon[s] of construction . . . reflec[t] the felt indispensable role of antitrust policy in the maintenance of a free economy.'" *Southern Motor Carriers,* 471 U.S. at 68 (quoting *United States v. Phila. Nat'l Bank*, 374 U.S. 321, 348 (1963)).

The debate over antitrust immunities and exemptions is often complex and nuanced. Outlined below are major topic areas that highlight AAI's positions and areas of focus. Each is followed by selected AAI research, education, and advocacy materials that elaborate on AAI's views regarding exemptions and immunities. These items have been selected based on topics identified for discussion during this roundtable. These comments do not reflect the entirety of AAI's views on the subject of antitrust exemptions and immunities.[2]

I. The Impact of Express Statutory Exemptions and Implied Immunities from the Antitrust Laws

A. Exemptions and immunities from the antitrust laws may shield anticompetitive conduct that has exclusionary or collusive effects, without adequately promoting the other values the exemption or immunity may be designed to foster.

[1] For more information please see http://www.antitrustinstitute.org.
[2] Individual views of members of AAI's Board of Directors or Advisory Board may differ from AAI's positions.

- Diana Moss, Revisiting Antitrust Immunity for International Airline Alliances: Consolidation and U.S. Consumers (AAI White Paper, forthcoming March 2018).
- Br. of the American Antitrust Institute as Amicus Curiae in Support of Neither Party, Teladoc v. Texas Medical Board, No. 16-50017 (5th Cir. filed June 27, 2016).
- Br. for the American Antitrust Institute as Amicus Curiae in Support of Respondents, Oneok v. Learjet, No. 13-271 (filed Nov. 26, 2014) [hereinafter AAI Oneok Br].
- Br. for the American Antitrust Institute as Amicus Curiae in Support of Respondent, North Carolina State Bd. of Dental Exam'rs v. FTC, No. 13-534 (S. Ct. filed Aug. 6, 2014) [hereinafter AAI Dental Exam'rs Br.].
- Br. of the American Antitrust Institute as Amicus Curiae in Support of Plaintiff-Appellant, United Nat'l Maintenance v. San Diego Convention Center Corp., No. 56809 (9th Cir. filed June 4, 2013).
- Br. of the American Antitrust Institute as Amicus Curiae in Support of Petitioner, FTC v. Phoebe Putney Health System, No. 11-1160 (filed Aug. 27, 2012) [hereinafter AAI Phoebe Putney Br.].
- Br. for Amicus Curiae American Antitrust Institute Supporting Plaintiffs-Appellants, Shames v. Cal. Travel and Tourism Comm., No. 08-56750 (9th Cir. filed July 9, 2010).
- Comments of the American Antitrust Institute, Working Group on Immunities and Exemptions, Prepared for the Antitrust Modernization Commission (2005).

B. When applied expansively and inappropriately, exemptions and immunities can contribute to the creation of regulatory gaps.

- Am. Antitrust Inst., Repeal of Network Neutrality Eliminates Important Antitrust-Regulation Partnership, Deprives Competition and Consumers of Needed Safeguards (Dec. 22, 2017) (discussing common-carrier exemption).
- Br. for the American Antitrust Institute as Amicus Curiae in Support of Appellant, Simon v. Keyspan, No. 11-2265 (2d Cir. filed Sept. 21, 2011).
- Br. for the American Antitrust Institute as Amicus Curiae in Support of Appellants, *In re* Hawaiian & Guatamanian Cabotage Antitrust Litig., No. 10-361-65 (filed Apr. 11, 2011).

C. When applied inconsistently, exemptions and immunities can create anomalous conflicts in the law that lead to disparate treatment of factually similar scenarios.

- Amici Curiae Br. of Antitrust and Economics Professors and of The American Antitrust Institute in Support of Petition for Certiorari, McCray v. Fidelity Nat'l Title Ins. Co., No. 12-527 (S. Ct. filed Nov. 28, 2012).

D. Exemptions and immunities can undermine cartel deterrence. Empirical research suggests that international cartels, in particular, have been proliferating, yet deterrence remains insufficient.

- Br. for the American Antitrust Institute as Amicus Curiae in Support of Petitioners, Animal Science Products v. Hebei Welcome Pharmaceutical, No. 16-1220 (filed Mar. 5, 2018).

- Br. for the American Antitrust Institute as Amicus Curiae in Support of Appellant, Motorola Mobility v. AU Optronics Corp., No. 14-8003 (filed Apr. 24, 2014).

II. How Implied Immunities and Exemptions Have Affected Antitrust Enforcement

A. Exemptions and immunities can deter plaintiffs from bringing meritorious claims, including by raising the cost and increasing the risk of such claims.

- Br. for the American Antitrust Institute as Amicus Curiae in Support of Respondent, Salt River Project Agricultural Improvement and Power District v. Tesla Energy Operations, No. 17-368 (filed Feb. 20, 2018).

B. Exemptions and immunities can interfere unnecessarily with the harmonious working relationship between antitrust enforcement and sectoral regulation.

- Br. for American Antitrust Institute as Amicus Curiae Supporting Respondents, Credit Suisse v. Billing, No. 05-1157 (S. Ct. filed Feb. 27, 2007).
- AAI Oneok Br.
- Prepared Remarks of Diana L. Moss, Hearings on Regulated Industries Before the Antitrust Modernization Comm'n (2005).

III. Whether the State Action Doctrine in Its Current Form Strikes the Appropriate Balance Between State Sovereignty and the Federal Policy Favoring Competition in Interstate Commerce

AAI believes the Supreme Court's recent* Dental Examiners *and* Phoebe Putney *decisions go a long way toward striking the appropriate balance between State sovereignty and the federal policy favoring competition by helping to ensure "real compliance with both parts of the* Midcal *test" so that States "accept political responsibility" for anticompetitive actions they intend to undertake.* FTC v. Ticor Title Ins. Co.*, 504 U.S. 621, 635-36 (1992);* see *AAI Dental Exam'rs Br.; AAI Phoebe Putney Br. Among other things, AAI has also argued specifically that:

- ***Calls to soften or eliminate the state-action doctrine's active-supervision requirement should be rejected.***
- ***Calls to immunize state entities subject to the active-supervision requirement that are (or are controlled by) active market participants should be rejected.***
- ***Policymakers should aspire to reduce* ex ante *uncertainty as to whether inferior sub-state entities may enjoy immunity, without sacrificing political accountability.***
- ***The merits of state regulations should not ordinarily factor into the immunity determination, but this fact need not prevent state and federal legislative compromise aimed at reducing the harmful effects of anticompetitive state regulation.***

- Randy M. Stutz, State Occupational Licensing Reform and the Federal Antitrust Laws: Making Sense of the Post-*Dental Examiners* Landscape (AAI White Paper, Nov. 6, 2017).

ConsumersUnion®
POLICY & ACTION FROM CONSUMER REPORTS

STATEMENT OF GEORGE SLOVER
SENIOR POLICY COUNSEL
CONSUMERS UNION

ANTITRUST DIVISION ROUNDTABLE DISCUSSION

ANTITRUST EXEMPTIONS AND IMMUNITIES, STATE ACTION DOCTRINE

March 14, 2018

Introduction

Thank you for inviting Consumers Union to this important discussion on the appropriate reach of the antitrust laws, and specifically focusing today on antitrust exemptions and implied immunities, and the state action doctrine.

Consumers Union is the advocacy division of Consumer Reports.[1] Our mission is to work for a fair, just, and safe marketplace for all consumers, and to empower consumers to protect themselves. And one key to empowering consumers to protect themselves is working to ensure meaningful consumer choice, through effective competition.

By meaningful choice, we mean choice that is easy for consumers to understand and compare, and is responsive to what's important to consumers. When consumers have meaningful choice, businesses are motivated to provide more affordability, better quality, and new thinking, in response to consumers' wants and needs.

That is why, from our founding over 80 years ago, we have been strong supporters of the antitrust laws.

Addressing these issues on today's agenda begins with a recognition of two basic principles:

First, the antitrust laws are an essential protector of competition, a necessary ingredient in making the marketplace work for consumers as well as for all other participants.

[1] Consumers Union is the advocacy division of Consumer Reports, an expert, independent, non-profit organization whose mission is to work for a fair, just, and safe marketplace for all consumers and to empower consumers to protect themselves. Consumers Union works for pro-consumer policies in the areas of antitrust and competition policy, food and product safety, health care, financial services, telecommunications and technology, privacy and data security, transportation, and other consumer issues, in Washington, D.C., in the states, and in the marketplace. Consumer Reports is the world's largest independent product-testing organization, using its dozens of labs, auto test center, and survey research department to rate thousands of products and services annually. Founded in 1936, Consumer Reports has over 7 million subscribers to its magazine, website, and other publications.

Second, the antitrust laws can't solve everything. There are other important protections consumers depend on, that won't be delivered merely by protecting and furthering competition.

Just to take one example, in an area that has always been a top priority for consumers, products and services offered to consumers should be safe, and that requires laws and regulations, for effective oversight, accountability, and deterrence. Competition can *help* promote safer products and services, if there is enough consumer awareness and engagement. But it would be very naïve, and dangerous, to assume we can dispense with government oversight and simply let market forces protect us.

Competition and regulation need to work hand-in-hand.

For that reason, we favor letting both competition and regulation do their appropriate work in the marketplace to the full extent they can.

For our purposes today, that means, first, that specific statutory antitrust exemptions should be *very* few and far between, and that there should be a very high bar to justify one – only where there is a demonstrable compelling overriding public interest that is truly irreconcilable with antitrust.

And even then, the decision still needs to be made, is the best way to further that overriding public interest to simply turn the matter over to joint decision making by competitors in that marketplace? That is essentially privatizing regulation. Are private sector, profit-seeking decision makers the best ones to entrust with furthering this overriding public interest, or does it more appropriately call for government regulatory engagement?

Second, and similarly, it means that implied antitrust immunity based on some separate federal regulatory presence should displace antitrust only if, and only to the extent that, antitrust is fundamentally irreconcilable with the regulatory objective. Those situations are also going to be few and far between, and there needs to be a high bar to substantiate that claim.

And third, it means that if state law or regulation is to ever displace antitrust as to a commercial activity, it should be deemed to have done so only if, and only to the extent that, similarly exacting conditions are met, demonstrating that the state government is committed to protecting the public through other effective means. First, the state government must have clearly stated, in the law, that it intends to restrain competition, as a matter of state policy, with the specified regulatory regime. And second, the state government must be following through on that expressed intention, with active and continuing regulatory supervision of that activity.

These principles are widely accepted among antitrust experts, and they are reaffirmed in the 2007 Report of the Antitrust Modernization Commission (AMC).[2] But they are under frequent assault by those seeking special treatment for their own company or industry, as well as by some who are more broadly opposed to or skeptical of the important role the antitrust laws play in protecting our free market system. So eternal vigilance will be necessary to defend them.

Regulation and antitrust – implied immunity, state action

For an industry or practice to have implied immunity from antitrust because it is regulated, it must be a situation in which Congress has determined that the free market is not working to deliver the benefits of competition, that a more active government regulatory regime is required to deliver those benefits, and that regulation under that regime is fundamentally not compatible with enforcing the antitrust laws. The cases refer to this as "clear repugnancy" between the antitrust laws and the regulatory regime. It requires far more than simply an industry preferring to follow only one set of laws, not two.

Importantly, implied immunity is not about resolving any supposed tension between promoting competition and ensuring other important consumer protections. Safety, health, a clean environment, honest advertising, and other important protections can be pursued entirely consistently with protecting competition.

In fact, as the Justice Department and the FTC recognize, professed safety concerns, for example, can be – and have been – misused, by those working in an

[2] https://govinfo.library.unt.edu/amc/report_recommendation/toc.htm.

occupation, as a pretext for imposing unnecessary and excessive licensing qualifications, to keep others out. This unduly restricts entry to that occupation, thereby restricting availability of the service, which means those working in that occupation can inflate the prices they charge consumers and lower the quality of the attention they pay and the service they provide.

Instead, we are talking about market regulation – typically, directly specifying the prices and terms under which goods and services can be sold. These are situations where Congress has determined that leaving it to competition to determine pricing and terms of service results in marketplace dysfunction. Implied immunity is appropriately limited to situations where regulation is supplementing or redirecting market forces in a marketplace that Congress has determined would otherwise not be functional in delivering the kinds of benefits that competition is supposed to provide.

And even in these situations, the displacement of antitrust should be narrowly focused on the irreconcilability with effectuating the regulation, and should only be to the minimum extent necessary to enable the regulation to be effectuated.

Notably, as the courts and the AMC have recognized, there should never be implied repeal of merger enforcement authority under section 7 of the Clayton Act. The competitive effects of a merger can be considered independently of any specialized regulatory regime.

We generally agree with the AMC that an explicit antitrust savings clause can be helpful when Congress wants to make absolutely clear that it intends for the antitrust laws to apply regardless of any arguable inconsistency. But at the same time, Congress should avoid casually including antitrust savings clauses when they aren't needed, when the regulation is not irreconcilable with – not "clearly repugnant" with – antitrust. We don't want to cheapen the coin of the realm, and send courts down the rabbit hole of expecting to see a savings clause every time someone raises this issue – and presuming that if there isn't one, Congress probably intended for the antitrust laws not to apply. The bedrock standard should remain demonstrated "clear repugnancy."

Two Supreme Court decisions, Verizon Communications, Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398 (2004), and Credit Suisse Securities (USA) LLC v. Billing, 551 U.S. 264 (2007), caused a stir when they were announced. But neither of them disturbs the "clear repugnancy" standard.

In *Trinko*, leaving aside Justice Scalia's freewheeling musings, in dicta, about possible tensions between the antitrust laws and the Communications Act, the holding was not about what constitutes "clear repugnancy" at all. The holding was simply that enactment of the Telecommunications Act of 1996 did not change the legal standard for monopolization under section 2 of the Sherman Act – and thus, that Mr. Trinko could not prove monopolization under section 2 by the shortcut route of proving failure to comply with the interconnection requirements of the 1996 Act.

One lesson that can be taken from Justice Scalia's dicta is that it can be helpful to have a savings clause when Congress wants to preserve antitrust in the presence of a comprehensive regulatory regime, as there is with the Communications Act.

In *Credit Suisse*, we learned another lesson about antitrust savings clauses – that if you are going to rely on one, better that you make it specific. But the more important point is that *Credit Suisse* exactingly followed the "clear repugnancy" standard, or as the Court also described it there, "clearly incompatible," carefully analyzing all four "critical" factors laid out in earlier cases for finding implied immunity, and finding them all satisfied in this case:

> (1) there is regulatory authority under the other law to supervise the activities in question;
>
> (2) the responsible regulatory entities are exercising that authority;
>
> (3) if the regulatory law and the antitrust laws were both applied to those activities, it would create conflicts in guidance, requirements, duties, privileges, or standards of conduct that are essentially impossible for those involved in the activity to reconcile;

(4) those conflicts affect practices that lie squarely within an area of market activity that the regulatory law seeks to regulate.

The "clearly incompatible" standard simply recognizes that there are limits to applying antitrust in the context of an industry subject to complex and exacting regulatory requirements governing the same conduct. It recognizes that in such an extreme case, it can be unfair, and unworkable, to require a company to expend undue resources on trying to figure out how to painstakingly thread the needle through a complex minefield of dual legal structures focused on similar and overlapping purposes.

Credit Suisse reaffirmed the holding of Silver v. New York Stock Exchange, 373 U.S. 341, 357 (1963) that "[r]epeal of the antitrust laws is to be regarded as implied only if necessary to make the Securities Exchange Act work, and even then only to the minimum extent necessary." This holding had also been reaffirmed in Gordon v. New York Stock Exchange, 422 U.S. 659, 6783 (1975).

Courts have already been working to appropriately contain any expansion of these two decisions – declining, for example, to extend *Trinko*'s holding as a basis for regarding the extensive regulation in the health care marketplace as a basis for finding implied antitrust immunity.[3] The courts have done the same for commodity futures,[4] for municipal bonds,[5] and even for securities.[6]

The AMC, in endorsing the "clear repugnancy" standard, recognized the limited, narrow nature of the *Trinko* holding – that failure to comply with the Telecommunications Act does not create a new violation of the Sherman Act that wouldn't have existed before. (*Credit Suisse* was decided after the AMC report was released.)

The state action doctrine applies similar limiting principles in the context of state government involvement. It gives due deference, pursuant to federalism, to a state's authority as a sovereign to decision that competition as enforced under the

[3] Steward Health Care Sys., LLC v. Blue Cross & Blue Shield, 997 F. Supp. 2d 142, 153 n. 6 (D. R.I. 2014).
[4] Texas-Ohio Energy, Inc. v. Centerpoint Energy, Inc., 661 F. Supp. 2d 1172 (D. Nev. 2009).
[5] Hinds County v. Wachovia Bank N.A., 700 F. Supp. 2d 378 (S.D.N.Y. 2010).
[6] Dahl v. Bain Capital Partners LLC, 589 F. Supp. 2d 112 (D. Mass. 2008).

federal antitrust laws is clearly incompatible with some specific overriding state regulatory objective. But it requires that the state be clear, and serious, about this decision. First, the state must have made affirmatively and unmistakably clear – in the law – that it intends to restrain competition, as a matter of state policy. And second, the state must be following through on that expressed intention, with active, ongoing government supervision of the conduct in question, so that those engaging in that conduct, and the state officials, are accountable to the public.

The Supreme Court laid out this standard almost 40 years ago, in California Retail Liquor Dealers Association v. Midcal Aluminum, Inc., 445 U.S. 97, 105 (1980). And the Court has reaffirmed it repeatedly, including most recently in FTC v. Phoebe Putney Health Sys., 568 U.S. 216 (2013) and again in North Carolina State Board of Dental Examiners v. FTC, 135 S. Ct. 1101 (2015). The AMC also endorsed it. We think it is the right standard, and that both requirements should be firmly enforced.

Statutory antitrust exemptions

Creating statutory antitrust exemptions for specific industries or activities runs counter to one of the central objectives of the antitrust laws, which is to base our economy on giving businesses and consumers alike the benefits of an open marketplace, in which all businesses are given full opportunity, and full incentive, to compete. Having a shared set of fundamental principles of fair competition is by far the better, more effective alternative to trying to construct a separate set of statutory requirements, to spell out specially designed rules of competition, for each different sector, with details and complexities that are difficult to grasp and become all-too easy to find ways to evade. Experience has shown that every statutory detail presents an opportunity for a creative lawyer to find a loophole.

It is certainly possible to envision an industry sector in which it might not make sense to have open competition. The railroads were once considered a perfect example, at least in terms of short-line end-to-end tracks – to not have numerous competing railroads each building side-by-side tracks to cover the exact same ground. Though even with the railroads, it was feasible to have competing long-distance

routes from one side of the continent to the other, or for other long distances, such as from New York to Dallas.

And for the vast majority of industries, the duplication of infrastructure, equipment, and human resources is part and parcel of providing choice to consumers, and different pathways to innovation. Competition is not ruinous and wasteful; it is enabling and energizing.

And yet we have witnessed, including in recent decades, how seductively attractive it can be to create an antitrust exemption, and how difficult it can be to remove an exemption once it is created.

It is all-too easy for industry partisans to paint a picture for a lawmaker that their business has a special mission, or special complexities, that antitrust lawyers and economists "just don't get." We know that's not true, but we have seen that thoughtful lawmakers can be persuaded by this kind of sales pitch.

We've seen these kinds of efforts result in statutory exemptions several times in just the past 25 years or so, including:

- for colleges to agree not to compete with each other on the amount of financial aid they will offer students.

- for hospitals to agree not to compete with each other on attracting candidates for medical residency programs.

- for financial firms to fix prices for the rates of return paid to clients who invest in a charitable gift annuity or charitable remainder trust created by one of the firms.

- for businesses in *any* industry to not compete with each other, and to share potentially sensitive business information, in developing solutions for possible digital data problems in converting designated years in automated systems, at the arrival of the Y2K Millennium, from '99 to '00.

- for pharmaceutical manufacturers to not compete in developing countermeasures for pandemic outbreaks.

These are all worthwhile endeavors. But why can't they be pursued consistent with the basic rules of competition? Why do they need to be exempted from the antitrust laws?

The first three of these, the ones for college student financial aid, for medical residencies, and for charitable gift annuities, were enacted with the specific purpose to derail ongoing antitrust enforcement actions and cases.[7] The medical residency and charitable gift annuity exemptions are permanent. The college financial aid exemption was enacted in 1992 as a temporary exemption, for two years, to give colleges an opportunity to adjust their practices; it is now on its fifth temporary extension, currently set to expire in 2022.

The other two, the Y2K and pandemic exemptions, were conceived by Congressional members and staff as a way of providing reassurance to businesses, against imagined concerns that businesses might otherwise not share expertise to work on these problems, out of fear that they might somehow accidentally violate the antitrust laws and be sued or prosecuted. The Y2K exemption came and went; the pandemic exemption was set to expire in 2012, but was extended, and is now set to expire this December.

We could imagine ways in which unscrupulous businesses might take advantage of concerns about either of these risks, to orchestrate some kind of conspiracy to fix prices or boycott a targeted business. But that kind of conduct is not shielded by either of the exemptions; it is explicitly excluded from both. And as to the broader fears that someone might innocently take some action, entirely in good faith, that turns out to be an antitrust violation, that's hard to imagine.

[7] http://www.nytimes.com/1991/05/23/us/ivy-universities-deny-price-fixing-but-agree-to-avoid-it-in-the-future.html; http://www.nytimes.com/2004/08/14/us/antitrust-lawsuit-over-medical-residency-system-is-dismissed.html; https://www.gpo.gov/fdsys/pkg/CRPT-105hrpt146/html/CRPT-105hrpt146.htm.

A variation on a complete exemption is found in the National Cooperative Research Act (NCRA) of 1984, enacted in response to claims circulating at the time that the antitrust laws were holding back innovation, and that that was why our country was being overtaken in the world economy by Germany and Japan. Claims that we needed to encourage more pooling of American ingenuity in research and development, and that the antitrust laws, or at least that antitrust fears, were getting in the way.

The NCRA approach was to invite joint R&D ventures to register with the antitrust agencies, in exchange for which their R&D activities would be guaranteed not to be treated as per se, outright antitrust violations, but would be subject to the more nuanced rule of reason, under which the effects of those activities would be carefully weighed and given the benefit of the doubt. And then, if any of those activities was nonetheless found to violate the antitrust laws, in any private case they would be subject only to single damages, not the usual treble damages that have been a cornerstone of the antitrust laws since their beginnings.

The NCRA treatment was initially limited to R&D joint ventures, but in 1993 it was extended to joint ventures for production. And then in 2004 the same approach was adopted for joint development of technical standards through a qualifying standards development organization.

The NCRA was initially introduced in Congress as a flat-out antitrust exemption, but in the course of its consideration it was not only revised to rule of reason, but considerable attention was given to carefully defining the scope of conduct that would be covered, and explicitly excluding conduct that might actually create antitrust concerns. Similar attention was given to both the production and standard-setting extensions. And similar care was given to crafting the contours of the pandemic exemption.

In a sense, it's good that the potential risks of creating these exemptions were largely neutralized. On the other hand, we probably could have done just as well without the exemptions. And there's always a risk of overlooking some detail, and inadvertently leaving a loophole for a creative lawyer to find.

During the past 25 years, there have also been a number of other exemptions proposed that *didn't* make it into statute, that were stopped. One of these was a proposal to add an exemption for doctors to the 1994 health care reform legislation, so they could force health plans to negotiate with them as a group on medical fees and other terms, and could refuse as a group to do business with a health plan that wouldn't meet the terms they'd insist on.

Another was a proposal to add an exemption for banks and financial institutions as part of the Emergency Economic Stabilization Act of 2008, so they could agree not to compete in addressing potential challenges to the financial system during the financial meltdown in 2008.

One exemption that was *not* stopped was the exemption, enacted more than 70 years ago, for the entire business of insurance, in the McCarran-Ferguson Act. Like the college financial aid exemption, this one was enacted with the specific intent of derailing an ongoing antitrust enforcement action by the Justice Department. The effort to enact it was aided by threats by numerous insurance companies to stop paying premium taxes, an important source of revenue to the States.

The bill passed both the House and the Senate as a temporary 3-year moratorium on further antitrust enforcement against insurance companies, to give them time to adjust their practices. In the conference committee, however, a few words were added that created a permanent exemption "to the extent that such business is not regulated by state law." Many who voted on the final bill were apparently not aware of the change; those who were aware, and concerned, could not get the attention of their colleagues and convince them not to accept it.

And as a result, the business of insurance ended up with an exemption resembling one conferred by the state action doctrine, but without having to satisfy the conditions that justify the state action doctrine, clearly articulated state policy and active state supervision.

Efforts to remove or scale back this exemption have been underway for at least 40 years, and are still underway today. None of the reasons put forward by the insurance industry for maintaining it hold water. At bottom, they essentially fall into

the category of avoiding the uncertainty that removing the exemption would create. An uncertainty that is not only overblown, but that would not even exist if the insurance industry had just stayed under the antitrust laws originally. Getting that outlying industry to join the rest of the economy is a reform that is three quarters of a century overdue.

We can expect to keep seeing various industry factions making similar efforts to convince a receptive ear in Congress that their business is different, is misunderstood, needs an exemption so that it can operate without the specter of legal uncertainty. We must depend on a critical mass of Members and staff, particularly on the committees with jurisdiction over antitrust, to be vigilant in spotting those efforts, and to be resolute in fending them off.

One statutory exemption that I think *does* belong in our laws is the one that has been enshrined in section 6 of the Clayton Act from its very beginning:

"That the labor of a human being is not a commodity or article of commerce."

This provision is what keeps the Sherman Act from being turned on and used against workers seeking to organize in their workplaces – used against those who work for a paycheck, not for profits. Some of the earliest Sherman Act prosecutions, before the Clayton Act, were actually criminal prosecutions against union organizing.

At the same time, we have to be careful that we do not allow groups of independent business entities to try to liken themselves to a union, and seek the same antitrust benefit but without the effort and accountability of actually creating the union. We have seen a number of instances where that has been attempted. One prominent example was the doctors seeking an exemption, so they could bargain collectively with health plans – and could refuse to provide medical services to any health plan that would not accept their demands.

It can be tempting to look at a business negotiation – with a behemoth on one side seeming to have the upper hand, the power to call the shots, and a smaller business on the other side, seeming to have no power, and to be at the mercy of the behemoth – to see that and want to help level the playing field. But granting the

small business an antitrust exemption, so it can lock arms with its competitors, and make joint demands, does not cure the market power problem; it just creates more market power. This has been referred to as the "sumo wrestler" approach – that the only way to go up against a giant is to create another giant. But the two giants will end up shaking hands, discovering a way to mutually accommodate their interests. Consumers are not part of that handshake, and now they suffer not just the effects of one giant throwing its weight around, but the combined effects of two giants.

The right way to deal with the market power on one side, if possible, is to protect and promote competition through *enforcing* the antitrust laws against the giant's abuse of that market power, not by excusing the other side from those laws. Or if that giant's market power is beyond the reach of the antitrust laws, and yet is creating a dysfunctional marketplace, it may be time to consider a regulatory solution. The last thing we want to do is turn over to the private actors the power to act as government and regulate the marketplace on their own, outside accountability to the public.

Keeping this distinction between employees and businesses in a gig economy, where more and more of us are working as independent contractors rather than employees, is going to be a challenge. But we should try to address protecting the rights of workers in the changing economy through labor laws, safety laws, and other laws directed at the workplace, rather than through creating new antitrust exemptions that end up restricting choices for consumers in the marketplace.

Conclusion

As the AMC put it, the antitrust laws "stand as a bulwark to protect free-market competition." But a bulwark loses its strength to protect as it becomes riddled with holes and gaps.

We think the AMC was correct when it concluded that "[s]tatutory exemptions from the antitrust laws undermine, rather than upgrade, the competitiveness and efficiency of the U.S. economy." That the benefits of an exemption flow to the narrow interests of a select group, with "the costs [borne by] consumers through higher prices, reduced output, lower quality, and reduced innovation." That

exemption cannot be justified unless there is "compelling evidence of the unworkability of competition or a clearly paramount social purpose," and the exemption is the "least anticompetitive method of achieving the regulatory objective."

PREPARED STATEMENT OF

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THE HERITAGE FOUNDATION

Before the

ANTITRUST DIVISION PUBLIC ROUNDTABLE ON STATUTORY EXEMPTIONS AND IMPLIED IMMUNITIES FROM THE ANTITRUST LAWS

March 14, 2018

Thank you for inviting me to speak today. Let me emphasize that I am appearing today in my personal capacity. The views I express today are solely attributable to me, and should not be taken to represent that views of the Heritage Foundation.

An economy based on vigorous competition, protected by the antitrust laws, does the best job of promoting consumer welfare and a vibrant, growing economy. This conclusion is supported by expert economic studies, both domestic and international, and most of our economy is based on this competitive model.

Antitrust is a key component of the competitive free market system. The Supreme Court has stated that the antitrust laws are "the Magna Carta of free enterprise. They are as important to the preservation of economic freedom and our free-enterprise system as the Bill of Rights is to the protection of our fundamental personal freedoms."[1] This suggests that laws or regulations authorizing departures from the competitive model should be disfavored, and proponents of such departures should bear a heavy burden of demonstrating, with robust empirical support, why such a regime is necessary.

Congress over the years has adopted a wide range of measures that partially or fully immunize certain sectors of the American economy from antitrust review. Collectively, these sectors of the economy cover a substantial volume of commerce. I believe that it is important to consider whether the continued

[1] *United States v. Topco Associates, Inc.*, 405 U.S. 596, 619 (1972).

existence of these exemptions in their current form fosters the goal of a strong, innovative, American economy – or, rather, undermines it.

Why might antitrust exemptions harm the economy? Many exemptions (albeit in different ways, depending upon the statute) allow firms to agree to limit the terms of competition among themselves and impose restrictions on entry into the affected sector. To put it more bluntly, such exemptions tend to foster legal cartels. From an antitrust perspective, such agreements – "horizontal restraints" – generally present the greatest risk of competitive harm. Unless the restraint is reasonably necessary to the generation of countervailing efficiencies, consumers are likely to be worse off.[2]

Concerns about the adverse economic impact of laws that limit competition are more than mere theory. There is a considerable empirical literature that suggests that industries sheltered from competition do not perform as well as those that are subject to vigorous competitive forces. For example, numerous studies of sectoral deregulation in the United States show that the unleashing of market forces has resulted in greater economic efficiency and benefits for consumers.[3] Similarly, an often-cited study by Michael Porter of the Harvard Business School points out that industries sheltered from international competition are less vigorous and successful than industries subject to such competition.[4] The adverse effects that Porter and others ascribe to governmental policies that shelter inefficient competitors and condone cartels may well result from certain antitrust exemptions.

In attempting to assess the magnitude of harm caused by antitrust exemptions, we cannot directly examine the "but for" world that would exist in the absence of such exemptions. Nevertheless, it is instructive to look at the positive welfare effects of deregulation in certain industries, because antitrust exemptions are like economic regulation in the sense that they, too, produce a more constrained form of competition. For example, the positive welfare effects of transportation deregulation (trucking, airlines), well documented by economists, may be a sort of "natural experiment" that highlights the benefits that flow from introducing more vigorous competition when it previously existed in a much more constrained form.[5]

Therefore, both economic theory and real world data support a standard that

[2] Basic economic theory teaches that an unregulated competitive market generally leads to the economically efficient level of output. See, e.g., Robert S. Pindyck & Daniel L. Rubinfeld, MICROECONOMICS 294 (5th ed. 2001).
[3] *See, e.g.*, Clifford Winston, U.S. Industry Adjustment to Economic Deregulation, 12 J. of Economic Perspectives 89, 98-102 (1998).
[4] Michael Porter, THE COMPETITIVE ADVANTAGE OF NATIONS 117-120, 225-38, 416, 708 (1990).
[5] *See, e.g.*, Giuseppe Nicoletti, *Cross-country regulation patterns and their implications for macroeconomic and*

requires proponents of an exemption to bear the burden of demonstrating that the exemption will benefit consumers. This burden should exist both at the time the exemption first is considered, and at regular intervals thereafter.

I would note in that respect that a number of the existing exemptions are many decades old, and represent a time when the American economy was very different. Revolutions in communications (computers, the Internet), transportation, and business methods have lowered transactions costs and substantially changed the ways in which firms and industries operate. Furthermore, international competition also has affected scores of industries; much more than in the past, the U.S. participates in a global economy. Thus, even if one assumes, for the sake of argument, that there may have been valid economic justifications for specific industry exemptions in the past, it is not at all clear that those justifications still hold water.

Furthermore, even if one believes that some of the matters currently protected by antitrust exemptions are efficient, socially useful forms of conduct, it does not follow that an antitrust exemption is necessary to realize those efficiency gains. The antitrust laws do not prohibit *all* restraints of trade, only those that are unreasonable,[6] and unreasonableness is assessed by weighing efficiency justifications against anticompetitive effects to determine the overall effect. Modern mainstream antitrust analysis does not condemn efficient collaborations, only those agreements that diminish competition and harm consumers. In short, antitrust law today is not an impediment to economically desirable form of collaboration by firms in exempt industries.

Finally, it is instructive to note that foreign jurisdictions are broadening the scope of their antitrust laws and subjecting to antitrust scrutiny formerly exempt sectors.[7] This should help invigorate the competitive process overseas. It would be quite ironic if the U.S. Government, which has argued strenuously in multiple forums about the benefits of antitrust to foreign economics, should (like the physician who fails to take the medicine he or she prescribes) fail to heed the implications of the argument for American law.

Thank you very much.

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sectoral performance, in Giuliano Amato & Laraine L. Laudati, THE ANTICOMPETITIVE IMPACT OF REGULATION 278 (2001).

[6] *Standard Oil Co. v. United States*, 221 U.S. 1, 60-70 (1911).

[7] *See* OECD, *Regulatory Reform: Stock-Taking of Experience with Reviews of Competition Law and Policy in OECD Countries – and the Relevance of Such Experience for Developing Countries* (CCNM/GF/COMP (2004)1, January 21, 2004), Annex at ¶¶ 20-55.

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March 7, 2018

Public Comments Submitted by the Open Markets Institute for the Antitrust Division's Roundtable on Exemptions and Immunities from the Antitrust Laws

The Open Markets Institute welcomes the opportunity to participate in the Justice Department's roundtable discussion about antitrust exemptions and immunities.

America's liberty and democracy depend on competition. Open and competitive markets promote innovation, resiliency, and prosperity. For this reason, we generally view exemptions and immunities from the antitrust laws with skepticism. But we believe that, in select and narrow circumstances, exemptions and immunities can play an important role in promoting open markets and fair competition, and in protecting the authority of states and municipalities to structure local markets.

Distinguishing between instances where exemptions and immunities are wrongfully serving powerful private entities and instances where they are rightfully promoting greater public ends is key. A failure by courts to view exemptions and immunities as part of a larger anti-monopoly framework has resulted in misguided judicial opinions, effectively shielding swaths of economic activity from robust application of the antitrust laws. This lack of a coherent vision has also resulted in perverse enforcement and policy actions by the antitrust agencies, with the Federal Trade Commission devoting resources to targeting workers and professionals that lack any significant economic power while leaving uninspected dominant firms with growing market power and increasing control over key arteries of American commerce.[1]

Below we offer our views on DOJ's specific prompts. We look forward to continuing to engage with the Antitrust Division on these important topics.

1. **The impact of express statutory exemptions and implied immunities from the antitrust laws. We will explore how segments of the economy with express exemptions may be unique, review justifications for those exemptions, and determine whether they are, and continue to be, warranted. We will also evaluate whether such exemptions harm consumer welfare.**

[1] For a deeper discussion of this trend, *see* Sandeep Vaheesan, *Accommodating Capital and Policing Labor: Antitrust in the Two Gilded Ages* (2018) (available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3046302).

The effects of express statutory exemptions must be assessed on a case-by-case basis. Our comments will focus on two categories: (i) exemptions that enable powerful industry players to engage in anti-competitive practices that enrich their interests at the public's expense, and (2) exemptions that enable players with no market power to engage in collective activity as a way of creating countervailing power and of enabling forms of organization that Congress has sought to protect.

The first set of exemptions are unjustified and should be repealed. The clearest example is the McCarran-Ferguson Act.[2] Passed by Congress following intense lobbying campaigns by powerful industry players, the Act immunizes state-regulated "business of insurance" from federal antitrust scrutiny. This exemption has proved especially problematic in the health insurance industry, where 69 percent of metropolitan-area markets are "highly concentrated."[3] Shielded from antitrust scrutiny, health insurers have engaged in anti-competitive practices, such as conscious parallelism, price-fixing, and the fixing of coverage,[4] contributing to skyrocketing costs for the public. Although insurers claim that the exemption is necessary to allow them to collect, aggregate, and share data on losses so that they can more accurately assess risk and set their rates accordingly, repealing McCarran-Ferguson Act would not jeopardize publicly beneficial forms of information-sharing. As the Antitrust Modernization Commission observed, this practice would be assessed by courts and enforcers under a rule-of-reason analysis, which would consider any pro-competitive effects.[5] The 70-year immunity enjoyed by the oligopolistic industry should be repealed.

The second set of statutory exemptions and immunities carry significant public benefits and should be maintained and strengthened. These include the Capper-Volstead Act and Section 6 of the Clayton Act.[6] Unfortunately, changes in underlying market realities have meant that these exemptions are failing to fully achieve their original purpose. Policymakers and legislators should consider how to realign these exemptions with their original purposes.

In 1922 Congress passed the Capper-Volstead Act to empower farmers to organize agriculture cooperatives. Efforts to organize cooperatives took off in the late 1800s, as farmers confronted the rise of local railroad monopolies and growing consolidation among food processors. These middlemen often abused their gatekeeper power and their buyer power, squeezing farmers and jeopardizing the country's food supply.[7] By immunizing certain activities undertaken by farmers collectively, Capper-Volstead enabled farmers to bargain collectively with food processors and retailers to get a fair price. In short, it sought to redress the effects of monopsony power. As a House Report stated, "[i]nstead of granting a class privilege, [the Act] aims to equalize existing privileges by changing the law applicable to the ordinary business

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[2] McCarran-Ferguson Act, 15 U.S.C. §§ 1011-1015 (2006).
[3] American Medical Association, *Competition in Health Insurance* (2017), https://www.ama-assn.org/about/competition-health-insurance-research.
[4] Phillip E. Areeda & Herbert Hovenkamp, ANTITRUST LAW ¶ 219d, at 31 (3d ed. 2006).
[5] Antitrust Modernization Comm'n, Report and Recommendations 351 (2007) (footnotes omitted), available at http://govinfo.library.unt.edu/amc/report_recommendation/amc_final_report.pdf.
[6] 7 U.S.C. §§ 291-292 (2012); Act of Oct. 15, 1914, ch. 323, § 6, 38 Stat. 730, 731 (codified as amended at 15 U.S.C. § 17 (2012)).
[7] 62 CONG. REC. 2059 (1922).

corporation so the farmers can take advantage of it."[8] For decades, the law helped level the playing field between farmers and middlemen, and ultimately helped keep wealth in the community rather than transferred to absentee owners afar.

Today, however, that co-op landscape looks very different. In recent decades, the cooperative movement has been co-opted by dominant companies that prey off the very small-scale producers that they're meant to protect.[9] For example, Dairy Farmers of America—the largest dairy co-op in the country—has morphed into an agribusiness giant in its own right, controlling a third of the nation's dairy supply. DFA was created through the merger of four regional dairy co-ops, and has vertically integrated across the supply chain, engaging in the business of production, processing distribution, trucking, and marketing.[10] Although DFA claims this level of consolidation was necessary to compete with massive industry players, in practice it has created a conflict of interest whereby the co-op cannot be trusted to bargain faithfully on behalf of its members.[11] As farmers alleged in a lawsuit, exclusive agreements between DFA and Dean's Foods enriched top executives at the organizations but suppressed prices for raw milk, sending farmer incomes plummeting.[12] And amid significant regional concentration, farmers face few options for where to sell their milk. As a longtime reporter for a dairy industry publication stated, "The management of DFA is consistently working against the rank-and-file members."[13] While Capper-Volstead does not immunize co-ops engaging in predatory conduct in violation of Section 2 of the Sherman Act, no public enforcement action has targeted DFA's anti-competitive practices, despite a 26-month investigation that reportedly recommended enforcement action.[14] As a result, DFA continues to enjoy antitrust immunity as a co-op, even as it no longer fully serves the function of a co-op.

Capper-Volstead recognized the importance of guaranteeing farmers countervailing power. It should be reviewed to ensure that the immunity that sought to *protect* farmers against buyer power is not being exploited to subject farmers to monopsony. It's critical that the exemption be limited to actual farmers, not to giant agribusinesses. We have been disappointed by DOJ's decision in the past to devote resources to targeting bona fide cooperatives for output restriction while failing to take action against anti-competitive conduct by massively consolidated and integrated firms.[15] While DOJ's joint agriculture workshops with USDA in 2010 were a step in the right direction, its decision not to act following this information-gathering exercise was a failure.[16]

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[8] H.R. REP. NO. 67-24 at 2 (1921)

[9] Leah Douglas, *How Rural America Got Milked*, WASH. MONTHLY (Jan/Feb/Mar. 2018).

[10] *Id*. *See also* Andrew Martin, *Yes, It's a Cooperative. But for Whom?*, N.Y. TIMES (May 18, 2008) ("To expand the cooperative, Mr. Hanman used a strategy that gave dairy farmers little choice but to join and, in the process, helped push competing cooperatives out of business. In some instances, they merged with the Dairy Farmers of America.").

[11] *Id*.

[12] Andrew Martin, *In Dairy Industry Consolidation, Lush Paydays*, N.Y. TIMES (Oct. 27, 2012).

[13] Douglas, *supra* note 9.

[14] Martin, *supra* note 12.

[15] *See, e.g.*, Complaint, U.S. v. Eastern Mushroom Marketing Cooperative, Inc., 2005 WL 3412413 (E.D. Pa. 2005) (No. 2:04-CV-5829).

[16] The stories that farmers and producers shared with DOJ and USDA at the public workshops—often at the risk of retaliation by meat processors—portrayed highly concentrated local markets where processors

Another statutory exemption that must be strengthened is Section 6 of the Clayton Act. While legislative history shows that the Sherman Act was passed in order to police aggregations of capital, not labor, the antitrust law was initially used against workers. To rectify this perverted use of the law, Congress enacted Section 6 of the Clayton Act as an express exemption for labor, stating "labor of a human being is not a commodity or an article of commerce."[17] The statute exempted all union activity, including secondary actions, from the purview of the antitrust laws. The Norris-La Guardia Act, passed by Congress during the New Deal, explicitly protected collective action and organizing, bolstering the Section 6 exemption.[18]

Today, however, federal enforcers and courts are once against harnessing antitrust law to target workers.[19] While courts recognize the Section 6 exemption for organized labor, this provision protects only workers classified as employees. Given that employers routinely misclassify workers as independent contractors across the political economy—one report estimated that 30 percent of workers are misclassified[20]—the Clayton Act exemption fails to reach a sizable segment of the population it was meant to protect, leaving them exposed to antitrust investigations and lawsuits. For example, the FTC has targeted independent drivers' associations representing low-income workers and physician groups bargaining with oligopolistic health insurers, as well as electricians and public defenders.[21] Recently the FTC has made actions against professionals and independent contractors a priority.[22]

To be sure, professional licensing groups can engage in cartel-like behavior that enriches private interests at the public's expense. But these instances constitute a small sliver of the anti-competitive activity in our economy. Devoting agency resources to targeting independent contractors—while neglecting to address monopolization and abuse of oligopoly power, and overseeing highly permissive merger enforcement—signals misuse of public resources and a misunderstanding of the purpose of antitrust. Expanding the Section 6 exemption to apply to independent contractors and individual professionals, in addition to organized workers, would help restore the ability of laborers to collectively organize and refocus the antitrust agencies on more appropriate targets.

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exercised significant monopsony power. *See* U.S. Dep't of Justice, Public Workshops: Agriculture and Antitrust Enforcement Issues in Our 21st Century Economy (updated Apr. 26, 2017), https://www.justice.gov/atr/events/public-workshops-agriculture-and-antitrust-enforcement-issues-our-21st-century-economy-10. For additional discussion of the industry practices that farmers endure and the retaliation they faced for taking part in the workshops, *see* Lina Khan, *Obama's Game of Chicken*, WASH. MONTHLY (Nov./Dec. 2012); Christopher Leonard, THE MEAT RACKET (2014).

[17] Act of Oct. 15, 1914, ch. 323, § 6, 38 Stat. 730, 731 (codified as amended at 15 U.S.C. § 17 (2012)).

[18] Act of Mar. 23, 1932, ch. 90, 47 Stat. 70 (codified as amended at 29 U.S.C. §§ 101–115 (2012)).

[19] Vaheesan, *supra* note 1. *See also* Warren S. Grimes, *The Sherman Act's Unintended Bias Against Lilliputians: Small Players' Collective Action as a Counter to Relational Market Power*, 69 ANTITRUST L.J. 195 (2001); Sanjuka M. Paul, *The Enduring Ambiguities of Antitrust Liability for Worker Collective Action*, 47 LOY. U. CHI. L.J. 969 (2016); Sandeep Vaheesan & Frank A. Pasquale, *The Politics of Professionalism: Reappraising Occupational Licensure and Competition Policy*, ANN. REV. OF L. & SOC. SCI. (forthcoming 2018); Marshall Steinbaum, *The Feds Side Against Alt-Labor*, ROOSEVELT INST. BLOG (Nov. 11, 2017).

[20] Danny Vinick, *The Real Future of Work*, POLITICO MAG. (Jan./Feb. 2018).

[21] Paul, *supra* note 19, at 980-84.

[22] Jared Meyer, *FTC Sets Its Sights on Occupational Licensing*, FORBES (Apr. 17, 2017).

2. How implied immunities and exemptions have affected antitrust enforcement. We will examine the appropriate roles of Congress and the courts in creating immunities and exemptions from antitrust laws. We will discuss whether the "implied repeal" doctrine in Credit Suisse v. Billing, 551 U.S. 264 (2007), helps or hampers competition.

Our view is that immunities and exemptions should be created by Congress. Although certain judge-made immunities and exemptions have proven useful in the past, courts in recent decades have expanded these doctrines significantly, delivering doctrinal formulations that are largely untethered from the doctrine's original purpose. In both *Trinko* and *Credit Suisse*, the Court limited the courts' traditional role in antitrust enforcement in the context of regulated industries.[23] We believe this is misguided and that antitrust enforcers have a critical role to play in industries that are separately overseen by regulatory agencies. Specifically, it is short-sighted to view the existence of a regulatory structure alone as presenting a conflict with the antitrust laws; the central question is whether Congress created the regulatory system in order to displace competition or to promote it. In *Trinko*, for example, the Court assumed that—when a regulatory structure exists—antitrust enforcement has a limited role to play. But this analysis ignored the fact that the 1996 Telecommunications Act and the attendant regulatory structure seek to *promote* competition in the telecommunications sector, such that antitrust enforcement would complement the goals of the regulatory regime rather than override or undermine them.

Primary jurisdiction doctrine and filed-rate (or Keogh) doctrine also warrant review. Originally, primary jurisdiction did not serve as an implied immunity; it addressed whether a court should suspend or defer a question until reviewed by a regulator that oversaw the underlying activity. This deference was viewed as beneficial when (1) the regulator had expertise necessary to resolve certain complex factual inquiries raised by the case, and (2) interpreting the regulatory statute involved a policy judgment within the purview of the regulator.[24] Today, however, courts tend to use primary jurisdiction as a basis for concluding that certain conduct is exempt from antitrust laws. This is dangerous and risks shielding from effective antitrust review a host of industries that Congress sought to govern through competition. Primary jurisdiction should be applied only where resolving the antitrust issue depends on an agency determination, *or* where agency action would significantly inform and further the court's antitrust analysis, and it should not be applied as an implied immunity.

Courts have also unjustifiably expanded the filed-rate doctrine beyond its intended purposes.[25] The doctrine emerged in the context of a plaintiff seeking to recover treble damages from rail companies acting in concern to set prices.[26] The Court ruled that antitrust damages were not available to the plaintiff, because (i) the rates became effective only if approved by the Interstate Commerce Commission, and (ii) the Interstate Commerce Act provided a separate means for obtaining a remedy for the "exaction of any illegal rate." Since then, courts have

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[23] *Verizon Commc'ns, Inc. v. Law Offices of Curtis V. Trinko*, 540 U.S. 398 (2004); *Credit Suisse Sec. (USA) LLC v. Billing*, 551 U.S. 264 (2007).
[24] *See, e.g.*, Alpharma, Inc. v. Pennfield Oil Co., 411 F.3d 934, 938 (8th Cir. 2005).
[25] For an excellent discussion of this trend, *see* Darren Bush, *Mission Creep: Antitrust Exemptions and Immunities*, 2006 UTAH L. REV. 761, 792-801 (2006).
[26] Keogh v. Chicago & Northwest Railway Co., 260 U.S. 156 (1922).

expanded the filed-rate doctrine to contexts where there is no filed rate—namely, where rates are set by firms without agency approval ex ante, only agency authority to review ex post. Since treble damages help deter abuse of market power, denying antitrust damages in industries where firms possess markets power and are subject to limited agency oversight is a problem.

3. Whether the state action doctrine in its current form strikes the appropriate balance between state sovereignty and the federal policy favoring competition in interstate commerce. We will assess policies and regulations states are adopting that may be considered exempt from antitrust scrutiny, and consider the resultant harm to competition and consumers. We will also query whether the dormant Commerce Clause can or should provide a meaningful limit on states' ability to reduce competition involving interstate commerce.

We think the state action immunity doctrine protects an important right of states to structure local markets and to promote policy goals that may conflict with federal antitrust law. We recognize that state action immunity may be misused or abused, but we think the source of this threat is regulatory capture, not state autonomy. For this reason, we think efforts to prevent abuse of state action immunity should target capture by special interests rather than limit state authority to promote non-competition policy goals.

We think the state action doctrine as articulated by the Supreme Court in *North Caroline State Board of Dental Examiners v. Federal Trade Commission* strikes the appropriate balance between state sovereignty and federal antitrust.[27] Specifically, we think the Court was right to focus not on an entity's formal relation with the government but on its incentive to self-deal or otherwise serve private interests. While greater clarity on what constitutes adequate "active supervision" by the state would be helpful, we strongly reject calls to eliminate or soften this requirement.

Finally, we are skeptical of attempts to use the dormant Commerce Clause to sidestep state action. States have legitimate public policy goals that may conflict with federal antitrust law. We should encourage these laboratories of democracy, not undermine them.

[27] N.C. State Bd. of Dental Exam'rs v. FTC, 135 S. Ct. 1101 (2015).

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Public Roundtable Discussion Series on Regulation & Antitrust Law
Session One: Roundtable on Exemptions and Immunities from Antitrust Laws

Wednesday, March 14, 2018

Statement of Craig Wolf
Representing the U.S. Chamber of Commerce and the Wine & Spirits Wholesalers of America

Good morning. I want to thank Assistant Attorney General Delrahim and the Antitrust Division for holding these discussions. The most effective government policies are those that are informed by careful consideration of the competing perspectives of those who would be directly impacted by those policies.

My name is Craig Wolf, and I am the President of the Wine & Spirits Wholesalers of America, a trade association whose members distribute more than 80 percent of all wine and spirits sold at wholesale in the U.S. WSWA is a member of the U.S. Chamber of Commerce, and I will be presenting the views of the Chamber as well as those of my association, which has a unique perspective on the issues to be discussed today.

The Chamber believes in market competition that yields self-regulated markets and is generally not supportive of immunities or exemptions from antitrust law. It recognizes that exemptions exist, has no expressed interest in reviewing those exemptions, but is hesitant to support additional exemptions.

With respect to immunities, the Chamber recognizes that the state action doctrine can shield anti-competitive regulation which can lead to market distortions, so it is generally supportive of a narrowing of its interpretation to prevent excessive regulation that could lead to fewer market participants and predetermine market outcomes.

The Chamber also has raised concerns with the interface between U.S. antitrust laws, the Foreign Sovereign Immunity Act (FSIA), the Act of State doctrine, and claims of foreign sovereign compulsion, and generally believes companies operating in foreign markets should be subject to the laws and regulations of the country in which they operate.

The Chamber believes that U.S. antitrust authorities should investigate and, where appropriate, bring cases against any commercial competitor in the market - state-owned, supported, or private - and that the courts need to limit the application of the act of state doctrine and granting of comity where deference results in immunity.

For companies finding themselves under scrutiny in a foreign market, the foreign sovereign compulsion defense may arise. While the Chamber has sympathies for companies caught trying

to comply with potentially conflicting legal regimes, the courts must evaluate the assertion of such a defense carefully.

The Chamber also believes that the Foreign Trade and Antitrust Improvements Act (FTAIA) is in need of clarity. Import commerce should fall within the scope of U.S. antitrust laws and the harm to U.S. consumers should be within reach of remedy.

Like the Chamber, WSWA generally supports the long-standing presumption that competition yields the best allocation of economic resources, the lowest prices, the highest quality, and the most innovation.

However, alcohol is unique, and the goal of unrestrained competitive forces to achieve the lowest prices must be balanced with competing public safety concerns. We believe that state-based regulatory systems successfully and effectively balance regulation with competition, promoting a dynamic and diverse purchasing environment while protecting citizens from the potentially harmful effects of alcohol.

The laws and regulations governing the production, distribution, and sale of beverage alcohol do not benefit from any express statutory exemption, nor do they enjoy implied immunities from the antitrust laws.

But the fundamental tenet of primacy of state regulation is strengthened in the context of state beverage alcohol regulations. The adoption of the 21st Amendment reflected recognition by Congress and the states that the difficult problem of regulating alcohol, a socially-controversial product that could be misused, required that states be granted sweeping authority to develop comprehensive, manageable solutions to protect their citizens.

As a result, many state beverage alcohol laws and regulations promote a level playing field by prohibiting below cost pricing, predatory pricing, and price discrimination. Those policy goals are consistent, and do not conflict, with the principles embedded in the federal antitrust laws.

When a state's regulatory requirements directly conflict with express federal policies, those regulations will only prevail when the interests implicated by the state regulation are closely related to the interests reserved to the states under the 21st Amendment.

The state action immunity doctrine, which also rests on principles of federalism and state sovereignty, functions to ensure that state-imposed constraints on competition are the subject of clearly articulated state policies, supervised by state officials who are not, themselves, market participants.

The dormant Commerce Clause limits the states' ability to discriminate between in-state and out-of-state producers, however the Supreme Court has made it clear that the 21st Amendment grants

the States virtually complete control over how to structure the liquor distribution system and that a state mandated three-tier system of distribution is unquestionably legitimate.

The regulatory systems developed in the states to manage beverage alcohol have created the most innovative, dynamic and competitive alcohol marketplace in the world today, offering consumers a wide array of brands from across the world. This demonstrates how strong state laws governing production, distribution and retail provide benefits to consumers while satisfying important policy interests of the state in ensuring a level playing field for market participants.

We encourage the Department of Justice to recognize that beverage alcohol is historically and constitutionally unique, and requires a balancing of interests between competition and public safety.



Second Roundtable

Antitrust Consent Decrees

Roundtable Agenda

Opening Remarks: Assistant Attorney General Makan Delrahim

Introductions and Statements from Roundtable Participants

. **Session 1: Behavioral Consent Decree Provisions**
Explores two main issues: first, how consent decrees have been used, what the trends are, and what we have learned from trying various approaches, including the differences between structural and behavioral forms of relief; second, how antitrust enforcement should employ consent decrees going forward. Much of this discussion focuses on perceived changes in the Antitrust Division's revisions of its policies on merger remedies as well as the commentary and literature regarding specific behavioral remedies in both non-merger and merger settlements, for vertical and horizontal mergers.

Session 2: The Usefulness of Perpetual Consent Decrees, and Terminating Outdated Decrees
Examines what effects perpetual decrees have on market competition. Includes a discussion of how companies subject to perpetual decrees adjust their business conduct versus how they would do business not subject to the decree, or subject to a time-limited one, and the role industry reliance on a decree should play with respect to the decision to eliminate or retain a perpetual decree. Considers specific perpetual consent decrees, but also broader questions of the effects that perpetual decrees can have in the marketplace. Discusses the Division's Judgment Review Project and the considerations the Division should apply in determining whether a consent decree should be terminated or retained.

Closing Statements from Roundtable Participants

Roundtable Participants

American Bar Association, Section of Antitrust Law – Jon Jacobson
American Antitrust Institute – Diana Moss
American Enterprise Institute – Jeffrey Eisenach
Consumers Union – George Slover
Open Markets Institute – Brian Feldman
Public Knowledge – Meredith Rose
U.S. Chamber of Commerce – David Wales

Biographies of Roundtable Participants

Jon Jacobson (American Bar Association, Section of Antitrust Law) is a partner in Wilson, Sonsini, Goodrich & Rosati. He is the Chair of the ABA's Section of Antitrust Law and was previously appointed by Congress to serve on the Antitrust Modernization Commission.

Diana Moss (American Antitrust Institute) has been the President of the American Antitrust Institute since 2015. Before joining AAI in 2001, Dr. Moss worked in private practice and coordinated competition analysis for electricity mergers at the Federal Energy Regulatory Commission from 1989 to 1994.

Jeffrey Eisenach (American Enterprise Institute) is a visiting scholar at the American Enterprise Institute. He is the Managing Director at NERA Economic Consulting. He previously served in a variety of senior positions at the Federal Trade Commission and the Office of Management and Budget at the White House.

George Slover (Consumers Union) is a senior policy counsel in the Washington Office of Consumers Union, the advocacy division of Consumer Reports, Washington office. He has three decades of federal government policy experience, including nine years at the House Judiciary Committee, two years at the House Energy and Commerce Committee, and eleven years in the Antitrust Division.

Brian Feldman (Open Markets Institute) is a Policy Analyst and Researcher at the Open Markets Institute. He previously worked as a researcher-reporter on competition policy issues at New America.

Meredith Rose (Public Knowledge) is a Policy Counsel at Public Knowledge. She is a regular participant in the triennial Digital Millennium Copyright Act Section 1201 hearings at the Copyright Office, and she is an Adjunct Professor at the George Washington School of Law.

David Wales (U.S. Chamber of Commerce) is a partner in Skadden Arps. He was the Acting Director of the FTC's Bureau of Competition from 2006 to 2009, and he previously worked as Counsel to the Assistant Attorney General in the Antitrust Division from 2001 to 2003. He has also worked in a variety of senior positions in private practice.

SECOND ROUNDTABLE:
Antitrust Consent Decrees

Thursday, April 26, 2018

Department of Justice ⇝ Attorney General's Conference Center

MAKAN DELRAHIM: Good morning. I'm Makan, the Assistant AG for the Antitrust Division, and I welcome you guys to the Department of Justice, the only agency in the government named after a moral imperative. General Ashcroft used to tell me that and it made me think through all the departments. I continue to find that every day to be what we strive for.

Today, we are pleased to continue the Division's series of roundtables on competition and deregulation. I'm joined at the table by several of my colleagues from the Antitrust Division here at DOJ — Rene Augustine in our Front Office and Doug Rathbun in our Competition Advocacy and Policy shop, Roger Alford, who is our International Deputy AAG, and Bob Potter, who is the Chief of our Competition Advocacy and Policy Shop, and, of course, Daniel Haar, who is the Assistant Chief of that shop, formerly with our Appellate Section, amongst others of the Division.

I would like to thank the distinguished participants in this roundtable discussion and their organizations for their participation today. It's an honor to have with us so many thought leaders in the areas of antitrust, competition, and regulation — many of whom in one capacity or another I've had the great honor and pleasure to work with. Let me also thank everyone who has made the written submissions that will be part of the record. I'm encouraged by the strong turnout of individuals interested in these topics, not only in this audience, but by the comments the public has submitted and continues to engage with the Division on.

[The prepared statement of Assistant Attorney General Makan Delrahim follows:]

Today's roundtable will focus on antitrust consent decrees, and on deregulation through different approaches to such consent decrees. Just as this roundtable is in the middle of our three-part series, today's topic is central to our goals of streamlining antitrust enforcement. I believe antitrust enforcers should approach using consent decrees consistent with a view of the Antitrust Division as a law enforcement agency, not a regulatory one. As Justice Robert Jackson once posited, "[we] should not spend great sums to obtain decrees which are economically unenforceable, and when carried out in form, are often only lessons in futility."[1]

Former Assistant Attorney General of the Antitrust Division William Baxter noted in 1982 that "[d]ecree provisions that were perfectly sensible and desirable when entered can be unreasonable today if they have been successful in promoting competition where there previously was none. . . . Where competition has been restored in the relevant market, the continued effectiveness of such provisions serves only to restrain competition, not to promote it." He also stated that, "[O]ur understanding of industrial organization and the dynamics of competition has improved markedly in recent decades. Many older decrees reflect legal positions that were based upon mistaken economic theories."[2]

I am happy to report that several initiatives are underway at the Division: An emphasis on structural relief in remedying anticompetitive transactions as the Supreme Court has emphasized repeatedly; improvements to consent decrees to make them more enforceable and

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[1] Robert H. Jackson, Assistant Att'y Gen., Antitrust Div., Dep't of Justice, Should the Antitrust Laws be Revised?, Address Before the Trade and Commerce Bar Association and Trade Association Executives (Sept. 17, 1937), in 71 U.S.L. REV. 575, 576 (1937), https://www.roberthjackson.org/speech-and-writing/should-the-antitrust-laws-be-revised.

[2] William F. Baxter, *Separation of Powers, Prosecutorial Discretion, and the Common Law Nature of Antitrust Law*, 60 TEX. L. REV. 661 (1982) (footnotes omitted or incorporated into text).

less regulatory; the establishment of the Office of Decree Enforcement; and an initiative to review and terminate legacy antitrust judgments.

First, we have announced a renewed emphasis on seeking structural relief when possible, as opposed to regulatory behavioral conditions, to remedy anticompetitive transactions. Doing so is consistent with the Division's broader emphasis on antitrust as law enforcement, not regulation.

I am deeply skeptical that Congress, in enacting Section 7 of the Clayton Act, envisioned a regime in which the Antitrust Division or a federal court would become the overseer of a company with thousands of employees, earning billions of dollars in annual revenues, and second-guessing market competition or future consumer or business behavior. In Section 7, Congress did not call for illegal mergers to be regulated, it called for them to be prohibited.

As Justice Gorsuch reminded us in an opinion earlier this week, we should "[s]tart where the statute does."[3] The text of Section 7 is clear. It deems unlawful any "*acquisition*" whose "effect… may be substantially to lessen competition."[4] A violation of Section 7 arises in many cases from the acquisition of a company as a whole, but in some instances, a violation comes from the acquisition of one or more parts or subsidiaries. In either case, The Clayton Act specifically contemplates proceedings initiated by the Department of Justice praying that "such violation shall be *enjoined or otherwise prohibited*."[5] The text specifically contemplates an injunction or other form of prohibition of the violation. If Congress envisioned that anticompetitive mergers should be permitted *so long as they are regulated* by the Department of Justice or other agencies of the government, it certainly could have said so.

It is therefore unsurprising that many courts, including the Supreme Court, consider divestitures or other structural relief to be the preferred method of remedying problematic transactions. According to the Supreme Court, "[c]omplete divestiture is particularly appropriate where asset or stock acquisitions violate the antitrust laws,"[6] and such relief "is simple, relatively easy to administer, and sure."[7]

The Division's preference for structural relief extends beyond legitimate concerns of administrability and efficiency. As enforcers of the antitrust laws, we have a duty to ensure that the risk of a failed remedy — and thus harm to consumers — falls on the parties to the unlawful transaction, not on the American consumer and taxpayer. This approach is consistent with the text of the Clayton Act, which makes illegal a merger that "*may*" substantially lessen competition. Congress recognized that a *risk* of harm is what renders a transaction unlawful — or, as courts say, a "reasonable probability" of anticompetitive effects.[8]

Where such a risk exists, the role of enforcers or a court should be to eliminate the risk entirely or place that risk on the parties — not to design elaborate remedies that purport to reduce that risk while still permitting the merged company to retain control over the source of harm. Divestiture of the source of anticompetitive harm substantially eliminates the risk of harm. Behavioral conditions merely lower the risk, assuming that they are even effective. At worst, behavioral conditions can fail to curb a company's natural economic incentives to act in ways that harm competition.

Most behavioral decrees cure neither the incentive nor the ability of the merged company to exert enhanced leverage gained through an anticompetitive merger. That is particularly true where such conditions require a third party victim to be willing to come forward to challenge the actions of a necessary business partner, potentially scorching their business relationship. Rational businesses may well decide that paying a higher supercompetitive price is better than

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[3] *SAS Institute Inc. v. Iancu*, No. 16-969, slip op. at 6 (U.S. Apr. 24, 2018) (Gorsuch, J.).

[4] 15 U.S.C. § 18 (emphasis added).

[5] 15 U.S.C. § 25 (emphasis added).

[6] *Ford Motor Co. v. United States*, 405 U.S. 562, 573 (1972).

[7] *United States v. Du Pont de Nemours & Co.*, 366 U.S. 316, 331 (1961).

[8] *FTC v. H.J. Heinz Co.*, 246 F.3d 708, 713 (D.C. Cir. 2001).

spending millions in legal fees and risking an unfavorable ruling. That is not an outcome dictated by the free market.

We take seriously our responsibility to protect the American consumer against the risk of harm, as the stakes can be enormous. Some transactions can profoundly transform an entire industry, or have a domino effect by precipitating other acquisitions until the competitive landscape has changed. Once this has occurred, it is often too late, and it is nearly impossible to unring the bell. Behavioral conditions merely muffle the bell's ring. Divestiture, by comparison, preserves separate control, and leaves open the opportunity for independent innovation and collaboration through arms' length transactions.

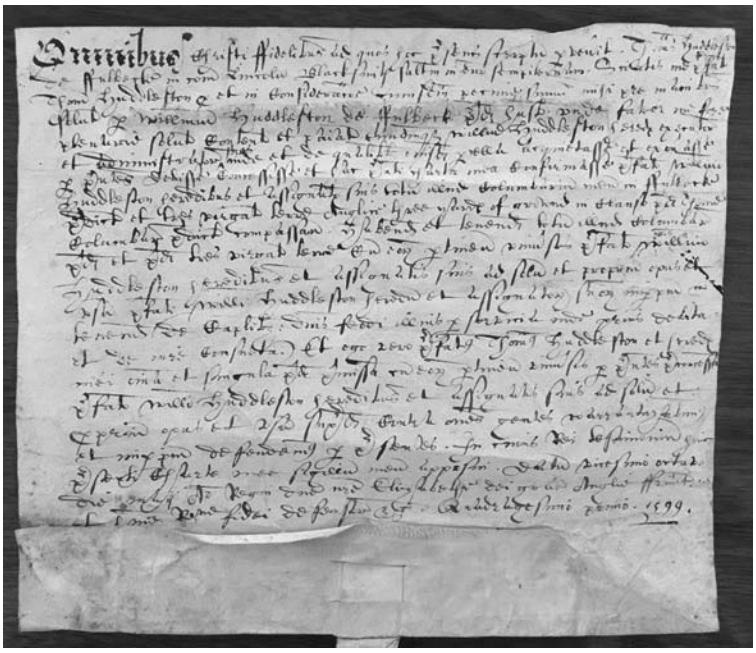
Turning to the Division's second recent initiative, the Division is incorporating a set of improvements to its consent decrees that will make them more enforceable and less regulatory. The Division has included these provisions in all recent settlements, and will include them going forward in settlements of mergers and civil non-merger actions.

These include provisions that the Division may establish a violation of a consent decree by a preponderance of the evidence, as opposed to clear and convincing evidence. They also include provisions allowing the United States to apply for an extension of a decree's term if the court finds a violation of the decree. The terms require defendants to agree to reimburse the American taxpayer for attorneys' fees, expert costs, and the costs incurred in connection with any consent decree enforcement effort. In addition, the Division can, after a certain number of years, terminate the decree upon notice to the court and defendants.

A third development at the Division with respect to consent decrees is the creation of the Office of Decree Enforcement, which I announced at the University of Chicago last week. The office will help ensure compliance by parties to current consent decrees and our enforcement of those decrees.

Yesterday, we announced our initiative to terminate outdated antitrust judgments. Nearly 1,300 "legacy" judgments remain on the books of the Antitrust Division, and many remain open on the dockets of courts around the country. Some of these judgments are nearly 100 years old. The vast majority of them no longer protect competition because of changes in industry conditions, changes in economics, changes in law, or for other reasons. The perpetual consent decrees call to mind the famous line from the Eagles song, "Hotel California": "You can check out any time you like, but you can never leave."

In the earliest consent decrees, in the first two decades of the antitrust laws, there was little guidance on what constituted a violation of the relatively new Anti-Trust Act. As a result, antitrust settlements played a significant role in providing guidance to businesses on the rules of the road. Our earliest consent decrees were almost always perpetual. Why? Simply because that had been the default historically, stretching back at least to the twelfth century in agreed-upon judgments, inscribed upon vellum much like this perpetual decree from 1599.



It's not that enforcers failed to envision that markets would change, or that they assumed that antitrust recidivism was extraordinarily high. That's just how settlement decrees had been written for centuries. Assistant Attorney General Jackson challenged the aluminum

monopoly in 1937 — at about the same time the Department that this was purchasing substantial amounts of aluminum to provide the impressive detailing and sculptures in this building, which I hope you noticed on the way when you came in. Jackson recognized that the decree the Department entered into with Alcoa 25 years earlier, in 1912, *perpetually* enjoining specific illegal behavior, had not foreclosed the possibility that Alcoa could find other ways to inhibit competition. And, it required the Supreme Court, in 1938, to determine that the 1912 perpetual decree did not prevent the Department from bringing future antitrust cases against Alcoa — which it did.

Periodic reforms of the antitrust laws throughout the 20th Century noted the undesirability of perpetual decrees. This is because a decree can be rendered obsolete not only by changes in our understanding of the way markets work but also by changes in the law. The Division long followed the policy of seeking perpetual decrees in cases against per se violations of the antitrust laws. However, certain conduct previously pursued as per se illegal became properly analyzed under the "rule of reason." Firms bound by perpetual decrees based on an outmoded per se view of a restraint are unfairly prevented from adopting policies that, if adopted by rival firms and analyzed under the "rule of reason," may be perfectly lawful and procompetitive. Such an imposition obviously denies consumers the benefits of market competition.

It is important to remember that consent decrees arise from a conclusion that a transaction or behavior was illegal. At the same time, a cornerstone of the American legal system is that settlement is favored, and indeed most lawsuits are settled before trial. In this regard, antitrust is no different than many other areas of the law. Parties often desire to abide by the law, and they seek ways to pursue their objectives within the bounds of what the law allows.

In this way, consent decrees involve putting into effect a settlement, where the parties bring their conduct or transaction to conform to the law, in the context of an enforcement action. The antitrust agencies find the right tools to address the issues presented; however, the tool picked for a company in 1920 may not be the same tool that's right for the job today. So when a decree from 1920 is still in effect, binding companies that are successors of — or successors of successors of, and so forth — the companies in 1920, the consent decree can distort incentives in marketplace dynamics and present complex and expensive compliance challenges for companies.

We remember from history reading of the Gilded Age steel trust, the railway trust, the oil trust — corporate forms that gave us the distinctly American word "antitrust." That said, we still have in effect a consent decree concerning what the Department, quite literally, described in 1913, the bicycle "coaster brake trust." The various successor companies today make cabinets, asbestos, power drills, filters, and many other products likely not in competition with each other, yet are still bound by the same decree crafted for the sake of competition in the "coaster brake" market.

To facilitate the termination of these judgments, the Division is reviewing all of its legacy judgments to identify those that no longer serve to protect competition. The Division has assigned each judgment to a Division attorney, who will examine court papers, internal case files, and publicly available information to determine whether each judgment continues to serve competition. The Division has already identified many judgments that it likely will seek to terminate unilaterally after a public comment period. It will begin its efforts by proposing to terminate a set of judgments entered by the federal district courts in Washington, D.C. and in Alexandria, Virginia.

Today's discussion will consider perspectives on these issues and others. And it is important that we who work in the antitrust agencies are aware of these perspectives, for a consent decree by its own terms, can be entered only with the consent of the parties.

Our first session this morning will focus on behavioral consent decree provisions. We will look back — exploring how consent decrees have been used, the trends, and lessons learned from various approaches. Then we will look ahead and examine how enforcement should employ consent decrees going forward.

In the second session, we will focus on the usefulness of perpetual consent decrees, and on terminating outdated ones. More specifically, we will consider what effects perpetual decrees

have on market competition, how companies subject to perpetual decrees adjust their conduct, and what role industry reliance on a decree should play with respect to the decision to eliminate or retain a perpetual decree. This session will also consider specific perpetual decrees — perhaps most prominently that affect every one of our lives are the ASCAP and BMI decrees. In addition, we will welcome our panelists' insights on issues the Division should consider in carrying out the Judgment Review Project.

[End of the prepared statement. The roundtable transcript continues:]

And now for the logistics. I will ask each of our panelists to provide a brief opening statement immediately after I introduce them. At the conclusion of the opening statements, we'll begin the first session and discuss behavioral decrees. We'll then have a brief ten minute break and return for our second session. At the conclusion of that, we will have a wrap-up in which each panelist will have the opportunity to make a brief closing statement.

Now let me just turn quickly to our panelists. And thank you, once again, for your willingness to participate today and to share your views on these important issues. We appreciate not only your time, but your views and your considerable input into this process.

On our left, Diana Moss, who is representing the American Antitrust Institute and has been the President of the AAI since 2015. Her work spans both antitrust and regulation with industry expertise in electricity, petroleum, agriculture, telecommunications, and healthcare. Before joining AAI in 2001, Dr. Moss was at the Federal Energy Regulatory Commission. From '89 to '94, she consulted in private practice. Dr. Moss holds a master's degree from the University of Denver and a PhD from Colorado School of Mines.

I'll continue with the introductions. Representing the Chamber of Commerce is David Wales, a partner with Skadden Arps. Mr. Wales has the distinctive experience of serving as a senior official in both U.S. antitrust agencies, and more recently as the Acting Director of the FTC's Bureau of Competition in 2008 and 2009, and as Counsel to the Assistant Attorney General in the Antitrust Division in 2001 to'03. He regularly speaks and writes on antitrust issues and has held various leadership positions at the American Bar Association's Antitrust Section.

Representing the Consumers Union, the Advocacy Division of Consumer Reports, is George Slover. He is a senior policy counsel there. Mr. Slover works on competition policy, regulatory policy, and other consumer protection issues. Previously, he spent 11 years in our Competition Policy and Advocacy Section at the Antitrust Division, previously called the Legal Policy Section, bookended by two stints at the House Judiciary Committee. He holds a JD and MPA from The University of Texas at Austin, and we're glad to have him back at the Department.

Representing the American Bar Association, the ABA Section of Antitrust Law, is the Chair of that section, Jonathan Jacobson, who is a partner with Wilson Sonsini Goodrich & Rosati. Jon has made significant contributions to the development of antitrust law, including just on this past Tuesday where he argued in the Supreme Court, a great honor, in the Vitamin C case. He was appointed by Congress to serve on the Antitrust Modernization Commission. He was the Editorial Chair of the Sixth Edition of American Law Developments and a presenter of the DOJ/FTC Intellectual Property hearings, the Single-Firm Conduct hearings, the Merger Guidelines workshop, amongst other workshops that the DOJ and FTC have held.

Representing the American Enterprise Institute is another old friend, Dr. Jeffrey Eisenach, the Managing Director and Co-chair of NERA's Communications, Media, and Entertainment Practice. He's also an Adjunct Professor at George Mason University's Law School where he teaches Regulated Industries. Previously, Dr. Eisenach has served in senior policy positions at the Federal Trade Commission and the White House Office of Management and Budget. He has written or edited 19 books and monographs on competition and regulation, submitted expert reports, and testified in federal courts as well as before the Copyright Royalty Board, the FCC, the U.S. Tax Court, several state public utilities commissions, and regulatory bodies in numerous countries.

Continuing on our right, representing Public Knowledge is Ms. Meredith Rose, Policy Counsel at Public Knowledge. She advocates for consumer interests in matters of copyright, intellectual property reform, music licensing, and the Digital Millennium Copyright Act. She has participated in numerous legislative efforts surrounding copyright and music licensing reform, and she is a regular participant in the triennial DMCA Section 1201 hearings at the Copyright Office. She is an Adjunct Professor at the great law school at George Washington University and holds a JD and AB from the other great school, University of Chicago.

Representing the Open Markets Institute is Brian Feldman, Senior Policy Analyst at OMI. He researches competition policy and the effects of market concentration on entrepreneurship. His writings on regional inequality, pharmacy benefit manager consolidation, and decline of small business ownership have appeared in the Atlantic, Washington Monthly, and BBC Future, among other outlets. The Wall Street Journal, Washington Post, NPR, Slate, congressional testimony, and two class-action lawsuits have cited his work. Thank you for being here.

And with the US Chamber of Commerce, Sean Heather is the Vice President of the Chamber's Center for Global Regulatory Cooperation, and we thank him for being here. So welcome to the Division. I apologize for my longer-than-you-probably-anticipated statement, but an important one to have for the record nevertheless, and thank you for indulging. With that, we'll start with Diana.

DIANA MOSS: Thank you very much. It's a pleasure to be here. Thank you to the Assistant Attorney General and the Department of Justice. Always an honor to be included in these very important discussions. AAI commends the Division for asking these difficult questions and framing a very constructive approach to resolving some of them.

Our comments filed in the record address three major themes — broader issues of enforcement policy that are raised by consent decrees for one. The second is the disadvantages of behavioral remedies contained in consent decrees, and third are questions and considerations to help guide the DOJ's policy on termination or modification of the perpetual decrees. So I'll speak very, very briefly to each of those three topics.

On the broader issues of enforcement policy raised by remedies, AAI believes it to be vitally important that the guiding principle is that remedies must be effective. In other words, they must fully restore competition, not simply restrain the exercise of market power. Steve Salop's work puts a really nice point on this in the concept of a design standard versus a performance standard for a remedy. A design standard is designed to ensure compliance with the four corners of a decree containing behavioral remedies. Whereas a performance standard is designed to achieve the ultimate goals of fully restoring competition, and those are most likely to be achieved through structural remedies.

We'd also like to make the point that full restoration of competition is very much aligned with the goals of antitrust as law enforcement. In other words, remedies must deter future violations of the antitrust laws. This point invokes the importance of the alignment of the same standard for violation of the decree as was the standard applied in finding the original violation, and that is a preponderance of the evidence.

On the second point of the effectiveness of remedies, we'd like to make a couple of points here. AAI believes, as I think as most people have read in our advocacy, that behavioral remedies should be strongly disfavored.

Behavioral remedies articulate prohibited, permitted, and required conduct without changing the firm's incentives to exercise market power. They most certainly encourage circumvention of a remedy. They carry a higher risk of failure, and it is a failure and a risk that is likely to be shouldered by consumers and not by the merging companies. Behavioral remedies require ongoing monitoring and enforcement by the agencies and the courts who are not well suited to act as regulators.

Behavioral remedies often depend on smaller market participants under the weak protection of anti-retaliation provisions to come forth and lodge complaints about noncompliance. Many of those smaller market participants fear retaliation because of high levels of concentration in some affected markets.

Arbitration provisions demand time and resources and are likely to lead to suboptimal settlements. Firewalls between affiliates of a merged firm are very difficult to police. As a former sector regulator, we put firewalls into place almost daily and received as many complaints about the violation of firewalls as were issued.

Finally, behavioral remedies are undermined by evidence that the types of efficiencies that they are designed to promote are not always realized. These include things like coordination efficiencies and other justifications for vertical integration.

Behavioral remedies try the bounds or press on the bounds of managerial competency. These are managers of organizations that must simultaneously integrate two different companies in a merger proceeding. They must deal with organizational complexity. They must, at the same time, often times manage spin-offs that are associated with the behavioral remedy and a consent order. All of this can change the firm's incentives post-merger and make it difficult to realize claimed efficiencies.

A quick note on structural remedies: they are not always a panacea. There are certain types of structural remedies that have been demonstrated to have low deterrence value. For example the FTC in their 2017 update to their divestiture study observed that targeted asset divestitures are much less effective than line of business divestitures. We are hoping that the agencies, both the DOJ and the FTC, incorporate this learning in their policies moving forward.

Finally, on behavioral remedies, I cannot sit here today without noting that sometimes the most effective remedy is for the government to block a transaction. Indeed, some mergers are too big to fix. There is a commensurately higher risk that a remedy for a complex merger will not be successfully executed. We find too-big-to-fix problems in highly concentrated markets where there are poor prospects for new entry, absence of viable buyers, and very complex business organizations. Viable buyers are very, very difficult to find in some of these cases, as has been demonstrated by a number of recent mergers — Sysco-US Foods, Baker Hughes-Halliburton, and other cases.

On the issue of consent decrees, AAI would like to raise a number of questions. We do not profess to have all the answers, but we would like to raise some questions and issues that might help guide the DOJ in their inquiry into termination or modification of perpetual consents. AAI believes there are some basic non-negotiable justifications for keeping decrees in place. One is noncompliance with the decree. There have been a number of cases where parties have been subject to repeat decrees. That demonstrated noncompliance with a decree would indicate a persistent underlying problem with the possession and potential exercise of market power.

A second reason would be need to preserve competition in a market, particularly in markets where we've seen increased concentration over time. For example, if the DOJ's probe into the airlines, concerns raised by the airlines over coordination capacity a few years ago, had resulted, hypothetically, in a decree, further concentration in the airline industry would strongly, strongly recommend that such a decree remain in place.

A third reason, or a third non-negotiable justification, for keeping a decree in place would be longstanding reliance on the decree in industries where there was no kind of competition at the outset and for which structural relief is not possible to obtain. These include examples like music licensing.

We would also encourage the DOJ to think about, as a non-negotiable justification for keeping a decree in place, significant concerns amongst smaller arrivals in an industry that fear retaliation. There have been cases where smaller arrivals have filed comments in proceedings where decrees have been revisited, but they have asked for protection so that their identities were not revealed.

We believe that there are relatively few clear cut cases for conditions necessary for termination. We would strongly urge the DOJ to err on the side of caution. There may be instances where the original firms that were subject to the decree no longer exist. There may be changes in technology or supplier-customer relationships that have fundamentally changed incentives to engage in the proscribed conduct. There may be a broadening of relevant markets that eliminate competitive concerns. There may be new entry that eliminates competitive concerns. We encourage the Division to think very, very carefully and cautiously about what

those conditions might be that would provide a fairly clear case for truncating or modifying a decree.

We do think that the Division should also take special care in considering certain types of conduct that have morphed or changed over time that might still be applicable under the decree. For example, we see more of an intersection between IP now, intellectual property law and competition law, and the use of IP in ways to restrain competition. We are looking at instances where algorithmic pricing can be used to facilitate coordination. That might have originally been of concern in motivating the original decree. We now see firms with data using data as a strategic competitive asset potentially to restrain competition. We also see firms engaging in commerce across multiple distribution channels. So these are all things that have emerged in the modern era that create incentives and abilities and potential strategies that could still be reached to under the original decree.

We would advise caution on eliminating decrees because of a changed legal standard. This would include things like *per se* violations versus rule of reason violations. We do not think a simple change from *per se* to rule of reason is necessarily sufficient to remove a decree. One would have to revisit the conduct under a rule of reason standard, and it may be possible, or entirely probable, that a procompetitive effect may not be found.

We would suggest caution in looking at the special case of markets that have involved decrees where there was no competition, where competition has sprung up around the parameters of the decree, and things like rate courts or alternative forms for dispute resolution have become very, very important. In some of these cases, removal or modification of the decree could lead to an excessively litigious dynamic or create a litigious dynamic.

Finally, we would urge the Division to think about what the alternatives are if decrees are terminated or removed. The question here, I think, is would DOJ seek structural relief in cases where a decree was truncated or modified in some way?

And finally, on sunset provisions, AAI has given some deep thought to what incentives are created by time limitations, on decrees, whether it be five years or ten years. We don't have a final word on this, but we are looking into whether those types of sunset provisions would create incentives for certain types of procompetitive or anticompetitive conduct by the affected firms. With that, I'll finish up. Thank you very much.

MAKAN DELRAHIM: Thank you so much, Diana. David.

DAVID WALES: Great, thank you. Thank you, Assistant Attorney General Delrahim for having me here today, and it's a great pleasure and honor to be back here in the great halls of DOJ. I think this is a really important topic and, having been a former enforcer, I also know that it's a hard topic, so I thank the Division for organizing this event. Hopefully, it will be a robust discussion on this important topic.

With that said, I'm going to try and keep my comments pretty brief. The Chamber of Commerce has submitted written comments that people can refer to, but I'd like to just make a couple of high level points. Hopefully, we can expand upon those during the discussion.

The first point is that it's really important that consent decrees be surgical, as you, AAG Delrahim have pointed out in your speech. It's important to make sure that the remedy doesn't go beyond fixing the anticompetitive conduct and allows parties to continue to engage in lawful and otherwise procompetitive conduct. There are, at times, decrees that have unintended consequences and really do regulate and chill procompetitive behavior.

Another issue in that context is that I think it is important to bring a dose of humility to the process. It's almost like a bullet hitting a bullet in the sense of defining the competitive problem and then coming up with a remedy that you think endures and fixes that problem without doing more harm than good, and so I think that's an important concept as well.

I would also add that one size doesn't fit all when you're talking about remedies. I get that the Division may have the view that there may be a violation. But not all violations are equal. You should think about remedies in the context of the case. Is it a merger? Is it a conduct matter? Very different remedies might apply to those. There are different trade-offs when you go back to the question of how do you remedy the problem without interfering with potentially procompetitive conduct.

I think that within the merger context both horizontal and vertical deals are different when you try to strike that balance between making sure you stop the anticompetitive effects but allow the procompetitive effects. But also, too, even Section 1 and Section 2 violations are different, and so different remedies could apply to those as well.

My next point would be don't throw the baby out with the bathwater. There have been quite a few studies of merger remedies. The FTC study done in 2017, that Diana just mentioned, found that, by and large, merger remedies were generally effective, and so I think that's important to keep in mind. That study included both structural and conduct fixes. I think that's also important to keep in mind.

I've got a lot of catchy themes here. The next thing I would say is don't let the perfect be the enemy of the good, in the sense of I think sometimes there's an attempt to be perfect in a remedy. The reality is that's probably impossible, and so I think you have to try to have an effective remedy. That doesn't mean you shouldn't work very hard. I know the Division works hard to protect consumers and prevent anti-competitive results, but I think that process really is not one that can be perfect in that it requires trying to predict the future. Again, that is like the bullet hitting the bullet. I think you have to try to have something pretty close to perfect without necessarily going all the way.

The last point I would make is that forever is a long time. I was surprised you didn't have that consent decree behind glass. It's a pretty old document. And, I applaud the Division's initiative of looking at perpetual decrees. I think those are a real issue. I also think that 10 years is a long time. It's a good idea to think about the proper term for consent decrees going forward and whether 10 years, which has been kind of the default, really makes sense in certain industries, especially high tech industries. Thank you.

MAKAN DELRAHIM: Thank you so much. Mr. Slover.

GEORGE SLOVER: Thank you. It's an honor to be part of this discussion. From our founding over 80 years ago, we've been strong supporters of the antitrust laws. Sound and effective antitrust enforcement protects and promotes healthy competition and the benefits that brings consumers through the leverage of choice.

Consent decrees are a key part of that. Each decree resolves a practice or merger that posed enough concern to convince enforcers to marshal resources to stop it. Each decree embodies an agreement by the defendants who created that concern on what they will do to remove it.

Most defendants don't really have much of any equitable claim to getting out from under what they agreed to, but the rest of the marketplace does have an equitable claim, in the marketplace's continued healthy competitive functioning. If the restrictions and obligations imposed on the defendants begin to interfere with that, to hold back overall growth and innovation, then that's a reason to reconsider, but what's important is what's good for the marketplace, not letting the defendants off the hook.

In a conduct case, the consent decree is designed to give the defendants guardrails to make sure they don't slide back into their old habits. Once they get out of the old habits and into healthy new habits, after a time it probably makes sense to think about removing the guardrails, especially if the guardrails are interfering with the healthy competitive functioning of the marketplace.

Two reasons it would not make sense. First, if it looks like the defendants might still be inclined to slide back into their old habits. And second, if the case revealed a more fundamental market dysfunction. If the default state is chaos, and if the natural market response is to rein in the chaos with collusion or market power, then the government needed to step in, and needs to stay. Congress could always step in with a regulatory framework, but the antitrust solution could be a consent decree that adds just the right amount of structure to quiet the chaos while guarding against the market power.

One good example is the ASCAP and BMI decrees. They've worked quite well in enabling music to be used conveniently and the creators to be compensated reliably, notwithstanding the complicating factors that continue to be discussed. Another good example is the AT&T decree that restructured Ma Bell.

By far, most consent decrees in conduct cases are behavioral: You are doing *x*. We brought enforcement action and you're now agreeing to stop. Maybe you're also agreeing to stop doing *y*, or agreeing that you *will* do *y*, because that makes it harder to do *x* without being detected.

Consent decrees in merger cases are different. The merger is making a one-time change to what we call the structure of the market, the array of competitors, and the concern is that the change in structure will lead to a substantial lessening of competition. It could result from new or easier opportunities for collusion or monopolization in violation of the Sherman Act, but it could also result just from the merged company acting on its new incentives and abilities that the merger creates, in ways that may now be legal under the Sherman Act, but are still harmful in comparison to what we have seen under the former pre-merger market structure.

The best response to a structure-based concern is to fix the structure. That can mean divesting businesses or facilities or other key assets, so the important parts of the pre-merger structure remain intact. Or if divestitures here and there aren't enough, it means challenging the merger outright.

Behavioral remedies, essentially promises to behave, fall far short of a structural fix. As explained by others, including AAG Delrahim and AAI President Moss just today, a behavioral remedy relies on the merged company to ignore new profit-maximizing opportunities created by the merger, to act against its incentives and abilities to increase profits, to defy its basic business DNA. This almost unavoidably means you end up needing to monitor its actions, including internal business decision-making that would ordinarily not be known outside the company walls, and to referee complaints.

The structural remedy is a permanent fix. The behavioral remedy is impermanent. It is a recipe for a quagmire that lasts until the behavioral conditions are removed, and after that, we're left with the merged company still having the problematic new structural incentives and capabilities.

I don't think we can quite say behavioral remedies have no place in merger enforcement. We can imagine a situation where some merger is shown to be overwhelmingly positive in the synergy and innovation benefits it will bring to society. Where those benefits would simply be impossible without the merger. Where, now that we know what those benefits would be, we simply can't justify depriving society. Where there is no possible divestiture that could help address the competitive concerns we've identified, without destroying the reason the merger makes sense for the merging companies, or without sacrificing those benefits.

So that all we're left with is to try to come up with some set of behavioral conditions and try to make them work. And, lo and behold, what appears to be a suitable set of conditions presents itself, one that appears to be fairly easy to monitor and administer

But those are exactly the kinds of claims I would try to make as an antitrust lawyer for my clients. And I would always be ready to negotiate promises to behave. So I think the expressed policy that behavioral remedies or structural concerns are "highly disfavored" is the right policy. And, I'd like to look for an even stronger word than "highly."

No behavioral remedy for a structural problem should have an arbitrary shelf life. It should last as long is the structural problem does. That could be forever, or until the marketplace is so evolved that the structural problem is truly gone, and depending on how the marketplace evolves, the structural problem may remain, but the behavioral conditions no longer work. Then you'd need to keep the conditions, but update them.

We wouldn't want to see a shift away from behavioral remedies become a retreat on merger enforcement. I don't think that's anyone's intent, but when the enticement of behavioral conditions is presented as an easy win-win, enforcers need to not only resist the enticement, they also need to be resolute in going the distance and insisting on effective structural relief. Keeping in mind that, by definition, these should all be situations in which the enforcers have determined, based on a thorough investigation, that the merger would violate the law. Thank you.

MAKAN DELRAHIM: Thank you, George. Mr. Jacobson.

JON JACOBSON: Thank you very much, General Delrahim. It's always an honor to appear here and today particularly so. My remarks are going to be very brief.

First, that there are still 1,300 outstanding consent decrees is a real eye opener, particularly given that General Baxter had a program to reduce the number of consent decrees back in the early '80s. I'm confident that the Division under your supervision is going to cut that number down way down, and I think it's great.

I looked at the list and the first one there is a 1926 decree telling people who sold tickets to movie theaters to stop allocating customers. All right, so 1926. So it's an excellent initiative, because those are a drain on the Division and on the economy.

When we start looking at these issues, we need to reflect the various changes in the economy that have happened since Celler-Kefauver was passed in 1950. In 1950, it was most common for even the largest companies to have one or just a handful of products.

For example, in 1950, the Coca-Cola Company had one SKU, the 6.5 ounce returnable bottle of classic Coca-Cola. Today, the Coca-Cola Company has many hundreds of SKUs.

And why is that important? It's important because the presumption in favor of blocking a deal or a structural remedy involving a discreet divestiture grew up under that milieu, and it did not really take into consideration, until decades later, the conglomerates that arose, the multi-product companies that arose, and all of the different contexts that have arisen since then.

And those different contexts make remedies more difficult, but make it important to look at the possibility of consent as a resolution of a competitive problem. When the overlapping assets in a horizontal deal, for example, occupy 2% of the combined company's turnover, you know that's not a deal where a full stop injunction is really an appropriate remedy, even though the law would permit the Division to go after a full stop injunction in such a case.

And David Wales stole my bathwater line, but I'm going to agree with him on that concept. Particularly in vertical deals, there are a number of transactions with massive efficiencies that do pose potential competitive problems. And in those, I think, we still need to be open to the possibility of behavioral remedies, and I hope to talk about that further in the discussion. We gave a few examples as an appendix to my paper.

And then, finally, although I've been rambling on a bit, I am not authorized to speak on behalf of the American Bar Association, although I'm confident my views are not totally out of line, but I'm 100% not qualified to talk about the clients of Wilson Sonsini and, therefore, do not. Thank you.

MAKAN DELRAHIM: Thank you so much, Jon. Dr. Eisenach.

JEFFREY EISENACH: Thank you, General Delrahim, for the opportunity to be here. Before getting to the substance, I'll start with my disclaimer first. I'm here speaking solely for myself not the American Enterprise Institute or NERA Economic Consulting or any clients or anybody other than me.

Consent decrees are the primary means by which the antitrust enforcement agencies seek to remedy harms to competition caused by mergers and by anticompetitive conduct. Such remedies generally are classified into two main categories: structural and conduct remedies. Structural remedies separate the ownership of assets, which might otherwise, if owned by a single firm, be used to harm competition and consumers. Behavioral or conduct remedies allow the potentially anticompetitive assets to remain together under a single owner, but restrict or place conditions on the manner in which they can be deployed.

The appropriate design of antitrust remedies raises a multitude of issues, which we're going to talk about here today, but I want to focus on two themes. David stole some of my thoughts also, but pre-staged, but I'll talk about them anyway. First, in thinking about remedies from a policy perspective, I'll make the point that it's useful to distinguish between remedies that address horizontal concerns and remedies that address vertical concerns and between remedies involving mergers and remedies involving anticompetitive conduct. Second, in all of these contexts, remedies policy should be guided by the principle of regulatory humility.

First, while antitrust practitioners understand that every merger and every conduct case is unique when it comes to discussing policy — and by policy I mean guidance — part of the effort here is to lay out for the private sector how we're going to address remedy issues going forward. In that context, I think it's useful to think about this distinction between horizontal and vertical on the one hand and conduct and mergers on the other.

So in my prepared statement, I have a table where I characterize some of the issues that come to light in those four cases — horizontal conduct, horizontal mergers, vertical conduct, vertical mergers, and they're very different, as David said.

Two distinctions I think worth focusing on, I think it can be argued that the issues in vertical matters are both harder to assess than horizontal matters and also more likely to implicate dynamic competition and innovation than horizontal mergers, and thus have larger implications for our economic welfare. The upshot is that the risk of getting remedies wrong in vertical cases — Type 1 and Type II error — are likely higher than in horizontal cases, and the current focus on better understanding both the consequences of vertical transactions and conduct and the appropriate remedies, I think, is very well placed.

Second, but important: distinctions between remedies policy in conduct cases as opposed to mergers, and, just to skip to the bottom line there, obviously, in a conduct case, we have the presumption of anticompetitive conduct and the hypothesis of efficiencies that might be harmed by a remedy. In a merger case, you have the opposite. You have no evidence of anticompetitive conduct yet in the presumption of merger synergies. So presumably, the benefits and costs in those two cases ought to be thought about differently.

Those thoughts bring me to two recommendations. First, I do think the agencies ought to give considerations to proposals to update the 1984 Vertical Merger Guidelines, 1984 being a long time ago. And, second, the agencies should also consider providing policy guidance on the design of remedies in vertical conduct cases, picking up where the Antitrust Division's 2008 Report on Single Firm Conduct left off.

My second overall theme relates to regulatory humility and the purposes of antitrust. FTC Chair Maureen Ohlhausen has eloquently explained that regulatory humility means keeping in mind the limits of government's ability to improve market outcomes through regulatory interventions. Happily for antitrust, the antitrust laws are broadly consistent with that principle. As the Antitrust Modernization Commission put it in 2007, "Antitrust law in the United States is not industrial policy; the law does not authorize the government (or any private party) to seek to "improve" competition. Instead, it seeks to deter or eliminate anticompetitive restraints. Rather than create a regulatory scheme, antitrust laws establish a law enforcement framework."

Now there is some unavoidable tension between those principles and the use of remedies, since every remedy is in at least some sense a regulatory scheme designed to improve competition relative to some but-for world. That's the nature of the beast. So the goal of remedies policy ought to be to reduce that or eliminate those tensions, and I think three principles can help to do that.

First, as the 2004 Remedies Guidelines explained, "structural remedies are preferred to conduct remedies… because they are relatively clean and certain." I think we've heard that quote already today. The Remedies Guidelines laid out four reasons why that is the case. I would add, a fifth reason to favor structural over conduct remedies is the potential for conduct remedies to spawn *de facto* regulatory agencies with lives of their own complete with budgets, staffs, and "constituencies." As Peter Huber put it in his assessment of the 1982 AT&T Modified Final Judgment, in such cases, "the best of antitrust degrades into the worst of commission," producing what Huber called "degenerate antitrust bureaucracies" that develop their "own lore, unique traditions, precedence, procedures, formalities, and technical vocabulary," all of that to be avoided.

Now to be clear, the 2004 Guidelines did not reject use of conduct remedies outright, nor am I. Rather, I'm suggesting that they be applied with more care and greater caution than the revised 2011 Remedies Guidelines seem to suggest.

Two more principals quickly. First, conduct remedies, when applied, should be of limited duration. Sunset provisions limit the potential damage associated with imposing inflexible conditions on a changing market and also serve as a prophylactic against institution building.

Third, and finally, my third guiding principle applies to both structural and conduct remedies and consists of a simple admonishment to heed one of the most fundamental and enduring laws of economics: the Law of Unintended Consequences.

Applied to the remedies policy, The Law of Unintended Consequences reminds us that despite the wealth of data and sophisticated analytical tools we bring to that task, our ability to accurately predict the effects of regulatory interventions in the economy is limited. As a practical matter, in this context, it suggests that the burden of proof in designing remedies of all kinds should be on the government to demonstrate that the benefits of any remedy are reasonably likely to exceed the costs.

Thank you for the opportunity to be here and I look forward to participating in the discussion.

MAKAN DELRAHIM: Thanks very much. Ms. Rose.

MEREDITH ROSE: Great. First of all, I would thank the Division for holding these roundtables and inviting voices from the consumer advocacy community who are, often underrepresented in many of these discussions and am very appreciative to be here today.

MAKAN DELRAHIM: You're well-represented today.

MEREDITH ROSE: Very well-represented, which is a good thing. So I went into a little more detail in my written statements, but I will say, and just as a high level point, I will keep my opening comments brief. Generally, consent decrees are imperfect, but necessary tools to address systemic problems of misaligned incentives in certain marketplaces.

Most of my discussion will focus primarily on the music consent decrees for ASCAP and BMI, but I would also like to talk very briefly about the Comcast-NBCU consent decree which we've previously talked about.

So the structure of music isn't good, and in particular, it makes the industry unique even among media markets, and the inherent incentive for issues of collective permitting and the intended interest and anticompetitive concerns that those raise. Without getting into too much detail, the creation of these rights organizations such as ASCAP and BMI is, in many ways, a natural outgrowth of the legal and economic structure of music as a product.

But that same collective bargaining raises inevitable competitive issues. Music delivery is a multi-layered system with numerous intermediaries that relies on what, to consumers, are fundamentally non-fungible benefits. PROs (performance rights organizations) are structurally invisible to an individual consumer, and so in order to accommodate consumer preferences, intermediaries along the chain must generally obtain licenses from all the four right organizations, such as ASCAP and BMI. This tends to create natural incentives for collusion among PROs who enjoy relatively captive buyers and delivery services.

This situation led to the imposition of consent decrees on the two major PROs. These decrees allowed them to continue to provide their value and services, while it makes some of the anticompetitive threats that this collective negotiation poses less likely. Now admittedly, this shows signs of strain in recent years. The kinds of uses and musical equipments have changed, and some owners have decided to pull out of the two major PROs. However, the same basic tensions remain, and the market at every stage has become increasingly concentrated from where it was in the early 20th century. So for whatever their flaws, the consent decrees in these instances are critical to the ongoing functioning of the robust marketplace.

To shift gears very briefly to Comcast-NBCUniversal, which is the other primary consent decree that public knowledge has focused on. This transaction is another example of an imperfect set of rules that is nonetheless responsive to a very real and continuing problem, namely increasing vertical and horizontal concentration in the video marketplace that could limit the development of new and lower cost alternatives for consumers. Obviously, the efficacy of this particular consent decree has been very hotly debated, including by people at this roundtable. Critics say that it did very little to protect video competition, while supporters say that it worked as intended to curb the worst potential anticompetitive excesses that might have otherwise have occurred.

Looking back, Public Knowledge does believe that the consent decree did prevent Comcast from fully leveraging its NBC/Universal assets to harm rival distributors or from fully using its distribution platform to harm rival programmers. Much of this, however, seems to have been as much a result of the structural side effects of the consent decrees' very existence, as of its terms as it provided major counterparties with a ready legal recourse in the event of perceived bad

behavior. That said, the decree likely failed to protect potential new competition delivered by independent and smaller providers as the dispute over pure programming conditions has demonstrated.

Also interestingly, though the online video marketplace has continued to grow since the time of the merger, its development has not been along a trajectory that was directly expected. Major online video services, such as Netflix and Amazon Prime, have not evolved to become full-fledged cable replacements, but remain complimentary services that occasionally create original programming, much more like cable channels than cable systems. More recently, a number of cable-like services have been launched including AT&T's DirecTV Now and Dish's Sling TV, but this market is dominated by video incumbents with the notable exception of Google's YouTube TV, which serves only to underscore how expensive it is to enter the video marketplace in the first instance.

On balance, the consent decree was predicated on the idea that Comcast could benefit from merger efficiencies without resorting to anticompetitive behavior. It is difficult to see why if this behavior was considered anticompetitive and disallowed in 2015 or 2016, it should be allowed in 2018 or 2019. Thus, late last year, Public Knowledge asked the DOJ to extend the consent decree. We recognize the problems that the decree addresses are not limited to Comcast, and we share many of the concerns about the use of consent decrees in place of regulation. However, until there is a better alternative, the DOJ should seek to keep its competitive protections in place.

And as a sum up high level point, one size fundamentally does not fit all. But in some situations, particularly such as the ASCAP and BMI consent decrees, ongoing decrees are the best and most effective option currently on the table to preserve a competitive market place.

MAKAN DELRAHIM: Thank you very much. Mr. Feldman.

BRIAN FELDMAN: Thank you, Assistant Attorney General Delrahim for your comments. Open Markets welcomes the opportunity to participate in this roundtable discussion on antitrust consent decrees and we look forward to continuing to engage with the Antitrust Division on competition policy.

We believe that preserving competition requires enforcing the antitrust laws, to stop economic concentration in its incipiency, and to prevent market power rather than to police it. This philosophy informs our view of consent decrees. We believe enforcement agencies should generally avoid such policing provisions. In many instances, consent decrees fail to strike at the root of anticompetitive conduct. Behavioral decrees, in particular, can often serve as Band-Aid solutions that seek to regulate the harms generated by market power without addressing the underlying incentive and ability that firms have to wield it.

In three instances, involving a consent decree in 1995 of Eli Lilly and Company and PCS Health Systems, between Ticketmaster and Live Nation in 2010, and George's and Tyson Foods in 2011, blocking the deal outright would have been a more practical and efficient use of agency resources. In these instances, the effects were clear. They further entrenched incumbents, raised barriers to entry for upstarts, and, in some instances, even allowed dominant firms to engage in price discrimination. Furthermore, behavioral decrees can be costly and resource intensive to enforce and can create conditions that are ripe for regulatory capture.

In concentrated markets, structural remedies also can have the effect of weakening rivalry among industry players. Again, in three instances, in 2001 in a consent decree involving Premdor and Masonite, in 2013 involving the Dollar Thrifty and Hertz deal, and in 2015 in Albertsons and Safeway, the effects, again, they failed to address the concentrated nature of the underlying marketplace, further concentrating the industry. Removing the number of industry players either from four to two or from three to two.

Therefore, recovering the prophylactic orientation of the antitrust laws is therefore the most effective way to tackle market power across our economy. However, recognizing the flaws of decrees is neither justification to relax antitrust enforcement nor to advocate for the removal of decrees altogether. In some instances, we still may be better off with the Band-Aid solution than with the open-wounded market concentration so to speak. If a merger is to be consummated, in

limited and narrow circumstances, behavioral decrees can make structural relief more effective. An interesting example of this is the ongoing consent decree involving ABI and SABMiller.

Furthermore, nondiscrimination provisions in mandatory licensing, especially in network and infrastructure industries, can help neutralize the power of companies that have used their patents to exclude competition.

Lastly, on the topic of perpetual decrees, it's important to evaluate how the market structure has changed and if it has changed before making a decision. While some of these decrees surely have outlived their relevance, we believe they shouldn't sunset unless the underlying market power has been addressed or if their removal would spur further market concentration.

So in conclusion, enforcing antitrust laws by blocking anticompetitive mergers is often the first line of defense to preserve competition. The second line can be the select use of consent decrees coupled with structural fixes or the select use of nondiscrimination provisions or mandatory licensing to help create open marketplaces in which firms can compete. These elements combined form a competition policy that can help stop economic concentration in its incipiency. Thank you for the opportunity to be here today.

MAKAN DELRAHIM: Thank you so much, and thank you for all of you for your testimony that you've submitted as well as the oral additions that some of you have added to it. I think there are a lot of important points, and I think lots of general agreement amongst very diverse points of views on the antitrust/economics ideological spectrum. I think, generally, a preference towards, what I kept on hearing, structural remedies, whether it is a way to prevent harm in the first place from a transaction. And probably more appropriate and necessary in a merger transaction rather than a Section 2 type of violation.

But also, I think, it seems like a recognition that in some certain circumstances, behavioral remedies may be appropriate, and some of your circumstances, certainly existing ones, should continue as a Band-Aid rather than an open wound. A lot of the views that we have, and I think the overarching discipline to a lot of these workshops is, what is the power? What is the statutory mandate that Congress has given us, and through the years and under the common law regime that we have — the Supreme Court has further defined — and how does that apply to what we do?

I'd rather not use the word regulatory humility, but that gets to humility in the prosecutorial discretion that we as an antitrust law enforcement agency, (I don't think the Federal Trade Commission thinks of itself as a regulatory agency, but maybe they do, some of them) but I view what we do is really law enforcement. It's very clear, whether it's Section 7, or other areas, if Congress wanted to give us other powers, they certainly could, and they have not been shy about doing that and creating regulatory agencies in other areas, particularly where antitrust enforcement has failed. The 1996 Telecom Act replaced a 1982 consent decree, and continued enforcement through the judicial system of a whole industry. That ultimately led to the '96 Act, and you wonder if effective and timely enforcement of the antitrust laws and proper remedies a lot of times could obviate the need for heavy-handed regulations, that Congress needs to step in where markets have failed.

So part of the reason for this is to find what are the appropriate remedies, where you let the markets determine, not some person who we just deputize. We can do that in the private sector perfectly fine, where it's part of a settlement in a private antitrust dispute. When we're dealing with a public enforcement, particularly in merger transactions, where Dr. Eisenach mentioned you have different considerations for Type I, Type II errors, when you're trying to remedy that public enforcement, should we have a remedy where the markets decide rather than our continued involvement, or imposing upon a judge or some third party panel to determine what an appropriate price should be? If we go down that road, then we should just admit that that's what we are, a regulatory agency, rather than trying to police the free markets, which is what I believe. Antitrust laws (as Dr. Eisenach mentioned and the AMC's report and statement set forth — and I had the great honor to serve on that with along with Jon) in the United States, at least, are not some industrial policy, should not be, and it is not a way to promote competition, but to police it, and best policed by the free markets to determine what those are.

We don't have, as some in Europe previously had called competition in the markets, gentlemanly competition. We don't. We have very violent competition. That's where you have dynamic competition and the consumer benefits. That's where you have the greatest innovation. That's where you have the greatest price wars.

We'd like to keep the structures of the markets policed in such a way to allow for that to continue. Whether it's a transaction, you want the pre-merger conditions, competitive conditions. Not necessarily the conditions as they are, because there are great efficiencies from vertical mergers that sometimes allow for great innovations, to allow for dynamic benefits for consumers. And you would like to allow that, particularly if there are ready ways to address a problematic element of such a transaction but preserve the procompetitive benefits of that.

A lot of times just because a certain behavioral decree from, I don't know, 50, 60, 70, 77, 80 years ago in the area of the movie industry and movie distribution under the Paramount consent decrees that have existed since 1948, just because they exist and there are businesses that have come around them, those consent decrees have now created market structures in and of themselves. They create monopolies and people that feed off of those systems. They don't allow for competition to occur.

Some people wonder, well, for 77 years we have a certain industry structure. Well, maybe if we didn't, we would have greater competition. Maybe you could have a one stop shop mechanism for licensing music. And you'd have greater competition to allow for that, and with that, greater innovation. So I think there's a lot of innovation that has probably been foreclosed because of the structures that some of these consent decrees have created.

And it gets back to the issue of who is in Congress, whether is it Congress, the courts, or the executive branch, and particularly, this Antitrust Division, Who should figure out what that is? Who has the appropriate constitutional power to do that? If a particular structure of industry has failed or continues to be problematic, is it the consent decree that needs to be in place or should policymakers step up and look at what are the broader policy implications not only for businesses but for innovation and for consumers ultimately, and determine a path going forward?

Believe me. I know that's not an easy process, the legislative process, but when it's needed, I have all faith in our elected officials to do what they ultimately believe is the right thing. It may not be as effective sometimes as antitrust enforcement, but it might be the more appropriate use of the constitutional authority rather than us continuing with a certain structure and policing that, and being there. We just don't have those resources. Our budget has gone down effectively about 20%, 25% the last 10 years, and merger transactions have been up 45%, 44%, and the size and complexity — for exactly the reason that Coca-Cola is not just one SKU, it's hundreds — you have businesses that have real implications and you have mergers, particularly new vertical mergers, that are really complex. And you try to do the right thing.

We're not in litigation to win, like private parties are. We're in litigation to do justice, to do what's right. And we're not in it just to win at all costs, it's to do what ultimately fixes the competitive failures.

I do hope that we can consider the overarching issue of who is the appropriate body and what do we do to preserve the market competition that creates the greatest dynamic innovation. Mr. Jacobson.

JON JACOBSON: So, I think the BMI, ASCAP, and Paramount decrees are an important discussion, but I think they are exceptions to the general rule. I think 99% of the cases should be resolved with either a full block or a structural remedy — except in vertical cases and we'll talk about that further — but BMI, ASCAP, it's completely clear that the better solution would be for Congress to legislate and for the Division to get out of the regulation business and Judge Cote to get out of the regulation business. There's no question about that. But those decrees have been on the books for forever, and Congress has not acted, and in terms of public policy they certainly should.

But, in the absence of action, I think continuation of those decrees, perhaps with some modifications, is essential, because you certainly you don't want to break up BMI and ASCAP. The efficiencies of two stop shopping for broadcasters are really too great to provide.

But, if the Division can push Congress into legislating in this area, to take the Division out of the business, that would be great. But good luck with that.

MAKAN DELRAHIM: I don't think the Division could push Congress to do anything, but it would not be a bad thing if that was done.

JON JACOBSON: And then briefly, Paramount arose because of a mistake in the antitrust laws. The Edison patent on the movie projector was allowed for years until the Clayton Act was passed to cartelize the motion picture industry. You couldn't make films without a license from the Motion Picture Patents Company. You couldn't make a movie without a license from the Motion Picture Patents Company.

So finally, when the Clayton Act was passed and the *Motion Picture Patents* case got decided in 1917, there was an injunction. But the harm had been done, and something needed to be done, and the Paramount decrees were a good solution for 1948, and again, in an area where Congress should have, but failed, to step in.

So my point is a simple one which is, most of the time, absolutely, let's go for a full block or structural, but in these particular instances — and there may be one or two others — if Congress is not going to act, the Division has to be there as the stopgap.

MAKAN DELRAHIM: Well, and Paramount I would say is largely a structural. It's kept two different industries from — at least the ones that have been signatories— from integrating, and probably kept a lot of great B-movies from being combined to be shown and get theatrical distribution. There are some phenomenal movies — Oscar winner Hurt Locker, that got maybe, I don't know, a total gross of $80 million, wins the Oscars, but only had $8 million dollars in theatrical, because it just wasn't there, you don't have the $100 million to do the promotion — but had that been, let's just say, tied, for lack of a better word, in antitrust parlance, to another movie and had been in theaters, many more consumers would have enjoyed it, and you probably would have filled a lot of the theaters, 90% capacity, that during the week are empty. But the antitrust laws prevented that.

Who knows? There was recent news that Netflix might be buying a theater circuit. That would be kind of interesting. But I think there are a lot of factors to those consent decrees that are structural. Just because it has got a label "structural," doesn't mean it is perfectly fine and procompetitive. It has actually created a lot of anticompetitive harm, I think, to not only consumers, but to filmmakers, and the thousands of people who work on those.

JEFFREY EISENACH: Well let me pick up on two points that were just made, and just very briefly. I think the right question on BMI-ASCAP is not so much — and I'll come back to the question of what should we do with them — but the question, maybe, that's more relevant for going forward is would you do it again? And I think the answer to that question has to be no, right? Is it the —

JON JACOBSON: Well, is that right? Would you want to enjoin a blanket license? Where is CBS going to go?

JEFFREY EISENACH: Is it the proper purpose of the Antitrust Division of the Department of Justice to impose upon parties a perpetual regulatory rate regulation regime in perpetuity? Where in the Sherman Act, where in the Clayton Act do you find that authority?

MAKAN DELRAHIM: Whether it's perpetual for seven years or five years or 10 years?

JEFFREY EISENACH: Well, it'd be different. I mean five years, I would argue maybe is a different question. That doesn't mean I'd be for it, but I think you'd look at it differently. So I don't think you would do that. Or at least, I think you would almost never do it. Never say never.

With respect to ASCAP and BMI — I'll come back, General Delrahim, to the point I think you were making earlier — I don't have an opinion on whether those ought to be reviewed or how Congress is in fact considering legislation that would make some changes in the music licensing regime, and maybe good ones, but the criteria that one would apply to ask the question should we give it a hard look must surely be satisfied. The technological and market changes that have taken place in the music marketplace since those two consent decrees were entered are transformational, starting with Pandora, Spotify, et cetera, the online music marketplace.

And what we see is, in fact, a working marketplace solution for a lot of music licensing today, which we didn't have at the time those consent decrees were entered.

JON JACOBSON: Pandora and Spotify both had to go to Judge Stanton and Judge Cote for relief. The decrees really were not intended to apply to Spotify and Pandora, and that's part of the problem.

MAKAN DELRAHIM: You mean 77 years ago, they didn't anticipate Spotify being created?

JON JACOBSON: Exactly. Which is which is why a legislative solution here really is the optimal outcome, but it's hard to get anything done by Congress these days. I remember an Assistant Attorney General appointment and it just sat there for months, for example.

MAKAN DELRAHIM: There's a few of them still pending. Ms. Rose, you mentioned with respect to, specifically, PROs — and we're jumping a little bit to issues because these were topics raised in the public discussion and the oral discussion — you mentioned that because of certain uncertainties, licensees have to now license all — I guess there's now four PROs, at least currently — get licenses and that allows for potential collusion in that industry. Tell me about that. What are those uncertainties in those consent decrees in those markets that could be remedied so that a consumer of music, whether it's a radio station or a Spotify who might target specifically a particular consumer? My guess is Mr. Feldman may not be necessarily into certain kinds of music that I may like. You know, it might be from the '70s or '80s.

UNIDENTIFIED SPEAKER: He likes the Eagles.

MAKAN DELRAHIM: But you know, he might like — who doesn't like the Eagles? — but maybe there's a service that targets and you only want to license particular kinds of music, and you don't want to get a license from all four. So what are those uncertainties and how could that be remedied?

MEREDITH ROSE: And so I'd respond to that by saying that the PROs are not divided by genre. Any given genre is going to be split along ASCAP-BMI and to a lesser degree SESAC and to a much lesser degree the fourth one — whose acronym I'm currently forgetting —

MAKAN DELRAHIM: GMR.

MEREDITH ROSE: GMR. Thank you very much. Bad music licensing lawyer. I forgot that one. So at the end of the game, fundamentally, and I think, and please correct me if I'm misinterpreting your question here, the ability of a given service to sort of hyper-specialize — for example, if you wanted to create, for example, a music delivery services that specializes only in hillbilly music, if we're going all the way back to the 1930s and '40s — the issue there is that, again, the consumer at the end of the day, I as a consumer do not know, I have no reason to know, I have frankly no energy or time or motivation to figure out what is in the ASCAP and BMI catalogs respectively, and whatever service I go to, even if it is specifically down to a given genre, I'm going to expect it to obtain what are, unbeknownst to me, musical works from both catalogs, and because, at the end of the day, these PRO arrangements are invisible to consumers, consumer demand is not shaped by them, even when you get down to hyper-specific sort of genre subsets.

MAKAN DELRAHIM: But certainly the availability of that service, for that consumer demand, would have to be need to know what that is right? The service would be sensitive to the genre specific or the catalog and the PROs.

MEREDITH ROSE: Correct, but at the same time, the service also must be sensitive to my demands as a consumer. And so I'm not saying that it is inconceivable that we could have a specialty delivery service that focuses only on hillbilly music and early country specifically from, for an example, the BMI catalog. That is entirely a possibility. However, I would have serious doubts as to its financial longevity and its ability to attract subscribers and consumers.

MAKAN DELRAHIM: So what is the problem with the current system then?

MEREDITH ROSE: Currently — and this is a larger structural issue with just the way that the music market — music as a good functions in the market is currently subdivided, it is fundamentally a legacy market. And this can go back into well over 100 years of history here. But at the end of the day, music is a very short product temporally. It's three to five minutes, unless you're really getting into Hans Zimmer, I guess.

As a consumer, I interact with many, many, many pieces of these works a day. Therefore, I attract many, many rights holders, and I do this in a PRO-blind fashion, and because of this multitude and high volume that I interact with, any service that is seeking to deliver that music to me is going to seek to obtain a blanket license. Blanket licenses are highly efficient. They allow, essentially, a delivery mechanism to say, I would take one of everything, please, and to do so at a rate that is overseen by a rate court in the event of a breakdown of discussions.

At the end of the day, because music is fundamentally a non-fungible good, if I want to listen to Lady Gaga's "Born This Way," then I will accept no substitutes. I must, in fact, listen to Lady Gaga's "Born This Way," and I will go to the service that can provide that to me and also provide whatever demands I have in particular tracks from other PRO libraries.

Because of the structure of music, it is not only advantageous for services to obtain blanket licenses, it is advantageous for musicians, specifically small musicians who, when these blanket licenses are negotiated, can often get higher rates than they would in a completely free individual negotiation market. And so essentially, these blanket licenses are actually, in fact, the most efficient solution for everyone all the way down to the end consumer.

The issue is that in the absence of a consent decree and in the absence of any kind of oversight, we have seen examples of anticompetitive behavior that the PROs have engaged in. I don't want to get too much into the weeds, because this removes all my fire for the second panel. But because of this tendency towards collective negotiation and blanket licensing, which is fundamentally an efficiency for all players involved really, it does raise certain behavioral incentives for these groups to collude or to boycott or to attempt things like partial withdrawal where they said despite the fact that we were required to treat all comers equally, we would like to be able to discriminate based on technology. And so these kinds of things naturally arise.

And we've seen arise over and over and over again, including in, frankly, SESAC, which is not subject to a consent decree. It has a substantially smaller catalog portfolio than BMI and ASCAP, which I believe had together over 90% of most of the works in circulation, but we've seen SESAC do sort of similar, the highly legal term I guess would be "shenanigans," regarding collusion with publishers.

And so, again, I don't want to get too deep into the weeds on this. I don't know that there is a particularly good, one-size-fits-all remedy to fix the market. I think it's an incredibly complex market right now. That, again, Congress is currently in the process of fixing certain licensing pitfalls with the Music Modernization Act, which addresses mechanical royalties, and to try to solve some of the Balkanization argument problems on that end. But at the end of the day, the system that we have is a sort of a bootstrapped historical system, and in absence of a substantial congressional intervention to fix the sort of systemic problems, I think just the natural state of this market tends to lend itself to anticompetitive issues.

MAKAN DELRAHIM: And that's one of the dangers of these types of decrees where there is a dispute resolution mechanism — whether it's a rate court or a judge like in the Southern District in New York, that seems to be the price regulator, for lack of a better word, but probably more accurately the rate regulator — and the discussion for an efficiency to have that would be just have compulsory licensing. Congress just does that, which is a horrible idea I think in general because we should not be for that. We actually should encourage greater creativity, whether by songwriters or innovators, inventors, to allow that, and then allow them to have the free market right to set the prices to recoup for that creation. I think that would be probably a more appropriate way, under the constitutional framework we have. If Lady Gaga wants to hold out to get you know $0.10 per play, but for my song the market doesn't care to give me a fraction of a penny, that should be her right to be able to do that even though that might be inconvenient for a new service that ultimately gets her to the consumer. But that's where the market really plays. And then if we have a system in place that is in effect a compulsory license mechanism, it is probably not the most market-enhancing or innovation-enhancing system.

Now if Congress wanted to come in — they certainly have done that in multiple areas where they have compulsory licenses — if that's their judgment, that's one thing, but I don't know if it is a valid exercise of the Antitrust Division's authority to impose such a scheme absent direct congressional authority to do so. And as Judge Cote said, look, if you guys think that there are

antitrust violations, there's nothing in these consent decrees preventing creative interpretations to bring yet another case for anticompetitive harm. That's always available and that's the proper exercise of the authority.

JON JACOBSON: It's challenging though, in that case, because you have a Supreme Court decision that says the blanket licenses are efficient and not illegal *per se*, so if the Division were to just jettison the decree and sue BMI and ASCAP, what's the outcome? There's no guarantee that you're going to get a better public policy outcome from a new case than by tweaking the decree, or better yet, as I've mentioned, getting a congressional enactment.

So in this particular case — I know we've focused on it to the exclusion of pretty much everything else — I think this one sort of has its own glue.

JEFFREY EISENACH: I'll keep this very brief. The PROs were a result of an information problem, and anybody paying attention might notice that the costs of information have dropped over the course of the last 50 years. The possibility of direct licensing, direct licensing is happening all over the music marketplace and all over the media marketplace. So the one thing we know is that as long as those consent decrees are in place, we won't be able to experiment with alternatives.

The other thing we know is that we've had two new entrants into that space, SESAC and GMR, and neither of them are charging infinite prices, which is to say the notion that this content is must-have and would allow anybody with a catalog to be able to extract all of the profits and rents out of the licensees is false on its face, because, in fact, that didn't occur. I don't have a view on where it ought to end up, but I certainly have a view that it ought to be looked at.

DIANA MOSS: If I could just make a broader policy-oriented comment around these types of perpetual decrees, which are I think a very unique case, but very important. So just two observations. You know, revisiting the music licensing decrees, if that were to occur, I would put in the same category as what I did with my colleagues at the FERC in the mid-1990s which was essentially to deregulate the electricity industry.

So you're talking about an industry that grew up around rate regulation, price and profit regulation. It affected everything in the industry, all the way down to the ownership of assets. And really, the FERC's approach in that case was very, very careful. First they opened up transmission access, and then they very carefully studied market power, whether companies' generators have market power if they were to give them market-based rate authority.

So long story short, it was a very, very stepwise careful process to consider a wholesale change in the landscape of an industry to open it to deregulation. I think there's a useful analogy here in the case of these long-term perpetual decrees.

And to the process issue, I think — and you all are grappling with how to deal with these decrees, how to triage them, how to put them in different buckets — these types of decrees really raise the question or stress the importance of looking at the but-for world. What is the but-for world?

If the decree were to disappear, how would the markets operate? Would they function efficiently? Would there be rampant exercise of market power? Would there be acute resolution problems?

And I think that's a really important question to ask. What does the but-for world look like?

And you know as Meredith was saying, some of the PROs operate not subject to consent decrees. So one exercise might be to say, well, let's go look at — is it GMR and SESAC? — and see what's going on over there in terms of resolving these types of competitive concerns, and that would really inform the broader process.

MAKAN DELRAHIM: Thank you. That's very useful. Now let's get away from some of the more fun aspects of this — and we can discuss these further in the second one, but we got a little bit off track. Let me ask a question appropriate to all of you.

So the Division recently introduced some of these new improvements to consent decrees. We lowered the standard for establishing the decree violation — which you have mentioned a couple of behavioral decrees that exist on our books, now more recent ones, whether it's the Comcast decree or Live Nation — the standard of proof, some people question whether those

consent decrees have been so effective and so wonderful, because there's been no violations of them, even though you have a couple of complaints in that handful of them.

But the standard to prove a violation of those decrees is "clear and convincing" evidence you need to show, whereas you only need "preponderance" to show the actual violation. And it's "clear and convincing" evidence of a clearly unambiguous term of those consent decrees.

When you're dealing in these high-tech areas, you show me five lawyers in this room, there's a few more, who will have 12 different opinions on what any single term is. We had a whole debate about the definition of what "is" is a few years ago. So imagine what the definition of "application programming interface" might be or "fair market value" of anything is.

Could you imagine trying to prove those violations, which is, why you don't have some enforcement actions in some of these decrees. It's not because the market is working perfectly as envisioned by the visionaries 12 years ago, 10 years ago, 20 years ago. It is for other reasons that has to do with legal barriers. So one of the things we did was to request as part of these, whether it's been structural or behavioral, agreements by the parties that if there's a violation, we would have to show as a preponderance of the evidence. And you interpret the consent decrees through a preponderance standard.

We also allow if there's been a violation, the Division could extend the termination date of a consent decree and also seek reimbursement for the taxpayers. We also allow the Division to terminate it upon the finding that the market has been restored and is no longer necessary, and you can do that unilaterally and go to the court petition for that.

So what I would love to learn is are we on the right track? Are there elements we are missing? And what do you think, given your vast experiences in this, of these provisions? Should we not include them? Should we include them? Are there other areas where we can improve our future consent decrees? Mr. Jacobson.

JON JACOBSON: So, General Delrahim, my paper's a little bit more lukewarm on this than I am. I think it's a great idea and for precisely the reasons that you've articulated. The only caution I would suggest is let's not make it too easy for the Division to want a decree, because sometimes public policy is better served by litigating the case. So if there are — and this burden of proof change is really not so monumental that it would affect the decision one way or the other — but as we're talking about innovations and consent decrees, let's be cautious to make sure that we're not making it too easy, and the cases that really should be litigated to cert denied don't get lost in the process.

MAKAN DELRAHIM: Thank you for that. George.

GEORGE SLOVER: So you had four innovations, and they all strike me as good, constructive improvements. I think it makes sense that the burden of proof for showing that a consent decree has been violated should be the same as the burden of proof in the underlying case that led to the agreement in the first place. I think it makes sense that the costs for enforcing a consent decree, in the event that it is violated, should be borne by the ones violating it, not by the taxpayers.

As to the other two innovations, extending the duration of a decree as a consequence for violating it, and allowing a decree or condition to be terminated early: both of those generally good ideas warrant a little bit more discussion, in part because they assume a decree of fixed and finite duration, and as I mentioned earlier, I'm not sure that's always the right way to go.

If a decree is violated, I agree that a higher level of monitoring is an appropriate consequence, but the appropriate form for that may be to consider whether the behavioral condition in the decree is written as protectively as it should be, or needs to be strengthened. So you don't want to just say continue the same thing if there's a flaw in it that makes it too easy to violate.

And then as to early termination, the rationale given, that it would be only when the decree conditions are materially impeding healthy innovation in the broader marketplace, I think is the right rationale. I don't think this should be a decision for the Antitrust Division to be making unilaterally.

I think, particularly in conduct case decrees, and in merger decrees where there is a behavioral remedy, I think there should be a notice and comment. You know, like the Tunney

Act. You know, you have a situation where you say you are intending to do it and you get comment. An earlier reference you made this morning seemed to indicate that that's what you're contemplating, and in that kind of situation, I think it makes sense.

I also noticed that the three consent decrees in which the Antitrust Division has added these innovations were all merger cases in which the remedy was structural. It was divestiture cases, I think, the three in December.

MAKAN DELRAHIM: That's certainly in our no-poach agreement with Wabtec, Westinghouse, and also in Baker Hughes and some of the others.

GEORGE SLOVER: I think the three that I had seen reference to…

MAKAN DELRAHIM: I think there are six.

GEORGE SLOVER: …were from December. So I do think in the other kind of the behavioral decrees, you just need to be careful to appropriately address ongoing concerns.

MAKAN DELRAHIM: With your point on the Tunney Act, of course every one of these is subject to the Tunney Act for civil cases where we go before a judge. You'd think that before even putting those provisions — and they're all subject to the Tunney Act review — we can discuss the appropriate boundaries of that Tunney Act, but I think as the D.C. Circuit has interpreted it, it's OK. Do you think that there should be a Tunney Act process for considering including these? Or are you talking about with each of the consent decrees as it already is?

GEORGE SLOVER: No, I mean as I read the description of the fourth proposal, which was that you all would have the right to terminate a decree upon notice to the defendant.

MAKAN DELRAHIM: So determination should be subject to a public interest test?

GEORGE SLOVER: There should be a public process there as well before it happens.

MAKAN DELRAHIM: If Congress wanted to amend the Tunney Act to say it so, we would certainly comply. But I think that's a good point for us to consider that, and I think in some cases, it would make a lot of sense to use our discretion to do so. Diana and then David after that.

DIANA MOSS: So just a quick comment. I think AAI really supports the alignment of the preponderance standard to equal that which was applied at the time of finding of the violation and whether a decree has been violated. I guess I do have a question about how that would be operationalized for behavioral remedies.

So clear and convincing evidence of a violation of a behavioral remedy would require, presumably, or depend heavily on market participants coming forth to complain about noncompliance. That's really the go-to evidence for whether a behavioral remedy has been violated or not.

MAKAN DELRAHIM: Or the new Office of Decree Enforcement from getting CIDs and doing appropriate oversight.

DIANA MOSS: I wonder how that clear and convincing showing would differ from a preponderance showing in the case of a behavioral remedy. So does it give the Division more latitude in determining whether a behavioral condition has been violated? Say it's a firewall or it's an access provision, a nondiscrimination provision. Would you have to rely as much on market participants coming forward? Or would there be sort of a different investigatory tool there?

I think for structural remedies, it's clear. Preponderance would be absolutely different than clear and convincing, because you either complied with the divestiture, you maintain assets. If you didn't maintain the assets and you degraded the assets specifically before the divestiture, then I think that's a very clear cut case, but in a behavioral remedy, I think it raises more questions.

MAKAN DELRAHIM: So the behavioral remedy, the question is: are there particular terms that have been violated by, say, a certain kind of company and some other asset in the particular distribution they may have bought or combined? And, the provision says you must treat a third party a certain way or you must not, in transacting — let's say a concert promotion or something like that — but what do those mean? What do those terms mean? And can the company and its phenomenally capable defense lawyers argue that you don't have enough

evidence to prove by a clear and convincing standard and of a clearly unambiguous term? So either of those two, you can shoot out a potential legal enforcement mechanism.

So those are some of the problems that the Division faces in investigating and, ultimately, enforcing consent decrees, and I don't see how it wouldn't be beneficial in a behavioral, because it makes it easier if there's been a violation. You still have the burden — and the Division should always have the burden in those cases, I think, because for various reasons, but I think we should have the burden — but what should that burden be? And obviously Congress can change all that.

But, if you are settling a matter and you're agreeing, those would be the provisions. David, you've got incredible experience in these merger areas.

DAVID WALES: The lone dissenting voice on this, Assistant Attorney General Delrahim —

MAKAN DELRAHIM: You have every right to have.

DAVID WALES: I recently negotiated a consent decree with the new language in it. I think what worries me is the unintended consequences from that. I've heard people explain that one of the unanticipated positives of the change in the standard is that people are more focused on what they're actually agreeing to do and scrutinizing much closer —

MAKAN DELRAHIM: I don't know if that's unintended.

DAVID WALES: Yes, but that's one at least unintended, or maybe positive unintended, positive outcome from it, but I worry about other unintended consequences, especially in conduct decrees. I think this is a great debate about whether structural or behavioral remedies are really the way to go, and certainly, I think no one would argue that looking at structural versus conduct remedies within a vacuum, conduct remedies are harder to enforce. It's harder for parties to comply with them.

But I think there has been a pretty good system in place where the Division and the Federal Trade Commission use their prosecutorial discretion to decide whether to pursue a consent decree violation, whether it's DOJ or the FTC, with its orders. There's some give and take there, because sometimes there are unanticipated problems that pop up with the divestiture. Or sometimes, too, I've actually had a client that was subject to a compliance investigation, where to be honest — as I'm a little biased — the interpretation was really out of bounds from what was negotiated. So I really worry that if there were a lower legal standard, it would be easier for the agency to bring that case. That would definitely be concerning and one of the unintended consequences of the lower standard.

Another thing is that there is a long line of jurisprudence concerning the higher legal standard when it comes to consent decree violations. So I think there's a bit of uncertainty as to how a court would grapple with the lower standard.

The last thing I would say is that I think there are other things that the Division should consider at ways to improve the consent decree process, and one of those is — and this is kind of I think the quintessential regulatory piece — monitor trustees, and I did see, I believe it was the Martin Marietta decree that just came out, that there's not a monitor trustee, which is great, but whether there needs to be a monitor trustee in other cases is something I think the Division should really think about. In my experience, monitor trustees can be very bureaucratic and regulatory. And maybe with a lower legal standard, you don't need monitors as much, I would posit.

MAKAN DELRAHIM: It's a good point. The Attorney General has a policy memo regarding monitors that we are following. We tried not to use that in one of the transactions, instead of a monitor, we put incentive payments that if you violate, it creates a self-policing kind of innovation, a self-policing mechanism by which they would pay a daily fee for not doing certain things that they had committed to do, rather than installing a monitor to do that. I agree with you, a monitor is yet another mechanism for regulatory intervention. You're just now appointing somebody to do it rather than the market doing it. In some cases that are very complex, I could see a benefit to that, but in other areas it just becomes a creation of another bureaucracy.

You and Jon and others may want to discuss the issue of behavioral decrees versus structural, specifically with vertical transactions. There are certainly, in a lot of cases, incredible

efficiencies that could be created in innovation that you could have, particularly in dynamic markets, and you would want to allow that.

I'm also concerned that, unlike in a horizontal transaction where even if you make an error where you have under-enforced, at least economic thinking has shown us that the market — if there are supercompetitive rents being sought — you have now incentives for new market entry, assuming there's not a structural problem for entry, but it could allow for that. Whereas with vertical, you now create foreclosure effects or raising rivals' costs, which even becomes more problematic from a market structure standpoint, that if you get that wrong, by under-enforcing it becomes a greater threat to markets than even horizontal.

Of course over 90% of all transactions, horizontal and vertical, are procompetitive, and then there's no enforcement action. A lot of times they just go through without even Second Requests. I'd say probably numbers are closer to 97%. But there are some that pose an issue.

So in vertical transactions, can you discuss, based on your experience, the benefits and the problems with behavioral and structural, and where it's more appropriate? Jon, maybe you can start us off, and we'll take a break after this segment.

JON JACOBSON: So I completely agree with the points that you've made publicly over the last several months that there should be a strong presumption, even in a vertical case for a structural remedy, but there are many vertical cases — we cite four examples in the appendix of my paper — where there are massive efficiencies and there is a behavioral fix that actually has a good potential to work. And I'm going to add one more and it's another soft drink matter.

So it wasn't that long ago that Pepsi acquired its bottling system and Coca-Cola, at the same time, acquired its bottling system, not 100% of the bottling system, but if you talk to people like Kroger and Safeway and Albertsons, you'll see these chains have operations in the territories of many, many different bottlers, and it was just a real pain in the neck to deal with different bottlers with different pricing for the same product basically and got in the way of cross-border promotion. So it was a real problem. And it was a problem solved by the acquisition of the bottling systems.

Now the bottling systems also were the major bottlers and distributors of Dr. Pepper, and that was the problem.

So we actually did an analysis that it was in Coke's financial interest to keep pushing Dr. Pepper as strong as it can, but the FTC said, well, we're not so sure, and so the outcome there was a firewall, and Pepsi, similarly, had a firewall.

And those decrees have worked well. And that is an example of a remedy that, on its face, you don't like. Because a firewall, how do you monitor it? Difficult to enforce.

But in this particular case, the firewall was able to achieve massive efficiencies with, to my knowledge, zero complaints from Dr. Pepper or anyone else. And so I use that just as an example to say let's look at the facts of each of these transactions carefully, because there are a number where the deal really should go through for the benefit of the public, and where the only remedy really can be behavioral.

MAKAN DELRAHIM: I think the alternative is important. What are the alternatives in that case? Was it just spin out bottling for Dr. Pepper? Now you're decreasing output for that particular product by doing so. And so in that case, I'm not as familiar with it, but part of the reason it probably worked so well is because they have such excellent antitrust counsel.

JON JACOBSON: Well, well, I'll deny that. I should say Pepsi had Debbie Feinstein representing them, so she certainly meets that criterion.

The remedy I think would have had to have been a full stop injunction or you can't acquire this bottler because it has too much Dr. Pepper which would still result in Balkanization of the bottling system. Alternative remedies in that one were going to be pretty tough.

JEFFREY EISENACH: So I think the upshot of what we're talking about here is the — and I'm the economist in the room, so I'll make this point, the economist point — which is continuing to make progress on admitting efficiency considerations into merger reviews is pretty important. We do that, for the most part, kind of through the back door of GUPPI models and a lot of pretty arcane modeling, which may help get at price effects. It's very difficult when you're talking about innovation effects of mergers.

I think the burden that you place back on the Division is the burden of really being willing to take a hard look at efficiencies, and in cases where the efficiencies are substantial, being willing to allow a merger, which may in some markets in some ways increase market power, but where that increase and its effects are overwhelmed by increases and efficiencies on the other side.

So as you walk away from behavioral remedies, I think it puts a lot more weight on that balancing test, and what you don't want to be doing is throwing out good mergers because the only way to eliminate all anticompetitive effects is with an unworkable or overly regulatory behavioral remedy.

MAKAN DELRAHIM: And, of course, I mean I'm assuming you're referring to what the courts and the guidelines have required for those efficiencies to be merger specific and verifiable rather than some pie in the sky.

JEFFREY EISENACH: Absolutely. That's as it should be.

MAKAN DELRAHIM: Great. And no disagreement. Mr. Feldman.

BRIAN FELDMAN: Just to add to that point, there's been a lot of talk about would it need regulation if these behavioral degrees can be very unwieldy. I would make the argument that if we were to have stopped the economic concentration in its incipiency, then the cost that fell to the Department wouldn't have been needed in the first place.

And there's a couple of issues here. The first is there's a lot of interesting consent decrees in the 1990s that involved firewalls in the pharmacy benefit manager industry. But one of the perverse effects of this is that it shifted the burden of oversight to other third party competitors in the industry, and as a result, this basically — if the concentrated industry would have just been broken up in the first place, there wouldn't have been the need for public enforcers to have relied on the private entities to monitor compliance in the first place.

The second thing is the Ticketmaster and Live Nation example. There was a behavioral provision in that, which was an anti-retaliatory clause. Unfortunately, because that market is so concentrated, again — there was a recent *New York Times* article that was just released that showed that these effects, in terms of the behavioral provisions, have not been effective and that ticket prices are now at record highs, and Ticketmaster tickets were also at 80 of the top 100 arenas in the nation.

So I think hindsight is 20/20, but had we looked back and had we already seen that Ticketmaster, which was the largest ticketing service provider, and Live Nation, which was the largest concert promoter, had that been forestalled in its incipiency, then many of these problems that now exist, both in terms of compliance and in terms of imposing behavioral decrees, and now the current market conditions, we likely wouldn't be faced with.

MAKAN DELRAHIM: Thank you for that. Dr. Moss.

DIANA MOSS: So I, too, will speak as an economist.

MAKAN DELRAHIM: We've got two of you.

DIANA MOSS: Sorry, sorry, Jeff, you didn't get the warning. I just want to make a couple of points. You know, for the most part, if you have lots of competition in a vertical play upstream and downstream, you're not going to have concerns over foreclosure or raising one of those costs. The problem is when you do have highly concentrated markets, up and/or downstream, that the radar starts going up. And AAI has raised these concerns in numerous vertical plays, mergers, most recently in CVS-Aetna.

So that really is sort of the threshold market structure, underlying market structure, problem that gives rise to concerns over foreclosure.

I have to point out that in recent years, there have been developments that really should be very much on the radar screen, we would hope would be on the DOJ radar screen about vertical integration, and that is commitments to maintain separate units after the merger. So, OK, isn't the purpose of the merger to integrate the units, to create those economies of coordination, to enhance quality control, to eliminate double margins? All of the traditional vertical economies we talk about in economics, maintenance of vertical units — as I believe Comcast NBCU have done — and as I believe — correct me if I'm wrong — I think AT&T and DirecTV just proposed as a way to sort of shepherd their transaction along.

I mean that would have serious consequences, real consequences, for the ability to extract efficiencies from the transaction. So I think we have to be very mindful of that.

And second, I would point out that if you go to the business management literature, McKinsey did a study — a very dated study from '04 now — but very interesting showing that managers have real difficulties extracting efficiencies from merger transactions. You know, they showed 60% of claimed cost savings were never realized. You can imagine if cost savings are hard to realize, then getting consumer benefits is going to be even more difficult, because those are even more elusive.

So all I'm saying is we should hopefully craft policy around these types of developments and evidence that we see in prior transactions, and hopefully, that will inform future policy.

And then, finally, I would point out that the agencies have taken structural remedies in vertical cases. When we wrote in a commentary supporting the DOJ's case against AT&T Time Warner, we went back through all of these verbal cases and found that in 25% of them there was a structural remedy taken. Which really does a lot more to eliminate enhanced ability and incentive to exclude rivals in a transaction.

MAKAN DELRAHIM: Thank you very much for that. And yes, of course, I mean if you promise to keep businesses separate and say that solves the problem of the potential rising rivals costs or foreclosure effects, well, you can't also with the same mouth argue you should take the benefits of the efficiencies in EDM [elimination of double marginalization]. Now I don't know if private securities lawyers would agree with that if a company was supposed to act in the shareholders' best interest is not maximizing its profits for those.

Ms. Rose, does anybody have a comment you'd like on this topic? Or should we take a 10 minute break and regroup again? I've really enjoyed it. Dave.

DAVID WALES: Real quick. I just wanted make one point, and again, maybe I'll be more the dissenting voice here, but I think the one thing that is really important is to focus on evidentiary based enforcement. I think it's one thing to say that conduct remedies in vertical cases don't work, but I think you have to really look at each merger individually.

And I can tell you from having done this, sitting there when the enforcers do do a conduct remedy in a vertical case, they're not saying, "wow, this is the most perfect thing I've ever seen. This is great," they know that there's a tradeoff in allowing efficiencies and potentially allowing some leakage on the anticompetitive effects side.

And so I think you have to examine whether that was successful in that light. Not just: did the remedy just fail? That's not really the right question. You have to look at that balancing. And maybe it was Jeff who made that point. If you're going to open up and basically say that conduct remedies never work in a vertical deal, I think you have to put that in context and make sure that you're doing that balancing should you do some sort of retrospective.

MAKAN DELRAHIM: I agree. We'll talk about it in the second session: retrospectives and who is the appropriate person who should be doing that? Should we be doing our own grading and review of what we have done? Should somebody else be doing it? Are there other ways? Maybe we should look at the National Institute of Justice, the DOJ arm that provides grants to some academics to take a look, or some body that takes a look at that. I think those are important and really good to learn from the past.

With respect to behavioral or structural, I don't disagree that these are tough choices. However, where there is a surgical, structural remedy that could allow the remainder of a procompetitive, or potentially procompetitive transaction to go forward — I realize EDM and others — that should be had. That's an easy call. That's not a difficult one.

But that's the trade-off, rather than one where, in some of the examples that Mr. Jacobson has provided, there isn't an easy way to do that, or in the McAfee case, and Intel, or others, where you could have, possibly, other mechanisms that could do that, but if you have a business unit that has been separate, it has been kept separate and can be spun off, and was one of the areas that is causing the competitive harm, that's not a tough question.

Let's take a break. Thank you so much for this session.

[Second Session:]

MAKAN DELRAHIM: Thank you for being back. We're joined by our Chief Legal Advisor of the Division, Dorothy Fountain. It's within her unit where the Office of Decree Enforcement is, and she has also been spearheading, along with a good 30, 40 other attorneys, the whole consent decree review process.

So I'm personally grateful for the last at least six, seven months where she has been working. She has created a whole database to digitize these consent decrees. They go back over 100 years. We are looking at the products, the specific provisions, the courts, the duration, the various terms.

There's a part of me that likes to think of myself as an academic. I think it would have incredible value for somebody to look at these once we're through with them and take a look at the history of some of these. They're not only entertaining, they're, I think, pretty informative, and I think we will learn a lot.

Let me ask — start where we left off about post-merger studies. A retrospective, I think, is always useful for us to learn from various remedies we have done. One, the easy answer, I think, is should we be doing them? Who should be doing them? How should they be designed? And what should be the elements of such a study from which we in the public could benefit from it? And look at what we're doing that might be wrong or what we're doing that's good that we should continue to do. George, you want to start us off?

GEORGE SLOVER: Sure. Yeah, I think it's a great idea. I think it obviously takes some resources to do a retrospective when you're trying to focus on what's going on now, too, but I think you can learn from that.

I think who does it may not be as important as that it's peer-reviewed or peer-reviewable. So that if the agencies are doing it themselves, there's somebody who's got access to enough of the same information so that the agency doesn't say, well, we think we've done a really good job, and we really can't share with you all the confidential details that prove that. I think there are people on the outside who would love to be a part of that, and so I think your idea of using the, what —

MAKAN DELRAHIM: National Institute of Justice.

GEORGE SLOVER: Yeah, using them —

MAKAN DELRAHIM: The Office of Justice Programs.

GEORGE SLOVER: — as a conduit for that is one idea. I know there are people in academia who would love to be able to do that. John Kwoka has already done a good stab at that, I think, and there are others like him who would like to be involved.

I think it's important to try to figure out — you go into one of these merger investigations and it's all predictive, and "likely," "may," and it's kind of developed into a higher level of proof being required than may be intended originally under the law and the incipiency standard.

You're making judgments about what's going to happen; you're letting a merger go through where you had a lot of concerns about it; you're kind of hoping for the best and hoping that you figured it out right. And if you didn't, it's important to know that.

MAKAN DELRAHIM: Joel Klein had established, on the international front, the ICPAC on international competition, which had a lot of great work that was done at the intersection of trade and antitrust law, headed by Jim Rill, former AAG. Which led to some of the international convergence efforts that we have now and led to the International Competition Network and some of those studies. There were both trade lawyers, practitioners, former agency officials, as well as antitrust.

Would something like that — where a public advisory committee established by the Division, made up of economists and practitioners — make sense? Or does a structure like that have a limitation? Jon.

JON JACOBSON: So I like the idea. It's critical to have balance. Ideological balance in these issues in particular is an issue that we struggle with at the ABA, and I would think you would want to take some care on that too.

The big challenge is going to be the data and making sure that what comes out of it is not purely anecdotal, which may be difficult, but to the extent there can be data that generates some macro conclusions, I think that would be awesome. I'm not optimistic that that's possible. But it's something to strive for.

MAKAN DELRAHIM: Let me throw that to our two economists on the panel. You guys know how to come up with data? What do you think?

JEFFREY EISENACH: Well, you mentioned economists, and I was going to say, there are two of us in favor of having economists on the panel. At least.

DIANA MOSS: Are you going to let me go first? Go ahead, Jeff.

JEFFREY EISENACH: So two things. One is understanding the effects of all these decrees over time will be important, and I think the kind of exercise you're talking about would be very useful in that regard.

But the other question is the process of getting rid of them. So let's assume, out of the 1,300, there are some significant number that just don't make any sense in the modern world. Is there a way to do that with a presumption where you would say, if it's more than 50 years old, it is done, unless someone shows up to complain? And is that a more efficient way of achieving the outcome? And I say this a little bit jokingly, but you could repeal two for every new one you enter into. If you wanted to think of it that way. But I think keeping an eye on the ball of, actually, let's get these things retired is also important.

MAKAN DELRAHIM: Thank you for that. Dorothy has made sure we stick with it and keep our eye on the ball and moving forward fast. I don't know if there's a presumption that's temporal. I'd be a fan of anything that's older than me should go away, but — that's a joke —

UNIDENTIFIED SPEAKER: 29 years old.

MAKAN DELRAHIM: Yeah, 29 — but I think that we should look at all of them and see if the markets have changed, and then look back to the organic question of: is this the appropriate role for us? So, Dr. Moss.

DIANA MOSS: So just looping back around to the concept of retrospectives, they can be done not only for merger cases, but for non-merger cases — Section 1 and Section 2 cases. I just want to add to something Jon Jacobson said over here. He obviously raised a major concern about data, who collects it, how is it made available to any sort of third party that might be helping the DOJ with the study?

But I think there is an even bigger problem, and that is, it's a sampling issue. So what cases do you pick?

MAKAN DELRAHIM: Right.

DIANA MOSS: You would really, really want to get a very good representative universe of cases that would help inform policy moving forward. So for example, you'd want cases — retrospectives done on mergers with and without consent orders. You would want to study both of those types of scenarios.

You would particularly want to look at merger cases that occurred in industries where there's been successive consolidation. Telecom and airlines are really good candidates for that. So how you structure the sample of retrospectives in the merger space, but also potentially in the Section 2 space and in Section 1 is a little different because of the criminal implications, as opposed to civil violations, but I think those types of well-constructed retrospectives that are part of a well-constructed model for how that vehicle can be used to inform policy would be really, really helpful.

And we have a lot of good ones already, and they've been done by academics, and there have been individual retrospectives, and then meta studies, studies of the studies. That process is chugging along very nicely, but some codification and formalization of it would be really useful, I think, in the agency context.

MAKAN DELRAHIM: That's a good point. Dave.

DAVID WALES: I have a slightly different view on that. Surprise, right?

As you know, the Federal Trade Commission has the ability to conduct studies by mandate and has done that in more of a limited capacity. They've done multiple merger remedy studies,

most recently last year. It's hard to argue with evidence-based enforcement, and it's hard to argue that it would be bad to have more data.

But I think you have to be very careful as to how ambitious that can be, because you're a law enforcement agency, you're not a study agency, and so you have limited resources.

And I think it's hard. You obviously can design studies and go look at tons of stuff, but I don't think you have the resources or time to do that, and so I this is something that should be very targeted and very specific.

I also think data is a huge problem when looking at mergers. Part of my concern are the costs to companies. This could entail going to third parties and saying, hey, we need data from you. We need you to tell us how the merger went. You are forcing the companies to spend resources and time to comply with a subpoena or something similar. That has real costs.

The other concern is that this could entail very confidential information, and so I don't know how you would obtain and use this data — this is not China, we can't just demand tons of data and use it as we like — so there's a real limitation on what private parties can do to participate in that kind of study.

I would also have a hard time, saying, "hey, guess what, third party," we're going to have McKinsey or all of these other third parties see your confidential data. I would have some real concerns about that.

At the same time, I think there's been some really interesting work done, including the 2017 FTC study. It definitely contributed to the body of knowledge on merger remedies. And so I would definitely encourage there to be more thought about how to get the evidence in an efficient and appropriate way that would inform the Division going forward.

Maybe you could have the Division get the data and look at it itself, and do an analysis that is kept confidential, but some of the non-confidential information is shared with broader constituents and members of the bar. Obviously, a lot of the organizations sitting here might be ones that could provide insights on that.

MAKAN DELRAHIM: Would a simple analysis of HHI changes be at all informative, do you think?

DAVID WALES: That's a pretty crude tool, in my opinion. I think that, obviously, as you know, a merger remedy's goal is to fix the anticompetitive harm that would have occurred but for the deal.

MAKAN DELRAHIM: Right.

DAVID WALES: And so you can imagine cases where the remedy was successful in that goal, but the HHIs went up for other reasons, e.g., market failure, companies buying other companies, potentially. So I don't know that analyzing just HHIs would really give you much. The analysis would also depend on how you define the market. There's a lot of real challenges there.

MAKAN DELRAHIM: It may change over time.

DAVID WALES: Yes.

JON JACOBSON: One fact that the data should be available for, that may be relevant to some of this, is entry. So look at post-conduct or post-merger effects on entry. That's less difficult.

And it doesn't answer all the questions. It doesn't answer price. It doesn't answer output. But that is something that can be looked at in, I think, pretty much every case.

JEFFREY EISENACH: So one point I wanted to make and I make briefly in the written comments is the Tunney Act requires a Competitive Impact Statement for every consent. So presumably, we have Competitive Impact Statements. Those are frankly not as substantial as I think they ought to be, and that's another topic going forward, maybe.

But looking back, one place to start would be to look at the competitive impact statement — what did it predict and what happened?

MAKAN DELRAHIM: Interesting. I had not thought about that, but that's a good point. I know that Mr. Feldman thinks there's just broad consolidation that should have been stopped in the first place. Anything you want to add on this about if you were going to design a study to examine such concentration increases? Is that something that you think would be good? And

who should be the best person to do such a thing, other than the Open Markets Institute, of course?

BRIAN FELDMAN: Naturally, yeah.

MAKAN DELRAHIM: Yes, of course.

BRIAN FELDMAN: These are all great points that have been discussed. In terms of HHI, I do agree that there are some problems in terms of that as a proxy. I do think it is valuable, is that that's a really great way to see if barriers to entry have been raised before the deal and after the consent decree has been imposed. So that's something I would favor.

And as well, I think that as we've seen with the work of John Kwoka on hospital consolidation, his results showing how the market has shifted from five to four hospitals, and that raised prices, then informed the agencies going forward in terms of blocking deals. So I think that they can be very instructive tools.

MAKAN DELRAHIM: Great. George, your statement mentioned that when using behavioral remedies in merger decrees, since the merger is forever, the behavioral decree provisions should also be perpetual. Correct me if in any way we have misstated of embellished upon what your view is. Do you think there are limits to the rule to account for the changes in the marketplace? And how should that be implemented?

GEORGE SLOVER: Oh, yes, definitely, and the point that I was making is that having an arbitrary shelf life for behavioral remedies that are designed to address the structural problem, that the structural problem is forever, and to say that we're going to sunset the behavioral protections after a certain period of time leaves the structure problems still in place. So the fact that it sounds so strange — and I think I also say this in my written statement — the fact that it sounds so strange to talk about having behavioral remedies that never end sort of points out the ambitious role that you're seeking for these limited-time behavioral remedies to play in fixing a permanent structural problem.

MAKAN DELRAHIM: Tough to disagree with that. Jeff, you've commented about the timing issue.

JEFFREY EISENACH: Well, don't you have to think about the definition of the word "permanent" there? So if a market is changing rapidly, there's no presumption of permanence to the underlying problem, and so I think the type I, type II error framework here can be useful.

What is the likelihood of a decree, over time, outliving changes in the marketplace and becoming harmful as opposed to assuming we can design a decree which is beneficial tomorrow and next week and even next year and even five years from now? At some point, the level of certainty around that benefit-cost analysis has to decay, and in some markets, maybe faster than others.

GEORGE SLOVER: Yeah, and that, I think, is the point that I led with. This is in the context of having some mechanism for going back after an appropriate period of time and deciding whether the decree is still necessary, whether it's still working effectively, whether it's causing more problems than it's solving, whether it needs to be relaxed or altered in some way to be more effective. So I absolutely agree that, in my saying that they should be, what I meant was that you don't start with a time limit on the protections that you are creating to take care of what is a permanent problem, or at least a permanent problem until the market evolves. At some point, you may have a completely different structure in which the decree makes no sense.

ROGER ALFORD: Can I ask the question whether or not something like in the anti-dumping and countervailing duty context, where this is sort of a sunset review process where, after a certain period of time, there's automatic review process, and then they decide whether or not they're going to continue with the duty or not. Is that the kind of thing that you're talking about?

GEORGE SLOVER: Potentially. Although, there's a resource issue here. For example, the MFJ almost immediately led to an unending cascade of requests for exceptions.

And so one of the things you have to think about is how often and for how many of these decrees do you do that? There should be some, I think, minimal threshold for reconsideration. Not just, every year, everybody gets a shot to come in and see if they can get out from what they

agreed to, but absolutely, some mechanism for methodically looking at them to make sure they still make sense.

JON JACOBSON: So I don't think that this is a one size fits all situation. If you have decrees — and there are lots of them in the 1,300 and otherwise — that simply say 'stop violating the antitrust laws, don't do it anymore,' and there's no reason for that to be perpetual, and certainly five years is a pretty good presumption for that length.

There are other decrees — and these were more common in the past — with fencing-in provisions, and those need to be looked at, I think, in each case to say, how long do we really think these fencing-in provisions provide? There are others that are more structural. So you will license this asset today forever.

And there's no reason why, once that license has been signed, that decree needs to continue further than that. So I think it's a case-by-case situation, but certainly, the point that you've been making, which is that there ought to be a heavy presumption against perpetual decrees, is correct.

DIANA MOSS: I think one really important point here, in terms of finding guiding principles for these types of questions for decrees, is whether the remedies contain therein — whether it be behavioral, structural, or a combo platter — whether they've been effective in fully restoring competition. I mean, that's the purpose of an antitrust remedy, and full restoration of competition is the best deterrence that the DOJ can find, as a law enforcement agency, to deter future violations. That should be the guiding principle.

So if in filing a complaint and simultaneously negotiating a consent, the DOJ was concerned enough about a violation of the law that a consent went into place, and that consent was in place for perhaps 10 years or 5 years, says something about what the Division's concerns were in the first place. That competition would be harmed by a transaction or a form of conduct, and that needed to be remedied for a period of, say, 10 years in a consent order.

I don't think that closes the door on revisiting consent orders in some cases, much like requests for immunity for the international airline alliances should be reviewed every three years. They're not, but they should be, and we strongly encourage DOT to work on that, and I think you all have as well.

But unless and until the remedy has fully restored competition, it should stay in place. I guess the question is, where the rubber meets the road is, how do you determine full restoration of competition? Well, accounting for all of the exogenous factors that spring up around markets and dynamic concepts, like innovation and market entry, and that sort of thing, that's the rub, and that's the difficult part of the calculus.

MAKAN DELRAHIM: Go ahead.

ROGER ALFORD: So one question I had is the idea of a default period of 10 years, is that an appropriate thing to do? Because, obviously, it's very stock-specific on the market. Is it better to have a situation where there's sort of a baseline expectation of 10 years, but that's a situation that's negotiated as part of the settlement?

DIANA MOSS: If I may, just one more comment on this. I think the time period is really critical. And again, I'll refer to DOT's reasoning in these grants of immunity for airline alliances.

DOT specifically shows a five-year period in the *Delta-Aeromexico* case, as you all know since you were involved, because it was a long enough period of time for infrastructure modifications to be made at both airports and for the companies to be able to plan ahead and engage in procompetitive expansion and efficiency-enhancing activities. If it had been shorter than five years, that wouldn't have happened. Ten years, probably plenty of time for all of the procompetitive activities, for the company to implement those kinds of things.

It's going to depend on the markets. Highly dynamic markets, maybe a shorter or even a longer period of time, depending on what you are talking about. Infrastructure markets, traditional markets, there's more guidance there based on the Division's history, but I think those are some of the key considerations that go into that.

JEFFREY EISENACH: I completely agree with what's been said in terms of case-by-case. I just think every market is evolving at a different pace. And every problem is different. So an

intellectual property licensing solution may be something that can be very temporary in nature. A more structural kind of problem may require a longer period.

GEORGE SLOVER: I was just going to say the same thing. I think it's got to be case by case, and rather than a hard and fast deadline, you might want to have a presumption or some ability to go back and make sure that it's time to get rid of it, and it could be sooner than you expect. Or it could take longer than you expect for not only the competition to be fully restored, but the risk to competition in the structure of the marketplace to be satisfactorily resolved.

MAKAN DELRAHIM: How should we measure those market changes? Not a one size fits all. However, what should be the analytical framework to examine the change in the market dynamics that we should apply when we look back?

GEORGE SLOVER: That's *really* going to be case by case.

JON JACOBSON: It is. I think you have to start with the basics — entry, price, and output. I think those are the key considerations. They can be very difficult and impossible to measure or get data for, but I think, going in, those are three things to be looking at.

JEFFREY EISENACH: When you look at future markets, for example, *Tokyo Electron* must have been a lot of fun around here, looking at those cases, I think the time period is going to depend a lot on the innovation cycle. So you would think about that differently for a pharmaceutical market, from a steel market, from a car market, from a market for airplane cockpits, to go back to an old case.

BOB POTTER: I was just going to follow up on the innovation part. You look at entry. You look at price. But how do you measure the benefit or missing the innovation because a decree was in place?

JON JACOBSON: Well, you can't. Absent some extraordinary document somewhere, like *The Man in the Gray Suit*, where all of the textile manufacturers wanted to put him out of business because his suit lasted forever. So it would depend on the nature of the IP right, the nature of the type of remedy and license or disposition that would be required. But in terms of projecting what innovations died on the vine because we allowed this deal to go through, I don't know how you do that.

JEFFREY EISENACH: Well, actually, I think —

JON JACOBSON: I'll stand corrected.

JEFFREY EISENACH: No, we have done it. In the one case which I cite someplace, and I'm blanking on the case — *FTC v. PPT Industries*, 1986 — this is a case involving airplane cockpits. There were basically two firms that were innovating. They looked carefully at what was the next product cycle. What would the impact be if one of the two firms was taken out of the market for the next generation of product cycle? And were able to come to some pretty concrete conclusions about that. So it's intensely fact-specific, and it may be, in a lot of cases, you'd be throwing a dart at the wall.

But in many cases, you can actually look at the realities of what's happening in the innovation cycle and make some — I think it's reasonably, it's becoming clearer and clearer where 5G wireless technology is going and how that's going to evolve. It was very foggy 18 months ago. It's less foggy now. It'll be less foggy 12 months from now. So in cases like that, there's stuff happening, and you can predict where it's going to go.

DIANA MOSS: This is all great stuff, for sure, but I think part of the challenge here is to develop some sort of tractable, reasonable, defensible framework around which the Division would be able to conclude that decree is no longer necessary in a market, because it's really a question of what should be measured, what should be looked at.

And here, I think this is actually one really good application of the structure, conduct, and performance paradigm. Start with market structure. Look at entry. Look at concentration, all of sort of the basic structural components that economists look to to determine whether markets are conducive to competition or not.

And then move to all the conduct stuff that flows from that. What have prices done, for example? How has quality changed over time? Are firms in differentiated product markets competing hard, because we see a lot of advertising and head-to-head competition and that sort of thing?

And then the innovation part really comes in at the end. That's the performance part of the deal. So good market structure, procompetitive market conduct generally leads to innovation and efficiencies.

So the structure, conduct, performance paradigm is highly controversial. We were joking about it earlier. Well, I don't joke about it, but other people do.

But it is a very useful construct in which to sort of couch or contextualize an assessment of whether a remedy in a decree has been fully effective in restoring competition. And then providing some basis or launching pad for determining that the decree is no longer necessary, it should be modified in some ways, or it is still necessary. And then maybe go for some structural relief and get rid of all the behavioral stuff.

BOB POTTER: Jon, I know you mentioned something about, we should be concerned about what foreign enforcers take from what we do with remedies. Do you want to expand on that a little bit?

JON JACOBSON: Well, it wasn't that long ago that we were really the only antitrust game in town. That's certainly changed, particularly after the fall of the Berlin Wall. My concern is that we have a robust consumer welfare standard here in the United States, and when you go abroad, the phrase "consumer welfare" is used, but it's just not the case. The European Commission views competitors as important as consumers, which is fundamentally different from the way we look at it here.

So when we are having conduct remedies, which seems to be the European Commission's favorite thing to try to do, we need to be very careful about how is this going to set a precedent for use in Europe or in Asia or in other areas? I think the number of cases where you would want to rethink a remedy because of the international blowback are few, but I think the issue is sufficiently important that it ought to be looked at, particularly for transnational companies.

ROGER ALFORD: I'm curious whether or not you think that the equation is different for smaller agencies around the world with respect to structural versus behavioral remedies. I heard one agency of a very small jurisdiction say that we know that all the structural remedies will be done by the big guys, and we're going to be doing the sort of specific behavioral remedies to deal with our small problem in our small jurisdictions. Any thoughts on that?

JON JACOBSON: Well, I think if you did an up-and-down analysis of those, you would see a tremendous amount of protectionism from the smaller counties trying to protect particular companies rather than consumers there, and so I view those with some skepticism going in.

JEFFREY EISENACH: There's a rent extraction problem there too, as we all know.

ROGER ALFORD: Yeah, I think the public interest versus consumer welfare standard is really important if the decree is going to be used for purposes of protecting a collective bargaining agreement on jobs in South Africa or something like that. That's a very different situation than the sort of consumer welfare standard that we're trying to promote.

JON JACOBSON: Absolutely.

MAKAN DELRAHIM: David.

DAVID WALES: I'm going to add quickly, I think what the U.S. enforcers do here matters across the world. The foreign enforcers are watching. Their incentives are obviously different, I think, from time to time, and they may not understand how our system is different in that we have judicial review and that agency settlements are not precedent setting. So I think U.S. enforcers need to keep that in mind.

As one example, I heard that Acting Chairperson Maureen Ohlhausen had commented about her recent trip to China, where someone had said to her, "wow, I didn't realize the U.S. had such a definitive view on essential facilities." The Chairperson said, well, that's not really the case, and what do you mean by that? The person then quoted the FTC's Bosch consent decree and the MMI consent decree as evidence that this had set U.S. precedent.

What does that mean? I think as a U.S. enforcer you have to consider that perspective, and obviously, whether you agree or disagree with those FTC cases, it is important that foreign enforcers understand what the U.S. is doing and have the proper context. Maybe they won't care and they will use settlements as official precedent anyway.

MAKAN DELRAHIM: I think, on that point, one of the reasons that we've been advocating for a structural remedy — where there is one to solve a problem, because it's certain, it gets markets back in charge — is that when you start getting into the behavioral remedies, sometimes, if you're not exercising the humility that you, Jeff, Maureen, George, and others have espoused, you could have a tendency to get into areas that have nothing to do with the actual competition nor something that you would otherwise get with a successful litigation. And you start creeping into other policy-setting goals that, whatever your personal views might be, could begin dictating what might not be the statutory mandate for an antitrust law enforcement agency.

There was an example I cited recently dealing with refrigeration at a chicken farm someplace. This is the type of thing that isn't a good idea for us to do, but businesses would be delighted to offer those types of things in order to get a deal through, if that becomes the holdup that we do because we have the power to do so. So we need to be very careful not to engage in that.

And, that is most dangerous when you're doing it in a behavioral context, and you'll say, look, Jon you're creating Coke, I'd like you to have a "Makan" labeled Coke and that's going to be 20% of your market share, will you agree? Sure, we'll agree, we get our deal through. And it's not the appropriate role — except for in that case. [LAUGHTER]

Do we have any final general thoughts? This has been incredibly helpful. This is an area that's important, that affects huge segments of the population.

Almost every consumer is affected by some of these consent decrees, certainly anybody who cares about music rolls — that's a subject of our consent decrees — or bicycle brakes, or likes to watch a movie every now and then, or listens to any kind of music, is affected by what we are doing and what we will do down the road. Who should do them, and what are the effects in lieu of some of these consent decrees? And what should we do down the road, more importantly than anything we'll do retrospectively?

Any closing thoughts you would have, I'd welcome you to share that with us now. And anybody in the public who would like to continue to submit any thoughts or statements for the record of this, we continue to welcome that.

JON JACOBSON: Makan, I just want to say that it's fantastic that the Division is looking at these issues. I know these are not the only issues that you're looking at, but you're taking a lot of perceived wisdom from the past and giving it a hard look, and I think that's a fantastic thing. At least on behalf of myself and the ABA, thank you for launching this project.

MAKAN DELRAHIM: Thank you. Thank you so much, Jon, for your input. Meredith.

MEREDITH ROSE: Yeah. I think, just to echo what Jon said, we're very appreciative that you are having this broad dialogue about all of these very difficult discussions, and I think probably the one thing we all agree on is that there's no simple answer, which is a particularly unsatisfying result, I know, especially when you get a lot of folks with many opinions in one room. But at the end of the day, this all comes down to differentiations in markets and particular products that have certain systemic issues.

And I think that the fact that we can have these discussions is very heartening, and that we can have them in good faith, and that, fundamentally, we can all agree that this is something that does need a much harder, longer look. Especially when you're dealing with very long-term consent decrees, such as, again, ASCAP and BMI. So just to reiterate, we're very grateful to be included in this and hope to keep working with folks moving forward as I look at these.

MAKAN DELRAHIM: Thank you very much. Diana.

DIANA MOSS: So again, thank you for inviting us here and for holding these incredible conversations. They are very helpful to the advocacy community. I'm sure, as well, to enforcers and to the antitrust community, more broadly, and the business community.

The antitrust laws are here to support open and free markets, which is a fundamental underpinning to our economy and very much incorporates democratic values. Enforcement of the antitrust laws is vital. Vigorous enforcement of the laws is vital for protecting consumers, entrepreneurs, innovators, everything that makes our market system work.

Antitrust enforcement, we believe, works best in the frame of law enforcement with optimal deterrence in mind. Structural remedies are generally to be preferred in achieving that goal. They're not a quick fix, but they are a one-time fix, and enforcers can go off and open new investigations and look into other types of concerns and conduct. Behavioral remedies don't achieve that for the agencies. They tie them up in a monitoring and regulatory function.

Finally, I would just say that, in moving forward with this project, I think we've seen here today that there are some very, very different consents presenting very, very different types of problems and concerns. There has to be a way to develop a framework to triage what these consents look like — and I hate to say "buckets," but what potential buckets they fall in.

Because this is resource-intensive, for sure, and the Division has limited resources, as we know, but to the extent that this process gives the Division better tools to engage in better enforcement, more vigorous enforcement, more creative enforcement moving forward to protect markets and consumers, then we would heartily endorse that. Thank you.

MAKAN DELRAHIM: Thank you very much. Anybody else? George.

GEORGE SLOVER: Yeah. Rather than to try to repeat what Diana has already said so well, I'd just like to echo my thanks for being invited and being a part of this discussion. No doubt, there's a lot of underbrush that can be cleared out. I think the review that you're doing is good. I hope you'll save all of the decrees that need saving and improve the ones that could stand some improving, and we look forward to working with you on that.

MAKAN DELRAHIM: Thank you very much. David.

DAVID WALES: AAG Delrahim, we just want to thank you for letting us participate on behalf of the Chamber of Commerce. This has been a fantastic discussion, and we look forward to further dialogue. Thank you.

MAKAN DELRAHIM: Thank you very much. Brian.

BRIAN FELDMAN: Yes, thank you again for the invitation. Open Markets is pleased to be here and to continue engaging with the Department. Just two quick points that dovetail very closely with those that Diana made: first, oftentimes, the upfront costs of litigation can yield savings in the future.

And I believe a lot of this relates to the point that Mr. Eisenach had made regarding decision theory and type I and type II errors. And I do just want to point out one thing is that embedded in that framework, although it sounds mutual, is the idea that markets are contestable and that they can self-correct over time. In some cases, this is true, but over time, as we've seen as certain markets have become more concentrated, this is less and less the case. So I do think that there is a harm to under-deterrence, and in that case, imposing antitrust laws first is a way to stall economic concentration.

MAKAN DELRAHIM: Thank you. It's certainly more true in those markets that are not regulated, that limit the entry of new entrants and new innovation. So the freer the markets are — and that's ultimately, hopefully, our goal. Dr. Eisenach.

JEFFREY EISENACH: Brian, thank you for that, and it set up exactly what I wanted to say, which I will keep extremely brief. The great thing about antitrust is that we all gather here within a generally agreed upon framework of analysis and debate over points like that and bring evidence to the table. That isn't necessarily the way policymaking works in other areas of government, so it's great to be able to sit with a group of thoughtful people and have a substantive discussion.

None of us is perfectly right, but we all learn from it, and I appreciate the opportunity to be here. I think you're doing a great thing by organizing this. So thank you.

MAKAN DELRAHIM: Thank you again. Let me just remind everybody that May 31st is our third roundtable, and it's on anticompetitive regulations, both federal and state. And we welcome public commentary on this.

These things could be state bars; they could be medical licensing boards that somehow limit markets; they could be various regulations. You mentioned some in the Department of Transportation. It could be energy, telecom.

But we have a very active competition and advocacy role in financial services and other areas where we have provided comments. We continue to do that. We're doing it in a much more robust way.

We're filing statements of interest and private actions around the country. You've noticed the one down in Florida against the Florida Bar for limiting a technology company because they're practicing law. But it's really competition for folks like us, lawyers, who they'd like to limit. And we've expressed our views on the limits of the state action doctrine and other immunities.

But we would welcome public comment and continued participation like this and a great dialogue. So I thank you for that. And I thank you for being here today. [APPLAUSE]

[Roundtable Two Submissions Follow]

Issues in Antitrust Consent Decrees

Comments for Department of Justice, Antitrust Division Roundtable on the Proper Role of Antitrust Consent Decrees

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Presented to the Department of Justice
Antitrust Division

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Thanks to the Antitrust Division for inviting me to this Roundtable. I want to start by commending Assistant Attorney General Makan Delrahim for creating this opportunity to consider the proper role of consent decrees within antitrust law. I am here today as a representative of the American Bar Association's Section of Antitrust Law, but make these comments on my own behalf, not on behalf of the Section or anyone else.

Resolving antitrust matters via consent decree has become significantly more common over the last few decades and, today, the vast majority of the DOJ's (and the Federal Trade Commission's) caseload is resolved via consent.[1] In the light of these developments, it is critical to evaluate how this important tool can be best deployed to protect consumer interests.

There are two particular considerations I would like to address in my written remarks. *First*, I understand the DOJ is considering requiring parties to agree to lower the standard of proof relating to consent decree violations, from the clear and convincing to a preponderance of the evidence standard, as a condition of entering into consents. This approach has much to commend it, but also has several significant implications that should be considered before applying it across the board. *Second*, while structural remedies are typically preferred in mergers, there is also an important role for behavioral remedies—particularly in tech mergers, where terms like non-discrimination may be effectively incorporated and where failure to proceed by consent could have negative consequences for consumer welfare.

I. THE STANDARD OF PROOF FOR CONSENT DECREE VIOLATIONS

It is well-established that a party seeking to prove a violation of a consent decree term must do so with clear and convincing evidence—not just within antitrust law, but for any alleged civil contempt.[2] General Delrahim has reported that DOJ is considering whether to require parties

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[1] Douglas H. Ginsburg & Joshua D. Wright, *Antitrust Settlements: The Culture of Consent*, *in* 1 WILLIAM E. KOVACIC: AN ANTITRUST TRIBUTE 177, 178 (Charbit et al. eds. 2013) ("By the 1980s, 97 percent of civil cases filed by the Division resulted in a consent decree, and that percentage remained relatively constant at 93 percent in the 2000s. This trend has continued, with the Division resolving nearly its entire antitrust civil enforcement docket by consent decree from 2004 to present." (citing Joseph C. Gallo et al., *Department of Justice Antitrust Enforcement, 1995-1997: An Empirical Study*, 17 REV. INDUS. ORG. 75, 111-12 (2000); George Stephanov Georgiev, *Contagious Efficiency: The Growing Reliance on U.S.-Style Antitrust Settlements in EU Law*, 2007 UTAH L. REV. 971, 1006-07 (2007); Department of Justice Antitrust Division, Congressional Submission FY 2012 Performance Budget 27)); E. Thomas Sullivan, *The Antitrust Division as a Regulatory Agency: An Enforcement Policy in Transition*, 64 WASH. U.L. REV. 997, 1001 (1986) ("[T]he Antitrust Division has changed from a traditional, litigation-oriented enforcement agency to a regulatory agency.").

[2] *See, e.g.*, *FTC. v. Kuykendall*, 371 F.3d 745, 756 (10th Cir. 2004) ("[I]n the civil contempt context, a plaintiff must prove liability by clear and convincing evidence."); *FTC v. Affordable Media, LLC*, 179 F.3d 1228, 1239 (9th Cir. 1999) ("The standard for finding a party in civil contempt is well settled: 'The moving party has the burden of showing by clear and convincing evidence that the contemnors violated a specific and definite order of the

entering into consent decrees to agree to a lower preponderance of the evidence standard as a condition of accepting any consent.

The justification for revising the burden of proof is substantial. In a typical case, the DOJ will have devoted significant resources to understanding and analyzing the conduct at issue long before the possibility of a consent was ever raised. After entering into a hard-earned consent, it is odd that DOJ would face a higher burden of proving a violation of that consent than it would of proving the original unlawful conduct which, in effect, triggered the consent. And we certainly do not want to assist defendants (or especially repeat offenders) in evading mandatory consent decree terms.

However, there are a number of important, additional considerations that should be taken into account before changing the standard for proving a consent decree violation, including not only incentives for domestic antitrust agencies but also potential spillover effects for other domestic agencies—and especially for foreign competition agencies. These factors may not warrant retention of the clear and convincing standard in every case, but they do warrant some flexibility in any policy change to account for those instances in which a lower standard of proof could have unintended negative consequences. These factors, discussed in turn below, include: (a) incentives for regulatory leveraging; (b) development of antitrust rules; and (c) spillovers relating to foreign competition agency behavior.

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court.'" (quoting *Stone v. City and County of San Francisco*, 968 F.2d 850, 856 n.9 (9th Cir. 1992))); *United States v. Microsoft Corp.*, 147 F.3d 935, 940 (D.C. Cir. 1998) ("A party seeking to hold another in contempt faces a heavy burden, needing to show by 'clear and convincing evidence' that the alleged contemnor has violated a 'clear and unambiguous' provision of the consent decree." (quoting *Armstrong v. Executive Office of the President,* 1 F.3d 1274, 1289 (D.C. Cir. 1993))).

"Moreover, it is well settled in the law that a motion for contempt is the proper way to seek enforcement of a consent decree." *Hawkins v. Dep't of Health & Human Servs. for New Hampshire, Com'r*, 665 F.3d 25, 30 (1st Cir. 2012) (citing *Brewster v. Dukakis,* 675 F.2d 1, 3 (1st Cir. 1982) (stating that enforcement of a consent decree is sought by "an action for enforcement (i.e., contempt)"); *see also, e.g., Whitehouse v. LaRoche,* 277 F.3d 568, 578 n. 6 (1st Cir. 2002); *Martel v. Fridovich,* 14 F.3d 1, 3 n. 4 (1st Cir. 1993); *Johnson v. City of Tulsa,* 489 F.3d 1089, 1103–04 (10th Cir. 2007); *NLRB v. Ironworkers Local 433,* 169 F.3d 1217, 1219 (9th Cir. 1999); *United States v. O'Rourke,* 943 F.2d 180, 189 (2d Cir. 1991); *DeGidio v. Pung,* 920 F.2d 525, 534 (8th Cir. 1990); *Green v. McKaskle,* 788 F.2d 1116, 1123 (5th Cir. 1986)).

A. Incentives for Regulatory Leveraging

"Regulatory leveraging" refers to situations where an agency exploits its authority over private parties.[3] An agency can do this in several ways, including by exerting its gatekeeping function in one area (such as competition) to alter a party's behavior in another policy area (such as consumer protection) or, similarly, using its authority to alter behavior within different components of the same policy area.[4] As former FTC Chairman William E. Kovacic and Professor David A. Hyman have explained, conditions that tend to invite regulatory leveraging include *ex ante* approval authority and pre-notification requirements—conditions that are not infrequently in display in U.S. merger enforcement matters under the Hart-Scott-Rodino Antitrust Improvements Act of 1976.[5] Most mergers are time-sensitive, and time-constrained parties are likely willing to agree to more agency demands than they would were approval not required *ex ante* and expeditiously. This dynamic—of which the agencies are certainly aware—would, accordingly, allow the agencies to extract additional concessions from the parties that would not be warranted otherwise.

During merger review, for example, agencies have obtained consents related to alleged conduct issues that did not implicate the issues raised by the merger.[6] For agencies like the FTC, that house both competition and consumer protection authority, such incentives to leverage regulatory authority may be enhanced. But in a world where competition and consumer protection issues increasingly are entangled, such concerns are not clearly limited to agencies with clear jurisdiction over both policy spheres.[7]

Regulatory leveraging also tends to degrade the quality of antitrust enforcement outcomes, both substantively and procedurally.[8] Essentially, when regulatory leveraging occurs, agencies take

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[3] William E. Kovacic & David A. Hyman, *Regulatory Leveraging: Problem or Solution?*, 23 GEO. MASON L. REV. 1163, 1165 (2016).

[4] *Id.* at 1166.

[5] *Id.* at 1166-67; *see also* Joe Sims & Deborah P. Herman, *The Effect of Twenty Years of Hart-Scott-Rodino on Merger Practice: A Case Study in the Law of Unintended Consequences Applied to Antitrust Legislation*, 65 ANTITRUST L.J. 865, 883 (1997) ("Practice before a regulatory agency often requires that you bite your tongue and swallow hard, simply because the agency staffer has something you need or want—approval.")

[6] *See* Kovacic & Hyman, *supra* note 3, at 1169-70, discussing the FTC's review of Robert Bosch GmbH's acquisition of SPX Service Solutions U.S. LLC.

[7] *See id.* at 1173 n.57 ("Privacy is a fundamental human right under EU law. For this reason, one might argue that all competition authorities within the EU, at the Commission level and within the member states, have an obligation to account for privacy in applying competition law." (citing ORLA LYNSKEY, THE FOUNDATIONS OF EU DATA PROTECTION LAW 8-9 (2015)).

[8] *Id.* at 1179 ("[R]egulatory leveraging leads to less disciplined decisionmaking by governmental agencies. Substantive antitrust law governs merger reviews, but regulatory leveraging encourages agencies to ignore or downgrade those controls. The result is the discounting of both process and

their eye off the ball of consumer welfare—and the strict criteria they would need to meet in litigation, as opposed to a consent. As a result, substantive decisions may suffer because the agency is acting beyond its ideal scope; and procedure might likewise be subverted, as the agency exercises leverage over private parties in a manner not practically subject to judicial review.

B. Development of Antitrust Rules

As D.C. Circuit Judge Douglas H. Ginsburg and Former FTC Commissioner Joshua D. Wright have explained, the "culture of consent" that characterizes modern antitrust enforcement has important impacts upon the development of antitrust case law.[9] Specifically, consent decrees do not offer the same development to case law or precedent as litigated cases—they are not binding on courts and, while they provide some (limited) insights into why the agencies might condemn or seek to remedy certain factual scenarios, they tell us nothing about those cases where the agency decides no wrongdoing has occurred. This is an important point, especially for industries, like high-technology, that are fast moving or where agency stances are less well-developed.

Yet even insights regarding what the agencies might conclude constitutes a violation or appropriate remedy are often difficult to discern from consent decrees. Confidentiality rules limit what information may be publicly disseminated, and so parties attempting to read the tea leaves from existing consents may be missing facts critical to the agency's decisions.[10] The ambiguous instructions such consents offer undermines any limited precedential value they may offer.

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substance, in favor of the unimpeded pursuit of more nebulous (and often contestable) goals. . . . [R]egulatory leveraging leads to decisionmaking that is less transparent and less accountable."). *See also* Elyse Dorsey, Jan M. Rybnicek & Joshua D. Wright, *Hipster Antitrust Meets Public Choice Economics: The Consumer Welfare Standard, Rule of Law, and Rent Seeking* (forthcoming Competition Policy International, April 2018) (describing public choice implications for antitrust enforcement and developing why laws imparting more discretion to government agencies tends to further rent-seeking and corporate welfare behavior). *Cf.* FTC, Closing Statement, Google/DoubleClick, FTC File No. 071-0170, at 2 (Dec. 20, 2007), https://goo.gl/1pvDZo ("At the outset, we note that some have urged the Commission to oppose Google's proposed acquisition of DoubleClick based on the theory that the combination of their respective data sets of consumer information could be exploited in a way that threatens consumers' privacy. . . . [however] the sole purpose of federal antitrust review of mergers and acquisitions is to identify and remedy transactions that harm competition."); Pamela Jones Harbour & Tara Isa Koslov, *Section 2 in a Web 2.0 World: An Expanded Vision of Relevant Product Markets*, 76 ANTITRUST L.J. 769 (2010) ("[T]he agencies should consider framing relevant product markets around privacy issues.").

[9] Douglas H. Ginsburg & Joshua D. Wright, *Antitrust Settlements: The Culture of Consent*, *in* 1 WILLIAM E. KOVACIC: AN ANTITRUST TRIBUTE 177 (Charbit et al. eds. 2013); Joshua D. Wright & Douglas H. Ginsburg, *The Economic Analysis of Antitrust Consents*, EURO. J.L. & ECON. (forthcoming 2018).

[10] *See* Sims & Herman, *supra* note 5, at 883 ("Given that consent decree negotiations are private, and confidentiality rules (and sometimes agency prudence) limit what can be disclosed about why

Lowering the standard of proof required in contempt hearings would likely provide additional incentives for agencies to utilize consents rather than actual litigation. This may be particularly true given that, if the government were to prevail at the end of trial and achieve a court-ordered remedy, it would likely have to abide by the higher clear and convincing standard to establish a violation. We should think critically about whether moving further in the direction of consents is desirable in terms of developing antitrust case law, for reasons related to clarity and predictability for parties as well as to ensuring that we are appropriately holding agencies accountable for their actions.[11]

C. Spillovers relating to Foreign Competition Agency Behavior

Today, approximately 130 jurisdictions worldwide have active antitrust regimes.[12] Many of these regimes were adopted within the last couple decades—meaning they are still in their relative infancy. As such, foreign jurisdictions often look to more established competition jurisdictions—like the U.S.—in creating and implementing competition policy. DOJ has demonstrated it takes its role as a model for foreign jurisdictions seriously, and determining the proper application of consent decrees should be no different.

Factors to consider in the international sphere include both obvious and unintended consequences of altering the standard for ascertaining consent decree violations. For instance, to the extent other jurisdictions perceive such a change as a regulatory agency crafting an exceptional rule for competition violations under its authority, that may be undesirable and inappropriate. Particularly when foreign jurisdictions appear at times to suffer from serious due process issues and, as this DOJ has recognized, when certain foreign jurisdictions tend to approach U.S. companies—particularly IP companies—with heightened scrutiny.[13]

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the agency did what it did, it is increasingly difficult for those who are not interacting regularly with the agency and other merger lawyers to be fully informed about how the agencies (and, to an even greater degree, particular staffers) are approaching specific types of problems.").

[11] *See* Dorsey, Rybnicek & Wright, *supra* note 8 (developing the importance of mechanisms holding antitrust agencies accountable for their actions to ensuring and enhancing consumer outcomes).

[12] European Commission, Competition Policy Brief (May 2016), http://ec.europa.eu/competition/publications/cpb/2016/2016_002_en.pdf ("In the past 25 years, the number of competition regimes around the world has increased from around 20 at the beginning of the 1990s to around 130 today."); William E. Kovacic, *The United States and Its Future Influence on Global Competition Policy*, 22 GEO. MASON L. REV. 1157, 1158 n.7 (2015).

[13] *See, e.g.*, Makan Delrahim, Assistant Att'y Gen., Antitrust Div., Dep't of Justice, Remarks as Prepared for Delivery at *Antitrust in Developing Countries: Competition Policy in a Politicized World*, NYU School of Law and Concurrences, at 12 (Oct. 27, 2017), https://goo.gl/VhEb7A ("Unfortunately competition agencies in some countries may have, from time to time, treated antitrust as somehow exempt from the fundamental requirement of non-discrimination, using it to

The risk of foreign jurisdictions engaging in regulatory leveraging, like the risk of domestic agencies doing so, should also not be overlooked or underestimated. Newer jurisdictions seeking to establish their antitrust expertise on the global stage, for instance, might be especially susceptible to entering into consent decrees that are aggressive, but not necessarily narrowly tailored to strict competition issues. Regulatory leveraging might also exacerbate any due process concerns, further undermining effective competition law enforcement. Here again, preserving local courts' abilities to evaluate agency decisions would provide important constraints and help facilitate effective antitrust enforcement.

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The proposal to lower the burden of proof required for consent decree violation has a lot of merit. It also, however, carries with it the risk of unintended negative consequences. I urge the Division both to keep those concerns in mind when negotiating decrees in particular cases, and to explain the rationale and limitations of the revised standard when applied.

II. NON-STRUCTURAL MERGER REMEDIES

Antitrust courts and agencies typically favor structural remedies for otherwise problematic mergers.[14] Structural remedies can and do effectively preserve competitive incentives in many

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favor domestic companies or discriminate against foreign firms. When they do, they not only violated universal norms, but they engage in short-sighted and counterproductive public policy."); Dissenting Opinion of Commissioner Hong Tsai-Lung at 110, The Taiwan Fair Trade Commission Decision against Qualcomm, Inc., https://goo.gl/P5Dx2M ("Although I have declared that the review period was too hasty and there were issues of dispute that have yet to be clarified through reasonable examination period such *as a thorough investigation, detailed examination by all commissioners and a full discussion*, etc. However, this case was hastily passed by vote, which is hard to determine the decision was in conformity with due process."); Joshua D. Wright, *The Taiwan Fair Trade Commission's Problematic Qualcomm Decision Highlights the Urgent Need for U.S. Leadership in International Enforcement*, THE FEDERALIST SOCIETY BLOG (Dec. 13, 2017), https://goo.gl/GcL24D ("The TFTC's process and substantive analysis in the Qualcomm decision demonstrate quite clearly that the TFTC failed to comport with some of the most basic and fundamental requirements for proper adjudication of antitrust laws. Indeed, three of the TFTC's seven commissioners found the decision was sufficiently detached from established norms to take the relatively rare step of issuing strong dissenting opinions.").

[14] *See* Robert Pitofsky, *The Nature and Limits of Restructuring in Merger Review*, at The Cutting Edge Antitrust Conference (Feb. 17, 2000), https://www.ftc.gov/public-statements/2000/02/nature-and-limits-restructuring-merger-review#N_14_ ("Most restructuring proposals accepted by the FTC are successful and consumer welfare is protected. . . . The Divestiture Study findings confirm that feasible divestitures play a constructive role in the overall merger review process."); *United States v. E.I. duPont de Nemours & Co.*, 366 U.S. 316, 326 (1961) (describing divestiture as the "most effective[] of antitrust remedies").

circumstances.[15] There are, however, also important roles for non-structural remedies within merger analysis, particularly in high-tech markets.[16]

Transactions in high-tech spaces often differ importantly from transactions in more traditional spaces. Mergers or acquisitions in more traditional industries (such as retail, hospitals, oil and gas) typically entail physical assets and/or discrete business units that may be more easily identified and divorced from the primary business units—meaning both (1) the merger continues to make sense for the parties even with the divestiture, and (2) a properly crafted divestiture can meaningfully replace competition that would otherwise be lost as a result of the merger.[17] High-tech transactions, on the other hand, are frequently motivated by intellectual property and/or network effects.[18] Particularly for these kinds of transactions, non-structural remedies may provide meaningful antitrust relief.[19]

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[15] *See, e.g.*, U.S. FED. TRADE COMM'N, THE FTC'S MERGER REMEDIES 2006-2012: A REPORT OF THE BUREAUS OF COMPETITION AND ECONOMICS, at 1-2 (Jan. 2017), https://goo.gl/Z8UHwA [hereinafter FTC Merger Remedy Review] ("In evaluating the 50 orders in the case study component, the Commission staff considered a merger remedy to be successful only if it cleared a high bar—maintaining or restoring competition in the relevant market. Using that standard, all of the divestitures involving an ongoing business succeeded. . . . Overall, with respect to the 50 orders examined, more than 80% of the Commission's orders maintained or restored competition.").

[16] *See* Scott Sher & Kellie Kemp, *A Comparative Analysis of the Use of Merger Remedies in Technology Industries*, COMPETITION POLICY INTERNATIONAL (December 2014); U.S. DEP'T OF JUSTICE, DEPARTMENT OF JUSTICE ANTITRUST DIVISION, ANTITRUST DIVISION POLICY GUIDE TO MERGER REMEDIES, at 4 (June 2011), https://goo.gl/QHoXqK ("The Division's focus is on effective relief for the particular merger presented. In certain factual circumstances, structural relief may be the best choice to preserve competition. In a different set of circumstances, conduct relief may be the best choice. In still other circumstances, a combination of both conduct and structural relief may be appropriate.").

[17] *See* FTC Merger Remedy Review, *supra* note 15, at 1-2; Sher & Kemp, *supra* note 16, at 2 ("Remedies involving non-technology mergers often are easier to administer than those in technology mergers, as the divestment of an 'autonomous, on-going business unit' often is a relatively straightforward task in non-technology industries: an airline merger can be resolved with the divestiture of airport slots; a retail or supermarket merger can be resolved with the divestiture of brick-and-mortar locations in a geographic region. These are options not always available as remedies in technology company mergers."); *Ford Motor Co. v. United States*, 405 U.S. 562, 573-74 (1973) ("Complete divestiture is particularly appropriate where asset or stock acquisitions violate the antitrust laws.").

[18] *See* Scott A. Sher, *Non-structural Remedies in High-technology Markets*, 3 CLAYTON ACT NEWSLETTER 19, 20 (2002) ("Several types of high-tech markets and mergers are particularly suited for non-structural remedies, including (1) mergers in networked industries, (2) mergers where the combined company's primary source of market power rests with its intellectual property portfolios,

For example, a given merger might be desirable because it would allow the combined firm, with command of each party's IP, to create entirely new products and innovations or to accelerate such developments. But simultaneously, such a combination might facilitate the merged company's incentives and ability to exclude rivals from necessary IP. These concerns might be particularly acute if the merger would involve IP that is part of an industry standard or if it would allow the merged firm to expand its network effects. Both standards and network effects can have tremendously important procompetitive effects, allowing firms to provide new, improved products for consumers—but they also have the potential for anticompetitive exploitation.

Another important consideration is the potential impact on investment and innovation. Many vertical technology mergers occur because that was the acquired firm's objective from the outset. Significant funds are invested every year on the basis that, if the product is successful, it can be sold to a Facebook or an Intel to improve their offerings. Consumers benefit when these larger platforms can make the innovative product available more broadly. Allowing these acquisitions with non-structural remedies can benefit consumers in a way that blocking the transaction cannot.

The predominant anticompetitive concern in these cases is often that the combined firm would be able to exclude competitors from critical technology. Resolving such concerns may be best accomplished, not through divestiture or a full-stop injunction, but through behavioral restrictions mandating, for instance, access on non-discriminatory terms for rivals. Such behavioral remedies may more effectively address the competitive concerns at issue.

It is also important to note that divestitures in such circumstances may be unworkable. This might be the case either because practically it is too difficult to discern where to draw the necessary lines for divestiture or because the appropriate divestiture package would vitiate the value of the deal for the parties.[20] In such cases, if the choice is framed as structural remedies or blocking the deal, consumers might lose out on the valuable innovations the deal would facilitate because structural remedies proved unmanageable. Behavioral remedies, then, might allow consumers to realize the value of the innovations from the deal, while forbidding the anticompetitive behaviors causing concern.

In the DOJ's investigation of *Google/ITA* (2011), for instance, the DOJ was concerned the transaction would allow Google anticompetitively to degrade or even deny rivals' access to ITA Software's airfare pricing and shopping systems (P&S systems).[21] The DOJ also recognized,

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and (3) mergers where the relationship between the merging entities is vertical, rather than horizontal.").

[19] *Id.*; Sher & Kemp, *supra* note 16, at 5.

[20] Sher, *supra* note 18, at 27, ("In high-technology markets, the agencies should consider non-structural remedies to resolve competitive concerns not only because such remedies have the potential to better preserve the efficiencies of a merger, but also because structural remedies are often impossible to fashion to address the competitive concerns in many of these industries.").

[21] Final Judgment, *United States v. Google, Inc. & ITA Software, Inc.*, Case No. 1:11-cv-00688, (D.C. Oct. 5, 2011), http://www.justice.gov/atr/cases/f275800/275897.pdf.

however, that the transaction would help the combined company to realize significant procompetitive efficiencies. Accordingly, DOJ permitted the transaction to proceed with certain behavioral remedies, including that Google must continue to license ITA's P&S systems software to other companies, impose a firewall to prevent Google from obtaining sensitive competitive information (to mitigate concerns regarding future discrimination), and establish a formal process for addressing customer and competitor complaints and agree to DOJ monitoring for five years. These remedies effectively preserved competition in the market while allowing the parties to realize the efficiencies from the merger—benefits that could not have been obtained with structural remedies. (This and a few other example of successful decrees are summarized in the attached addendum.)

It is true enough that behavioral remedies place a burden on the Division to monitor the remedy for compliance, and that violations may be difficult to detect. This is an important consideration. But it should not outweigh the procompetitive effects of allowing an otherwise beneficial acquisition in every case. What is needed, rather, is a close examination of the likely enforcement costs against the consumer benefits of allowing the transaction subject to behavioral conditions. There is no "one-size-fits-all" approach that can be expected to work.

The DOJ (and the FTC) have extensive experience in reviewing mergers, and have previous examples—both successful and unsuccessful—to turn to in crafting workable, effective remedies. Where the costs of non-structural remedies are outweighed by their benefits, which is often the case, consumers will benefit from the prospect for enhanced dynamic competition and innovation.[22]

III. CONCLUSION

This roundtable creates an important opportunity for the antitrust community to analyze how consent decrees can be crafted and enforced so as to best protect consumer interests. I thank the DOJ for inviting me to join this discussion and look forward to a valuable conversation on these issues.

[22] *See* Sher, *supra* note 18, at 27 ("If non-structural remedies ultimately benefit consumers by preserving and maximizing merger efficiencies, then such relief may indeed be more appropriate regardless of the cost to enforce it.").

Addendum

Below are case summaries describing four acquisitions that were subject to behavioral remedies in the U.S. and Europe. The summaries provide a (1) short description of the transaction; (2) an overview of the reviewing agency's concerns; (3) a description of the potential efficiencies stemming from the transaction; and (4) an explanation of the behavioral commitments put forth.

1. Northrop Grumman Corp. / TRW Inc. (DOJ cleared in 2002 subject to conduct remedies)

- ***Key Message:*** *The behavioral commitments preserved the synergies gained from vertical integration while preventing the merged entity from discriminating against upstream or downstream rivals or using rivals' sensitive information to gain a competitive advantage.*

- **Description of Transaction**: In 2002, Northrop Grumman Corp. ("Northrop") announced its intent to acquire TRW Inc. ("TRW") for $7.8 billion.[23] Northrop was one of only two U.S. companies that manufactured the payload used in reconnaissance satellites, while TRW was one of the only companies with the ability to serve as a prime contractor on U.S. government reconnaissance satellite programs. Importantly, the Department of Defense relied on prime contractors to select the best payloads for their satellites.

- **Agency Concerns**: The DOJ was concerned that the vertical integration would give Northrop the ability and incentive to lessen competition by (1) favoring its in-house payload if it was selected as the prime contractor, and (2) by refusing to sell its payload to competing prime contractors.[24] Additionally, the DOJ noted that the merger could pose a threat to the proprietary information of rival prime contractors and payload suppliers that entered into partnership agreements with Northrop.

- **Potential Efficiencies**: The vertical integration would allow Northrop to be both the prime contractor and the payload provider for reconnaissance satellites. Markedly, the Department of Defense (the only customer affected by the transaction) determined that the acquisition "offered the possibility of increased competition for its space requirements."[25]

- **Behavioral Commitments**: The DOJ required Northrop to enter into a consent decree as a condition to approving the merger. The decree required Northrop to act in a non-discriminatory manner in: (1) choosing a payload for a satellite program where Northrop is acting as the prime contractor, and (2) supplying its payload to prime contractors competing with Northrop for U.S. satellite programs. Northrop was also required to maintain a firewall between its payload business and its prime contractor business. In reaching this conclusion,

[23] https://news.northropgrumman.com/news/releases/northrop-grumman-to-acquire-trw-for-60-per-share-in-stock.

[24] https://www.justice.gov/archive/atr/public/press_releases/2002/200543.htm.

[25] https://www.justice.gov/atr/case-document/competitive-impact-statement-165.

the DOJ noted that given the "significant competitive benefits" that would not occur absent the merger, "strict behavioral prohibitions and significant potential sanctions [was] the best available means of satisfying the public interest in competition."[26]

2. Google/ITA (DOJ cleared in 2010 subject conduct remedies)

- ***Key Message****: The behavioral commitments allowed the combined entity to develop new flight search tools while preventing the merged firm from denying its OTI competitors access to a key input (i.e., QPX software).*

- **Description of Transaction**: In 2010, Google announced its intent to acquire travel software company ITA for $700 million dollars. ITA was the developer and licenser of QPX software, which was used by airlines, travel agents, and online travel intermediaries ("OTIs") to provide customized flight searches.

- **Agency Concerns**: The DOJ alleged that the merger would give Google the ability and incentive to deny OTIs access to (or raise their prices) for QPX software, as Google planned to introduce its own competing OTI site. Additionally, the DOJ alleged that Google could gain access to competitively sensitive information from OTIs via QPX licensing agreements.

- **Potential Efficiencies**: Although DOJ did not explicitly reference the efficiencies stemming from the vertical integration, Google argued that the acquisition would allow it to pursue the creation of new flight search tools that would enable users to find better online flight information and drive more customers to airlines' and online travel agencies' websites.[27]

- **Behavioral Commitments**: Recognizing that the merger would generate significant procompetitive effects, the DOJ allowed the transaction to proceed but required Google (1) to honor existing QPX licenses and renew existing licenses under similar terms and condition; (2) offer licenses to other OTIs on reasonable, non-discriminatory terms; (3) devote substantially the same amount of resources to R&D for QPX as ITA did before the merger; (4) to not use certain restrictive terms in its agreements with airlines and OTIs; and (5) to firewall OTIs' competitively sensitive information from personnel involved in Google's travel search service. Google also agreed to establish a formal process for customer and competitor complaints and submit to government monitoring for five years.

3. Intel/McAfee (EU cleared in 2010 subject to conduct remedies)

- ***Key Message****: The behavioral commitments allowed the combined entity to develop more sophisticated chipsets using McAfee's security know-how, while ensuring interoperability between the merged entity's products and those of their competitors.*

[26] *Id.*

[27] https://www.google.com/press/ita/faq.html.

- **Description of Transaction**: In August 2010, chipset manufacturer Intel announced its intention to purchase security technology company McAfee in a deal valued at $7.68 billion.[28] Although the parties didn't directly compete, their products were closely related from both a technical and a commercial point of view.

- **Agency Concerns**: The European Commission expressed concern that Intel might favor its McAfee business by interfering with interoperability between its CPUs and endpoint security solutions offered by McAfee's rivals, or that Intel might bundle McAfee's products with Intel's hardware. The Commission also feared that Intel might prevent McAfee from interoperating with non-Intel CPUs and chipsets.

- **Potential Efficiencies**: Although the Commission didn't explicitly describe the efficiencies stemming from the merger, experts noted that the purchase of McAfee would give Intel access to more security specialists and the ability to hardwire more of these security tools into its chips.

- **Behavioral Commitments**: In February 2010, the Commission conditioned approval of the merger on Intel committing to numerous conduct remedies, including refraining from selling an integrated package of CPU and anti-virus software as well as taking specific steps to ensure that its CPUs interoperated with McAfee antivirus competitors. Intel also committed not to actively impede competitors' security solutions from running on Intel CPUs or chipsets. The Commission concluded that the "commitments were suitable to remove the competition concerns identified while preserving the efficiencies of the merger, because they are designed to maintain interoperability between the merged entity's products and those of their competitors, thereby ensuring competition on an equal footing between the parties and their competitors."[29]

4. AlliedSignal/Honeywell (EU cleared in 1999 subject to divestiture and conduct remedies)

- ***Key Message****: The behavioral commitments prevented the combined entity from foreclosing competition in the developing IHAS market while preserving the efficiencies of the transaction (i.e., the development of next generation IHAS technology).*

- **Description of Transaction:** In June 1999, AlliedSignal announced its proposed $13.8 billion acquisition of Honeywell. AlliedSignal was a manufacturing company with operations in aerospace, automotive products and engineered materials. Honeywell was an international controls company that developed and supplied advanced technology products, systems and services for the aerospace industry.[30]

[28] https://newsroom.intel.com/news-releases/intel-to-acquire-mcafee/.

[29] http://europa.eu/rapid/press-release_IP-11-70_en.htm.

[30] http://www.nytimes.com/1999/06/07/business/allied-signal-and-honeywell-to-announce-merger-today.html

- **Potential Efficiencies**: The Commission found that Honeywell's engineering know-how paired with AlliedSignal's TAWs technology would permit the successful development of a next generation Integrated Hazard Surveillance Systems (IHAS).[31]

- **Agency Concerns**: The parties both competed in the following three markets: (1) the Airborne Collision Avoidance Systems ("ACAS") market; (2) radar systems for civil helicopters market; and (3) for Terrain Awareness Warning Systems ("TAWS") market. One of the commission's main concerns was that the combined entity could foreclose TAWs competitors by preventing them from interoperating with the combined entity's other avionics products. Additionally, the Commission expressed concern that the combined entity could foreclose competition in the next generation IHAS market by refusing to license AlliedSignal's TAWs technology (an essential input for IHAS) to potential IHAS competitors. One other issue concerned the ability of the new entity to bundle offers of avionics products and non-avionics products, which would give it substantial commercial advantages in the marketplace.

- **Behavioral Commitments**: The Commission authorized the merger subject to the combined entities' compliance with a number of divestiture and behavioral commitments, including (1) supplying third parties with open interface standards of other avionics products, so that new Terrain Awareness Warning Systems (TAWS) suppliers could have their products installed on airplanes which are equipped with other avionics from the parties; (2) supplying third parties with TAWS technology as well as interface data, so that third parties could continue to carry out IHAS product developments with crucial AlliedSignal technology; and (3) not pursuing a policy of selling avionics and non-avionics jointly.[32]

[31] http://ec.europa.eu/competition/mergers/cases/decisions/m1601_en.pdf.

[32] http://europa.eu/rapid/press-release_IP-99-921_en.htm.

PUBLIC COMMENTS OF THE AMERICAN ANTITRUST INSTITUTE
PREPARED FOR THE ANTITRUST DIVISION ROUNDTABLE
EXAMINING ANTITRUST CONSENT DECREES

APRIL 26, 2018

I. Overview

AAI is pleased to participate in the Antitrust Division's Public Roundtable Discussion Series on Regulation & Antitrust Law. AAI is an independent, nonprofit organization devoted to promoting competition that protects consumers, businesses, and society. Please see antitrustinstitute.org for more information. AAI commends the U.S. Department of Justice (DOJ) for hosting this roundtable discussion on consent decrees. The AAI believes that consent decrees negotiated in settled merger and non-merger antitrust cases raise a number of important issues. These comments address three major themes: (1) broader issues of enforcement policy that are raised by consent decrees; (2) the disadvantages of behavioral remedies contained in decrees; and (3) questions and considerations to help guide the DOJ's policy on termination or modifications of perpetual decrees.

II. Issues Generally Raised by Antitrust Consents

Antitrust consent decrees raise issues that are integral to the goals and effectiveness of antitrust enforcement in promoting competition and protecting consumers from unlawful, harmful anticompetitive behavior. These issues apply equally to consents that are negotiated in merger and non-merger settings, and are of time-limited or perpetual duration. The most central of these issues include:

- The guiding principle for merger remedies contained in antitrust consents is that they must be effective. This means they must fully restore competition that is lost by an illegal merger or mitigate the risk that post-merger firms will act on incentives to exercise any form of market power, alone or in concert with rivals. Consents that rely on behavioral restraints to prevent the exercise of market power are not effective, since they create incentives for market participants to circumvent the remedy, leading to harm to competition and consumers.

- In conduct cases, the standard that a remedy must fully restore competition is aligned with the goals of antitrust and DOJ's role as a law enforcement agency. Law enforcers are not administrative agencies that regulate through forward-looking rules to promote competition and other societal or economic goals. Rather, DOJ's antitrust remedies in conduct cases must prevent and deter future violations and, where necessary, compensate victims.

III. Behavioral Remedies

A. The Ineffectiveness of Behavioral Remedies

AAI has consistently advocated for the U.S. antitrust agencies to forebear from using regulatory-style behavioral (or conduct) remedies and to remain consistent with the agencies' own stated and strong preferences for structural remedies. This applies equally to merger and non-merger consent decrees. Behavioral remedies are well known to be fraught with problems that directly affect their deterrence value.[1] They articulate prohibited, permitted, and required conduct without changing the merged firm's incentives to exercise market power. Behavioral remedies thus encourage circumvention of the remedy.

Behavioral remedies require ongoing monitoring and enforcement by the agencies and the courts, which are not well suited to act as regulators. Such remedies often depend on smaller market participants, under the weak protection of anti-retaliation provisions, to come forth to lodge complaints about non-compliance. The AAI believes that high levels of market concentration increase smaller entities' (rivals, customers, or suppliers) fear of retaliation and reduce the effectiveness of anti-retaliation provisions. Decrees that rely on arbitration provisions for complaint resolution demand considerable time and resources and are likely to lead to suboptimal settlements that defeat the purpose of fully restoring competition. Moreover, firewalls that attempt to limit anticompetitive information transfers between affiliates of a merged company are difficult to police.

Behavioral remedies are thus oriented around a "design" standard, i.e., compliance with the requirements of the remedy. This stands in stark contrast to structural remedies that are shaped around a "performance" standard, or an "obligation in terms of ultimate goals that must be achieved."[2] Behavioral remedies thus carry a higher risk of failure, a risk that is more likely to be shouldered by consumers, not the merging parties.[3]

Behavioral remedies are also undermined by evidence that the types of efficiencies they are designed to promote are not realized in consummated merger transactions.[4] A major reason for this is that after the merger, managers must often simultaneously integrate the merging business ecosystems, spin off assets to comply with any divestiture requirements, and also make good on their promises

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[1] *See* John E. Kwoka & Diana L. Moss, *Behavioral Merger Remedies: Evaluation and Implications for Antitrust Enforcement*, 57 ANTITRUST BULL. 979, 994, 1010 (2012). *See also,* John E. Kwoka Jr., *Does Merger Control Work? A Retrospective on Enforcement Policy, Remedies, and Outcomes* 78 ANTITRUST L. J. 619, 636 (2013); *See also,* Makan Delrahim, Asst. Att'y Gen., Dep't of Justice, Antitrust Div., Keynote Address at American Bar Association's Antitrust Fall Forum (Nov. 16, 2017), https://www.justice.gov/opa/speech/assistant-attorney-general-makan-delrahim-delivers-keynote-address-american-bar.

[2] *See, e.g.*, Steven C. Salop, *Modifying Merger Consent Decrees to Improve Merger Enforcement Policy*, 31 ANTITRUST 15 (2016).

[3] *See, e.g.*, Bill Baer, Responses of Assistant Attorney General Bill Baer to Questions Submitted for the Record Senate Judiciary Committee Subcommittee on Antitrust, Competition Policy, and Consumer Rights Hearing: "Oversight of the Enforcement of the Antitrust Laws" (Mar. 9, 2016), https://www.judiciary.senate.gov/imo/media/doc/Baer%20Responses%20to%20QFRs.pdf; D. Bruce Hoffman, Acting Director, Bureau of Competition, U.S. Fed. Trade Comm'n, It Only Takes Two to Tango: Reflections on Six Months at the FTC, 6-7 (Feb. 2, 2018), https://www.ftc.gov/system/files/documents/public_statements/1318363/hoffman_gcr_live_feb_2018_final.pdf.

[4] Scott A. Christofferson, Robert S. McNish, and Diane L. Sias, *Where mergers go wrong,* McKinsey Quarterly (May 2004), https://www.mckinsey.com/business-functions/strategy-and-corporate-finance/our-insights/where-mergers-go-wrong.

to deliver cost savings and consumer benefits. Completing these tasks presses on the bounds of managerial competency at the same time they create significant changes that are likely to affect profit-maximizing incentives, relationships between affiliates, and other key operational factors. Collectively, these factors affect post-merger operations, conduct, and strategy.

B. Ineffectiveness of Some Types of Structural Remedies

Some structural remedies contained in consent decrees also are ineffective. The FTC has experienced problems with some structural remedies involving divestitures of targeted assets. In the merger of retail grocers Safeway and Albertsons, the FTC-approved sale of almost 150 stores to a regional west-coast grocer (Haggen) led to the failure and shuttering of the divested stores only a few months later.[5] In Hertz-Dollar Thrifty, the buyer of the divested assets (Advantage Rent-a-Car) filed for bankruptcy soon after the sale.[6] And despite divestitures in the UnitedHealth-Sierra and the Aetna-Prudential mergers, analysts have documented post-merger premium increases.[7]

The FTC has performed two major studies of its divestiture remedies – one in 1999 and an update in 2017.[8] The latter study observed that targeted asset divestitures are much less effective than line of business divestitures. The report noted "all of the divestitures involving an ongoing business succeeded. Divestitures of limited packages of assets in horizontal, non-consummated mergers fared less well . . . ."[9] The AAI urges the DOJ to consider these issues in crafting structural remedies and to incorporate learning from previous merger cases and retrospectives.

C. The Government's Move to Block a Merger is Often the Most Effective Remedy

In some cases, the most effective remedy may be for the government to move to block a merger. Such cases include mergers that are "too big to fix" because the degree of concentration in the industry precludes a remedy that fully restores competition. A number of recent, large horizontal mergers that have been successfully blocked by the agencies or abandoned in the face of government opposition illustrate this phenomenon. These include: Staples-Office Depot, Sysco-US Foods, John Deere-Precision Planting, GE-Electrolux, Applied Materials-Tokyo Electron, Halliburton-Baker-Hughes, and Anthem-Cigna.[10]

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[5] Press Release, Fed. Trade Comm'n, FTC Requires Albertsons and Safeway to Sell 168 Stores as a Condition of Merger (Jan. 27, 2015), https://www.ftc.gov/news-events/press-releases/2015/01/ftc-requires-albertsons-safeway-sell-168-stores-condition-merger; Brent Kendall, *Haggen Struggles After Trying to Digest Albertsons Stores*, WALL ST. J. (Oct. 9, 2015), http://www.wsj.com/articles/haggen-struggles-after-trying-to-digest-albertsons-stores-1444410394.

[6] Press Release, FSNA, Franchise Services of North America Inc. Announces Bankruptcy Filing by Simply Wheelz LLC (Nov. 4, 2013), http://www.fsna-inc.com/newspdfs/115201391920.PDF.

[7] *See, e.g.,* Guardado, Jose R, Emmons, David W. & Kane, Carol K, *The Price Effects of a Large Merger of Health Insurers: A Case Study of UnitedHealth-Sierra*, 1 HEALTH MGMT POL'Y 16 (2013); Leemore Dafny, Mark Duggan, & Subramaniam Ramanaraynan, *Paying a Premium on your Premium? Consolidation in the US Health Insurance Industry*, 102 AM. ECON. REV. 1161 (2012).

[8] FTC'S MERGER REMEDIES 2006-2012, A REPORT OF THE BUREAUS OF COMPETITION AND ECONOMICS (Jan. 2017), https://www.ftc.gov/system/files/documents/reports/ftcs-merger-remedies-2006-2012-report-bureaus-competition-economics/p143100_ftc_merger_remedies_2006-2012.pdf; A STUDY OF THE COMMISSION'S DIVESTITURE PROCESS, BUREAU OF COMPETITION (Aug. 1999), https://www.ftc.gov/sites/default/files/attachments/merger-review/divestiture.pdf.

[9] *Id.*, at 1.

[10] *See* Press Release, Fed. Trade Comm'n, *After Staples and Office Depot Abandon Proposed Merger FTC Dismisses Case from Administrative Trial Process* (May 19, 2016), https://www.ftc.gov/news-events/press-releases/2016/05/after-staples-office-depot-abandon-proposed-merger-ftc-dismisses; Press Release, Fed. Trade Comm'n, *Statement of FTC Bureau of*

The foregoing transactions share a number of characteristics: highly concentrated markets, poor prospects for new entry, the absence of viable buyers of potential divestiture assets, and complex business organizations. The viable buyer problem—where no purchaser of sufficient size, scale, or competency can be relied upon to deploy the divestiture assets so as to fully restore competition—has been at the center of several recent merger cases. These include the Safeway-Albertsons and Hertz-Dollar Thrifty cases, as noted above, where failed divestiture remedies led to assets exiting the market. In mergers that were successfully blocked by the government, including Sysco-US Foods, Staples-Office, and Halliburton-Baker Hughes, viable buyers of possible divestiture assets did not exist. uch buyers need to be capable of functioning independently (without the help of the merging parties), successfully maintaining the assets, and quickly re-injecting the competition lost by the merger.

The complexity of a remedy is likely to correlate with the complexity of a merger. A potential buyer will inherit a diverse package of assets from players that are deeply entrenched in the market. This often involves significant involvement in R&D and distribution, in addition to production and marketing. Structural remedies in such situations are often accompanied by conduct remedies such as limited-term supply agreements to increase the chances of a successful transition from the merged company to the buyer. Behavioral remedies may also include licensing and access provisions to ensure that the buyer has continued access to technology or distribution controlled by the merged company.

There is a commensurately higher risk that a complex merger remedy will not be executed successfully. The government's experiences in Comcast-NBCU, Ticketmaster-Live Nation, and even in ABInBev-Miller Coors highlight this risk. The Monsanto-Bayer and AT&T Time-Warner mergers also raise these concerns, adding to the list of deals that are "too big fix."[11] Complex remedies are therefore likely to conflict directly with the government's requirement that an effective remedy preserve competition and protect consumers. A remedy with the most deterrence value therefore might well be to move to block the deal instead.

Competition Director Debbie Feinstein on Sysco and U.S. Foods' Abandonment of Their Proposed Merger (June 29, 2015), https://www.ftc.gov/news-events/press-releases/2015/06/statement-ftc-bureau-competition-director-debbie-feinstein-sysco; Complaint, *United States v. Deere & Co.*, No. 1:16-cv-08515, at 16 and 18 (N.D. Ill. Aug. 31, 2016), https://www .justice.gov/opa/file/889071/download; Press Release, U.S. Dep't of Justice, *Electrolux and General Electric Abandon Anticompetitive Appliance Transaction After Four-Week Trial* (Dec. 7, 2015), https://www.justice.gov/opa/pr/electrolux-and-general-electric-abandon-anticompetitive-appliance-transaction-after-four-week; Press Release, U.S. Dep't of Justice, *Applied Materials Inc. and Tokyo Electron Ltd. Abandon Merger Plans After Justice Department Rejected Their Proposed Remedy* (Apr. 27, 2015), https://www .justice.gov/opa/pr/applied-materials-inc-and-tokyo-electron-ltd-abandon-merger-plans-after-justice-department; Complaint at 2, 30, 32, 36, United States v. Halliburton Co., No. 1:16-cv-00233-UNA (D. Del. Apr. 6, 2016), https://www .justice.gov/opa/file/838651/download; Complaint at 25, United States v. Anthem, Inc., No. 1:16-cv-01493 (D.D.C., Jul. 21, 2016), https://www.justice.gov/atr/file/903111/download; *see also*, United States v. Anthem, Inc., No. 17-5024, at 12- 13 (D.C. Cir. Apr. 28, 2017), https://www.justice.gov/atr/case-document/file/971316/download.

[11] See, e.g., Letter from American Antitrust Institute, Food & Water Watch, and National Farmers Union to the U.S. Department of Justice *Re: Proposed Merger of Monsanto and Bayer* (Jul. 26, 2017), http://antitrustinstitute.org/sites/default/files/White%20Paper_Monsanto%20Bayer_7.26.17_0.pdf. *See also* Letter from American Antitrust Institute, Food & Water Watch, and National Farmers Union to the U.S. Department of Justice *Re: Monsanto-Bayer Merger: Competitive Concerns Surrounding Traits-Seeds-Chemicals Platforms, Digital Farming, and Farm Data* (Oct. 3, 2017), http://www.antitrustinstitute.org/sites/default/files/AAI-FWW-NFU_MON-BAY%20addendum.pdf.

IV. Questions and Considerations to Help Guide Policy on Perpetual Consents

To determine if and how a perpetual decree should be terminated or modified, the AAI urges the DOJ to explore a number of important questions. The answers to these questions will usefully inform the DOJ's recommendations on how a particular decree or class of decrees should be approached. For example, the AAI suggests that the following queries would provide essential information to guide this process:

1. ***Persistence of the proscribed conduct.*** Does the underlying competitive problem and conduct that the consent was originally intended to proscribe still pose a significant risk to competition and consumers? If not, has the conduct that gave rise to the decree evolved to encompass more sophisticated ways to exercise market power? This could include the use of intellectual property to shape or control competition, algorithmic pricing that could facilitate coordination, the deployment of data as a strategic competitive asset or barrier to entry, or efforts to stymie competition across multiple (e.g., bricks and mortar and online) distribution channels.

2. ***Changes in markets and technology.*** Have changes in the scope and structure of markets, entry, innovation (e.g., new or improved products and services), or regulation affected the ability or incentive for market participants to exercise market power as originally proscribed? If so, how have such changes eliminated opportunities for the exercise of market power (e.g., by broadening relevant markets, encouraging entry, etc.)?

3. ***The absence of competition at the time of the decree.*** In instances where competition did not exist in the affected markets at the time of the decree, how has the decree "shaped" the evolution of competition in the industry? Could termination of a decree under such circumstances lead to inefficiencies in promoting competition? This could include the exposure by all parties to an excessively litigious market dynamic once antitrust claims begin to fill the vacuum left by a terminated decree.

4. ***Proof of competition.*** What steps are necessary to gather evidence and gain assurance regarding the state of competition in the markets affected by decrees? How will information gleaned from previous decree reviews (e.g., Assistant Attorney General Bill Baxter's 1982 reviews), and previous administrations' decisions regarding whether to leave longstanding decrees intact or to terminate or modify them, affect the Division's analysis of whether a decree warrants removal?

5. ***Changes in the standard for determining the original competitive harm***. Has the formal or informal standard (e.g., *per se* or rule of reason) for evaluating the conduct proscribed by the decree changed since the decree was put into place? Although the DOJ and the courts may now adhere to a "looser" standard for determining whether a competitive problem exists, for example, nothing can be presumed in either direction. Indeed, more rigorous and careful scrutiny, and further investigation, may be warranted if the proscribed conduct was governed by the *per se* rule at the time of the decree but is now governed by the rule of reason.

6. ***Effects related to price determination forums.*** How would forums such as rate courts that are part of some decrees be affected by the termination or modification of a decree? How would the purpose and function of such forums be considered in this process, particularly where a marked transition from administrative rate setting to market price determination is a possibility?

7. ***Options if the risk of anticompetitive conduct remains***. Under what circumstances would the DOJ decide to terminate a decree where anticompetitive incentives persist and seek structural relief in a new settlement? Under what conditions would the agency seek to impose sunset provisions on a decree and what considerations would govern the agency's reasoning on the timing of a sunset?

U.S. DEPARTMENT OF JUSTICE, ANTITRUST DIVISION

ROUNDTABLE SERIES ON COMPETITION AND DEREGULATION

ROUNDTABLE ON CONSENT DECREES

Prepared Statement of Jeffrey A. Eisenach, Ph.D.
Visiting Scholar, American Enterprise Institute

April 26, 2018

Thank you for the opportunity to appear at this important roundtable on the use of consent decrees in antitrust enforcement. Before getting to the substance of my remarks, let me emphasize that I am appearing solely on by own behalf and that the views I express do not necessarily represent those of the American Enterprise Institute or of any other entity with which I am affiliated.[1]

Consent decrees are the primary means by which the antitrust enforcement agencies seek to remedy harms to competition caused by mergers and by anticompetitive conduct. Such remedies may take a variety of forms, but generally are classified into two main categories, structural and behavioral. Structural remedies operate by seeking to permanently separate the ownership of assets which, if owned by a single firm, would likely to be used to harm competition and consumers. Behavioral (or "conduct") remedies, by contrast, allow the potentially anticompetitive assets to remain together under a single owner, but restrict or place conditions on the manner in which the assets can be deployed.

The appropriate design of antitrust remedies raises a multitude of issues – including but not limited to the need for administrability, the goal of efficient deterrence, the danger of multi-jurisdictional redundancies or inconsistencies,[2] and the appropriate balance between protecting competition and harming incentives for innovation. In these remarks, I focus on two primary themes. *First*, in thinking about remedies from a policy perspective, it is useful to distinguish between remedies that address horizontal concerns and remedies that address vertical concerns, and between remedies involving mergers and remedies involving anticompetitive conduct.

[1] In addition to my role at AEI, I am a Managing Director at NERA Economic Consulting, where I regularly consult on antitrust and related matters. The opinions expressed herein relate to policy issues and should not be interpreted as reflecting my opinions on any specific matter.

[2] See generally Jeffrey A. Eisenach and Robert Kulick, "Do State Reviews of Communications Mergers Serve the Public Interest?" *Federal Communications Law Journal* (forthcoming 2018).

Second, in all of these contexts, remedies policy should be guided by the principle of regulatory humility.

First, while the issues associated with proper remedy design are generic, the circumstances in which they are applied are not. At the most fundamental level, remedies policies should distinguish between the nature of the underlying competitive concerns (that is, whether the issues are horizontal or vertical) and between situations involving illegal conduct and situations involving mergers. That is, remedies policy should distinguish clearly between the four sets of circumstances depicted in Table 1 below.

TABLE 1:
REMEDY GOALS, OBJECTIVES AND CONCERNS

	Horizontal	**Vertical**
Conduct	• Standard: *Per se* (Sherman §1) • Competitive Concerns: Higher prices/lower quality; supracompetitive profits • Primary Remedy Goals: Deter or enjoin future conduct; remediate damages to consumers • Primary Remedy Concerns: Efficient mix/level of penalties relative to enforcement/detection; incentivizing over-compliance	• Standard: Rule of reason (Sherman §2) • Competitive Concerns: Raising rivals costs/foreclosure of actual or potential competition • Primary Remedy Goals: Deter or enjoin future harmful conduct; remediate competitive harm; restore competition • Primary Remedy Concerns: Creating dyssynergies; discouraging efficient conduct; harming innovation
Mergers	• Standard: Reasonable likelihood of substantial harm to competition (Clayton §7) • Competitive Concerns: Unilateral or coordinated effects; supracompetitive profits • Primary Remedy Goals: Preserve competitive conditions in the relevant market/preserve static competition and consumer choice/prevent higher prices • Primary Remedy Concerns: Preventing realization of static efficiencies; creating dyssynergies; divestiture viability	• Standard: Reasonable likelihood of substantial harm to competition (Clayton §7) • Competitive Concerns: Creating "incentive and ability" to foreclose/raise rivals' costs • Primary Remedy Goals: Preserve competitive conditions in the relevant market; prevent foreclosure of actual or potential competition • Primary Remedy Concerns: Preventing realization of dynamic efficiencies; discouraging efficient conduct; harming innovation

While these distinctions have multiple implications for remedies policy, I will highlight just two. First, the issues in horizontal cases are often relatively clear cut compared with vertical matters; and, the stakes in vertical matters are arguably higher, as may be more likely than horizontal matters to implicate dynamic competition and innovation, and thus have larger implications for economic welfare.[3] As a result, the risks of "getting remedies wrong" (that is, the combined costs associated with Type I *and* Type II error)[4] are likely higher in vertical cases than in horizontal ones. Thus, in my view, the current focus in academic and policymaking circles on vertical issues is, in my opinion, well placed.

A second take-away from Table 1 relates to the distinction between conduct cases and mergers. Specifically, in conduct cases the anticompetitive effect is presumed, and the likelihood of harm to economic efficiency from potential remedies is at most prospective; in mergers the situation is reversed – anticompetitive effects are prospective, and potential for remedies to limit the realization of synergies is front and center. Thus, while both types of cases implicate similar issues of effective remedy design, the goals and objectives, and the benefits and costs, of potential remedies are inherently different. For example, in a vertical monopolization case, the objective is to restore competition to its pre-conduct state, which may (if the effect of the conduct was to create a monopoly where none existed before) include "dismantling the monopoly to restore the competitive environment that would have existed without the violation."[5]

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[3] See e.g., Michael L. Katz and Howard A. Shelanski, "Merger Policy and Innovation: Must Enforcement Change to Account for Technological Change?" in Adam B. Jaffe, Josh Lerner and Scott Stern, eds., *Innovation Policy and the Economy*, Vol. 5 (MIT Press, 2005) 109-165. Of course, horizontal conduct and transactions can also have significant effects on innovation. See e.g., *F.T.C. v. PPG Indus., Inc*., 628 F. Supp. 881 (D.D.C. 1986), aff'd 798 F.2d 1500 (D.C. Cir. 1986).

[4] See e.g., Frank H. Easterbrook, "The Limits of Antitrust," *Texas Law Review* 63;1 (August 1984) 1-40.

[5] U.S. Department of Justice, *Competition and Monopoly: Single-Firm Conduct Under Section 2 of the Sherman Act* (2008) at 144 (*citations omitted*) (hereafter *Section 2 Report*).

Putting these two concepts – the relative importance of vertical issues and the need to distinguish between conduct cases and mergers – leads me to offer two suggestions: (a) The agencies should give serious consideration to proposals to update the 1984 Vertical Merger Guidelines;[6] and, (b) the agencies should also consider providing policy guidance on the design of remedies in vertical conduct cases, picking up where the Antitrust Division's 2008 report on single firm conduct under the Sherman Act left off.[7]

My second overall theme relates to regulatory humility and the purposes of antitrust. As FTC Chair Maureen Ohlhausen has eloquently explained, regulatory humility means always keeping in mind the limits of government's ability to improve market outcomes through regulatory interventions.[8]

Happily for antitrust enforcers, the antitrust laws are broadly consistent with the principle of regulatory humility. As the Antitrust Modernization Commission explained in 2007:

> Antitrust law in the United States is not industrial policy; the law does not authorize the government (or any private party) to seek to "improve" competition. Instead, antitrust enforcement seeks to deter or eliminate anticompetitive restraints. Rather than create a regulatory scheme, antitrust laws establish a law enforcement framework that prohibits private (and, sometimes, governmental) restraints that frustrate the operation of free-market competition.[9]

To be sure, there is some unavoidable tension between these broad principles and the use of remedies, since every remedy is at least in some sense a "regulatory scheme" designed to "improve competition" compared with some but-for world. The goal of remedies policy should

[6] For a review of recent merger cases in the information technology sector, see Jeffrey A. Eisenach, "US Merger Enforcement in the Information Technology Sector," in *Handbook of Antitrust, Intellectual Property and High Tech* (Roger Blair and Daniel Sokol, eds.) (Cambridge University Press, 2017).

[7] See *Section 2 Report* at 143-163.

[8] See e.g., Maureen K. Ohlhausen, "The Procrustean Problem with Prescriptive Regulation," Sixth Annual Telecom Policy Conference, Free State Foundation (Washington, D.C. Mar. 18, 2014) (available at http://www.ftc.gov/system/files/documents/public_statements/291361/140318fsf.pdf).

[9] Antitrust Modernization Commission, *Report and Recommendations* (April 2007) at 3.

be to reduce these tensions to the extent possible. In my opinion, three guiding principles can help to do so.

First, as the 2004 *Remedies Guidelines* explained, "structural remedies are preferred to conduct remedies … because they are relatively clean and certain, and generally avoid costly government entanglement in the market."[10] At that time, the Division concluded – correctly I believe – that conduct remedies are inferior to structural remedies in at least four ways, including the need for direct monitoring, indirect costs associated with firms' efforts to evade conduct restrictions, the risk of discouraging efficient conduct, and the prospect of preventing subject firms from responding efficiently to change.

To these reasons for favoring conduct over structural remedies, I would add a fifth: The potential for conduct remedies to spawn *de facto* regulatory agencies with lives of their own, complete with budgets, staffs and "constituencies." As Peter Huber put it in his assessment of the 1982 AT&T Modified Final Judgment, in such cases "the best of antitrust degrades into the worst of commission," producing what he called "degenerate antitrust bureaucracies" that develop their "own lore, unique traditions, precedents, procedures, formalities and technical vocabulary."[11]

To be clear, the 2004 *Remedies Guidelines* did not reject the use of conduct remedies outright, nor am I.[12] Rather, I am suggesting they be applied with more care and greater caution than the revised 2011 *Remedies Guidelines* seem to suggest.[13]

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[10] U.S. Department of Justice, *Antitrust Division Policy Guide to Merger Remedies* (October 2004) at 7.

[11] See Peter Huber, *Law and Disorder in Cyberspace: Abolish the FCC and Let Common Law Rule the Telecosm* (Oxford University Press, 1977) at 98-99.

[12] See e.g., Jeffrey A. Eisenach and Ilene K. Gotts, "In Search of a Competition Doctrine for Information Technology Markets: Recent Antitrust Developments in the Online Sector," *in Competition and Communications Law: Key Issues in the Telecoms, Media and Technology Sectors* (Kluwer Law International, 2014) 69-90.

[13] U.S. Department of Justice, *Antitrust Division Policy Guide to Merger Remedies* (June 2011) at 12 ("There is a panoply of conduct remedies that may be effective in preserving competition.").

This brings me to my second guiding principle, which is that conduct remedies, when applied, should be of limited duration. Sunset provisions both limit the potential damage associated with imposing inflexible conditions on a changing market and also serve as a prophylactic against institution building. Time limits are especially important in dynamic markets, where "decrees of long duration can soon become obsolete."[14]

My third proposed guiding principle applies to both structural and conduct remedies, and consists of a simple admonishment to heed one of the most fundamental and enduring laws of economics: the Law of Unintended Consequences.[15] Applied to remedies policy, the Law of Unintended Consequences reminds us that – despite the wealth of data and sophisticated analytical tools we bring to the task – our ability accurately to predict the effects of regulatory interventions in the economy is limited. As a practical matter, it suggests the burden of proof in designing remedies of all kinds should be on the government, to demonstrate that the benefits of any remedy are reasonably likely to exceed the costs.[16]

Thank you again for the opportunity to present these remarks. I look forward to participating in the discussion.

[14] See *Section 2 Report* at 148 ("In fast-changing markets, however, absent sufficient adaptability, decrees of long duration can soon become obsolete, with unintended effects that potentially can stifle a defendant's ability to compete, thereby harming consumers.") (*citations omitted*).

[15] See Rob Norton, "Unintended Consequences," *The Concise Encyclopedia of Economics* (2008) (available at http://www.econlib.org/library/Enc/UnintendedConsequences.html),

[16] For example, the Antitrust Procedures and Penalty Act (the "Tunney Act") requires the Justice Department to prepare a Competitive Impact Statement when it enters a consent decree. See 15 U.S.C. § 16.

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STATEMENT OF GEORGE SLOVER
SENIOR POLICY COUNSEL
CONSUMERS UNION

ANTITRUST DIVISION ROUNDTABLE DISCUSSION

ON

CONSENT DECREES

April 26, 2018

Introduction

Thank you for inviting Consumers Union, the advocacy division of Consumer Reports,[1] to this important discussion on the appropriate role of consent decrees in furthering the objectives of sound antitrust enforcement.

From our founding over 80 years ago, we have been strong supporters of the antitrust laws. We deeply appreciate the importance of sound and effective antitrust enforcement in protecting and promoting healthy competition in the marketplace, and the benefits that brings all of us as consumers, through the leverage of choice.

Consent decrees are a core part of that sound and effective antitrust enforcement. Each of them is a resolution of conduct, or a merger, that posed enough concern to convince either the Justice Department or the FTC that enforcement resources had to be marshalled to stop it. Each decree embodies an agreement by the defendants, whose conduct or merger created that concern, on what specifically they will do to remove that concern.

So those defendants, who created the concern that gave rise to the enforcement, don't really have much of any equitable claim to getting out from under what they agreed to.

The rest of the marketplace does have an equitable claim, however – in the marketplace's continued healthy competitive functioning. If the restrictions and obligations imposed on the defendants begin to interfere with that healthy competitive functioning, begin to hold back overall growth and innovation, then that's a reason to reconsider those restrictions and obligations. And realistically, the defendants may be among the first to recognize that that's happening. So they should have a right to be heard – but should expect to be greeted with some skepticism. What's important is what's good for the marketplace.

[1] Consumers Union is the advocacy division of Consumer Reports, an expert, independent, non-profit organization whose mission is to work for a fair, just, and safe marketplace for all consumers and to empower consumers to protect themselves. Consumers Union works for pro-consumer policies in the areas of antitrust and competition policy, food and product safety, health care, financial services, telecommunications and technology, privacy and data security, transportation, and other consumer issues, in Washington, D.C., in the states, and in the marketplace. Consumer Reports is the world's largest independent product-testing organization, using its dozens of labs, auto test center, and survey research department to rate thousands of products and services annually. Founded in 1936, Consumer Reports has over 7 million subscribers to its magazine, website, and other publications.

Considerations in conduct cases vs. merger cases

How long should a consent decree endure? That would seem to depend on the kind of case.

If it's a conduct case, the consent decree is designed to give the defendants guardrails to make sure they don't slide back into their old anticompetitive habits. Once they get out of the old habits, and into healthy new habits, after a time it probably makes sense to think about removing the guardrails – if, in fact, the guardrails are interfering with the healthy competitive functioning of the marketplace.

Two reasons that might not be the case. First, if there's a likelihood that the defendants might still be tempted to slide back into their old habits. The more time that's gone by, probably the less likely that is. But that's an important consideration in whether the consent decree is still serving a purpose.

And second, if the case revealed a more fundamental market dysfunction. If the default state for a wholly unconstrained market is chaos, and if the natural market response is to rein in the chaos with collusion or market power, then the government needed to step in, and needs to stay. Historically, in some situations, we've seen Congress step in to establish a regulatory administration. But in the course of antitrust enforcement, it could be a consent decree that adds the right amount of structure, to quiet the chaos while guarding against the creation, or at least against the exercise, of the market power.

One good example of that is the ASCAP and BMI decrees. They have worked quite well in enabling music to be used conveniently and the creators to be compensated reliably – notwithstanding the complicating factors that continue to be discussed.

Consent decrees in conduct cases are inherently behavioral remedies. You were doing X, and we brought enforcement action to enjoin you, and you are now agreeing to stop. Maybe you are also agreeing to stop doing Y, because Y too readily sets the stage for doing X, or makes it easier to do X without being detected. Or

maybe you are agreeing that you ***will*** do Y, because Y makes it more *difficult* to do X, or more difficult to do X without being detected.

Consent decrees in merger cases are conceptually different. In a merger case, the combination is making a one-time change to what we call the structure of the market, the array of competitors, and the concern is that the change in structure will lead to a substantial lessening of competition. This lessening of competition could result from new or easier opportunities for collusion or monopolization in violation of the Sherman Act. But it could also result just from the merged company acting on its new incentives and abilities that the merger creates, in ways that may now be legal under the Sherman Act, but still harmful in comparison to what we'd have seen under the former, pre-merger market structure.

The best response to a structure-based concern is to fix the structure. That can mean divesting businesses or facilities or other key assets, so the important parts of the pre-merger structure remain intact. Or, if divestitures here and there aren't enough to keep the important parts of the structure intact, it means challenging the merger outright.

Behavioral remedies – essentially, promises to behave – fall far short of the structural fix. As explained by others with more direct experience, including AAG Delrahim, and American Antitrust Institute President Diana Moss, a behavioral remedy relies on the merged company to ignore new profit-maximizing opportunities created by the merger, to act against its incentives and abilities to increase profits – to defy its basic DNA. And to do this on a day-to-day basis, as those opportunities present themselves, and to continue doing so over the long haul.

This means either trusting the merged company, or else constantly monitoring its actions, including internal business decision-making that would ordinarily not be known outside the company walls, and refereeing complaints.

The structural remedy is a permanent fix. The behavioral remedy is inherently impermanent. It is a recipe for quagmire that lasts until the behavioral conditions are removed. And after that, we are left with the merged company still having the problematic new structural incentives and capabilities.

I don't think we can say behavioral remedies have absolutely no place in merger enforcement. We can imagine a situation where some kind of merger is shown to be overwhelmingly positive in the synergy and innovation benefits it will bring to society.

Where those benefits would simply be impossible without the merger. Where, now that we know what those benefits would be, we simply can't justify depriving society of them.

Where there's no possible divestiture that could help address the competitive concerns we've identified, without destroying the reason the merger makes sense for the merging companies, or without sacrificing those benefits.

So that all we're left with is to try to come up with some set of behavioral conditions and try to make them work. And lo and behold, what appears to be a suitable set of conditions presents itself, one that appears to be fairly easy to monitor and administer.

But those are exactly the kinds of claims I would try to make as an antitrust lawyer for every one of my merging clients. And I would always be ready to negotiate promises to behave if that would stave off divestitures or a full challenge. So I think the expressed policy that behavioral remedies for structural concerns are highly disfavored is the right policy. And I'd like to look for an even stronger word than "highly."

Moreover, no behavioral remedy for a structural problem should have an arbitrary shelf life. It should last as long as the structural problem does. Since the merger is forever, that should also be the default expectation for the behavioral conditions. Or until the marketplace has evolved past the merger to such an extent that the structural problem has disappeared.

By the same token, depending on how the marketplace has evolved, the structural problems may remain, but the behavioral conditions as originally designed no longer work to address them. It may be appropriate to keep the conditions but to update them so they remain effective.

That kind of updating is familiar for behavioral conditions in consent decrees in conduct cases. The fact that it might seem strange for a merger consent decree simply further points out the shortcomings with trying to use behavioral remedies to solve problems in merger cases.

Of course, we wouldn't want to see a shift away from behavioral remedies in merger cases become a retreat on merger enforcement. I don't think that's anyone's intent. But when the enticement of behavioral conditions is presented as an easy win-win that would avoid the costs and uncertainties of litigation, enforcers need to not only resist the enticement. They also need to be resolute in insisting on structural relief that is truly effective, whether that means sufficient divestitures to fully fix the competitive concern, or challenging the merger in its entirety. Keeping in mind that, by definition, these should all be situations in which the enforcers have determined, based on a thorough investigation, that the merger would violate the law. If not, the enforcers should not be discussing relief of any kind.

The lines between merger and non-merger cases aren't quite as clean as I've described them. Monopolization case remedies can be structural, as was the MFJ in the case against the Bell Telephone System, and Judge Jackson's initial remedy in the case against Microsoft. There, the considerations would be similar. Does the case reveal a flawed market structure that predisposes the dominant player to abuse monopoly power to thwart competition? If so, a structural remedy is likely needed. And it needs to be permanent, or to endure until the market has evolved so that the structural fix no longer addresses a current competitive risk.

Recent DOJ decree innovations

Turning to the Antitrust Division's recent consent decree innovations, I think they are indeed constructive improvements, for the most part, that can help better ensure that consent decrees serve their deterrent and remedial purposes. Specifically:

It makes sense that the burden of proof for showing that a consent decree has been violated should be the same as the burden of proof in the underlying case that led to the agreements in the consent decree in the first place.

And it makes sense that the costs for enforcing a consent decree, in the event it is violated, should be borne by the ones violating it, and not by the taxpayers.

As to the other two innovations, extending the duration of a decree as a consequence for violating it, and allowing a decree or condition to be terminated early, both of those generally good ideas warrant more discussion – in part because they assume a decree of fixed and finite duration. As I have explained, I don't think that will always be the right approach, either in a conduct case or in a merger case.

If a decree is violated, I agree that a higher level of monitoring is an appropriate consequence. But the appropriate form for that may be to consider whether the behavioral condition in the decree is written as protectively as it should be, or needs to be strengthened. That's maybe a more effective protection, and deterrent, than simply extending the duration of the same condition. Again, assuming that the condition should have even been time-limited in the first place.

And as to early termination, the rationale given, that it would be only when the decree conditions are materially impeding healthy innovation in the broader marketplace, that's the right rationale, as I have already said. I don't think this should be a decision for the Antitrust Division to be making unilaterally – particularly in conduct case decrees, and in merger decrees where there's a behavioral remedy.

The three consent decrees cases in which the Antitrust Division added these innovations were all merger cases in which the remedy was structural – one-time divestitures. And the consent decrees were just to require that the divestitures occur. That's not the kind of consent decree where we're likely to see early termination problems. It's the other decrees, the behavioral decrees, and the decrees in conduct cases that contain structural aspects, where we need to be careful to appropriately address ongoing competitive concerns.

And especially for those other kinds of decrees, we need, at a minimum, prior public notice, and a full opportunity for public comment, and an independent assessment by the court that accepted the consent decree – like the Tunney Act requires for the initial decree.

Conclusion

The consent decree is an essential part of ensuring that antitrust enforcement can stop anticompetitive conduct, or an anticompetitive merger, from enriching a narrow set of corporate interests at the expense of the broader public interest in the benefits that flow from healthy competition. The consent decree stands in for a judicial decree, and needs to be every bit as effective.

It must be tailored to stop the anticompetitive conduct, or cure the anticompetitive effects that would otherwise result from a merger. For a conduct case, it may also need to address broader structural problems in the marketplace that led to the conduct. For either kind of case, the decree must last as long as the structural problems that create the anticompetitive risk persist. And it must be adaptable so that it continues to protect the marketplace while allowing it to evolve in ways that can bring innovation and better choices for consumers.

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Public Comments Submitted by the Open Markets Institute for the Antitrust Division's Roundtable on Antitrust Consent Decrees

The Open Markets Institute welcomes the opportunity to participate in the Justice Department's roundtable discussion on antitrust consent decrees and looks forward to continuing to engage with the Antitrust Division on competition policy issues.

America's liberty and democracy depend on competition. Open and competitive markets promote innovation, resiliency, and prosperity. For this reason, we believe that preserving competition requires enforcing the antitrust laws to arrest "the rising tide of economic concentration" in its incipiency and to prevent market power rather than police it.[1]

The question before us today is the effectiveness of antitrust consent decrees. In general, we believe antitrust enforcement agencies should avoid over-reliance on such agreements. In many instances, consent decrees fail to strike at the root of anti-competitive conduct. They often serve as band-aid solutions that seek to regulate the harms generated by market power without addressing the underlying incentive and ability that firms have to wield it. Moreover, consent decrees can introduce unwieldy regulatory regimes that are both difficult to administer and susceptible to runarounds by the private parties they are intended to cover.

In limited and narrow circumstances, however, a consent decree can serve as an appropriate tool to open up to competition markets that private interests have closed through illegal or improper means.[2] As we discuss below, the select use of non-discrimination provisions and mandatory licensing behavioral decrees—especially in network and infrastructure industries—can be key mechanisms for promoting competition.

Below we provide detailed responses to the three questions on which Open Markets will lead discussion at the roundtable. Our answers detail our general philosophy: that targeting the underlying incentive and ability of a firm to wield market power is superior to policing it through

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[1] *Brown Shoe Co. v. United States*, 370 U.S. 294, 317-318 (1962).

[2] This statement by the Temporary National Economic Committee clarifies the role the consent decree can play in maintaining open and competitive markets:

> Its origin stems from the broad power of equity… unlike a decree emerging from litigation, [the consent decree] take[s] into account the potential consequences of its terms. It can make its attack upon the sources, rather than the manifestations, of restraint; give consideration to activities which would never be aired in open court; probe into matters which the prosecution could never prove; explore conduct just outside of restraint; follow wherever the trail leads. It can amend usage, create new trade practices, provide safeguards against unintended harm. Hamilton and Till, TNEC Monograph No. 16, p. 88 (1940).

consent decrees, and that the prophylactic orientation of the antitrust laws must be recovered to tackle market power across our economy.

QUESTION 1:

What are the costs and benefits of consent decrees that are designed to constrain the exercise of market power rather than to restore competition lost due to the violation?

Consent decrees that constrain the exercise of market power and attempt to restore competition may be, on the surface, appealing. But if enforcers recognize that certain market and business structures will enable firms to exercise market power, why not prevent those structures from emerging, rather than hoping that new competitors created through consent decrees will discipline dominant firms?

Relying primarily on consent decrees presents key challenges, including:

- *Continual and Costly Enforcement of Past Decrees Diverts Resources from Future Enforcement:* Ensuring consent decrees are effective requires constant monitoring by the agency. Even in cases involving compliant businesses, the agency must spend valuable labor and expertise analyzing whether any misconduct has occurred. In instances of noncompliance or disagreement between the agency and the parties, courts must intervene, presenting additional costs.[3] In practice, this means that agencies either (1) focus resources on ensuring the compliance of past decrees—at the expense of future investigations or enforcement actions—or (2) fail to ensure the compliance of past decrees.[4]

- *Acting as a Regulator Creates the Risk of Regulatory Capture:* Relying on consent decrees to restrain market power transforms the Justice Department from an enforcement agency to a regulatory agency.[5] This, in turn, incentivizes firms to lobby for restraints that are more easily avoided and creates the risk of capture.

- *Complying with the Letter of the Consent Decree Can Have Perverse Results:* Market-power restraints, such as barring price increases, are a more targeted approach. But, given the limits and asymmetries of information, expecting the Antitrust Division to address through consent decrees the full range of ways that firms with market power could abuse their dominance is unrealistic. Moreover, even with market-power restraints, firms have every incentive to comply with the letter rather than the spirit of the decree, which, as Deputy Assistant Attorney General Bernard Nigro pointed out, has led to increased

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[3] *Id.* at 27-28.

[4] The Federal Trade Commission's consent decree with Facebook in 2011 is a recent example of non-compliance. David C. Vladeck, *Facebook, Cambridge Analytica, and the Regulator's Dilemma: Clueless or Venal?*, Harv. L. Rev. Blog (Apr. 4, 2018), https://blog.harvardlawreview.org/facebook-cambridge-analytica-and-the-regulators-dilemma-clueless-or-venal/.

[5] Makan Delrahim, Enforcers Round Table, Remarks Before the ABA Section of Antitrust Law Annual Meeting (Apr. 13, 2018) ("return to the Division's mission as an enforcement agency, not a regulatory agency. ").

> complexity and longer negotiations over the terms of the decrees.[6] Furthermore, market-power restraints—on price increases, for example—may incentivize a company to cut quality in order to maintain profitability, resulting in a different form of harm.[7]

Decrees which attempt to restore competition can also prove problematic. In the past few years, two examples especially illustrate how attempts to restore competition through consent decrees can harden incumbents and weaken rivalry among industry players.[8]

Dollar Thrifty and Hertz (2013):

In approving the acquisition of rental car company Dollar Thrifty by Hertz, the FTC required Hertz to divest its Advantage Rent A Car subsidiary.[9] The FTC sought to enable Advantage to compete for the business of deplaning passengers at airports, and to inject competition into the largely concentrated rental car industry more generally, given that the FTC's approval of the merger[10] handed three companies 95% of the market.[11] As the FTC explained in a press release, "the settlement will replace the current and future competition that otherwise would have been lost as a result of the deal...enabl[ing] Advantage to become the fourth-largest car rental competitor in the United States."[12]

But four months after the government settlement in July 2013, Advantage filed for Chapter 11 bankruptcy.[13] Advantage noted that Hertz had overvalued the 24,000 cars that Hertz was leasing to the newly independent rental car company, leading Advantage to lose more than $1,600 on each sale.[14] After Advantage could not satisfy the contract's terms, Hertz terminated the leases,

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[6] Bernard Nigro, Agency Update with the U.S. Department of Justice, Remarks Before the ABA Section of Antitrust Law Annual Meeting (Apr. 11, 2018).

[7] John E. Kwoka & Diana L. Moss, *Behavioral Merger Remedies: Evaluation and Implications for Antitrust Enforcement,* American Antitrust Institute, 26-27 (Nov. 14, 2011), https://www.antitrustinstitute.org/sites/default/files/AAI_wp_behavioral%20remedies_final.pdf.

[8] *See* Ángel González, *Struggling Haggen files for bankruptcy protection, parts with Southwest co-CEO*, Seattle Times, Sept. 9, 2015, *available at* https://www.seattletimes.com/business/retail/struggling-haggen-files-for-bankruptcy-protection/; *see also Car rental company Advantage to be placed under Chapter 11*, Reuters, Nov. 5, 2013, https://www.reuters.com/article/advantage-hertz-bankruptcy/car-rental-company-advantage-to-be-placed-under-chapter-11-idUSL3N0IQ1FO20131105 [Hereinafter Advantage under Chapter 11].

[9] Decision and Order, *In re Hertz Global Holdings, Inc.*, Dkt No. C-4376, 12, https://www.ftc.gov/sites/default/files/documents/cases/2013/07/130711hertzdo.pdf.

[10] Federal Trade Commission, *FTC Requires Divestitures for Hertz's Proposed $2.3 Billion Acquisition of Dollar Thrifty to Preserve Competition in Airport Car Rental Markets* (Nov. 15, 2012), https://www.ftc.gov/news-events/press-releases/2012/11/ftc-requires-divestitures-hertzs-proposed-23-billion-acquisition [Hereinafter Hertz Divestiture].

[11] *Airport market share of major car rental companies in the United States in 2013*, Statista, https://www.statista.com/statistics/303949/airport-market-share-of-major-car-rental-companies-us/ (Last Visited Apr. 19, 2018).

[12] Hertz Divestiture, *supra* note 10.

[13] Advantage under Chapter 11, *supra* note 8.

[14] *Id.*

leaving Advantage without any rental cars.[15] Following the bankruptcy, Hertz ended up acquiring back some of the very cars that it had divested.[16]

Albertsons and Safeway (2015):
When the FTC cleared the sale of Safeway to Cerberus Institutional Partners (the parent company of Albertsons) pursuant to a consent decree, the agency predicted that the sale of 146 of Safeway, Albertsons, West Coast Von, and Pavillion stores to regional chain Haggen would restore the competitive environment in the Northwest grocery markets.[17]

Eight months after the divestiture, Haggen sued Albertsons for misrepresentations during the sale and for restraint of trade, before filing for chapter 11 bankruptcy.[18] Albertsons ended up taking back 33 of the stores originally purchased by Haggen, along with the 29 "core stores" in a later deal.[19] The saga culminated in a market far more concentrated than it had been prior to the deal, and resulted in Albertsons making a significant profit off of the stores which it had repurchased.

The two examples above illustrate how attempts to introduce competition through divestiture in already concentrated markets ultimately failed. Crafting a consent decree that effectively restores competition is difficult. It requires the agency either to have the capacity to spin-off or to grow a successful competitor with the same skill as an investment bank or M&A lawyer, or to rely on the target of the investigation for information about how it can weaken its competitive position.

Given the difficulty of enforcing decrees that seek to restrain market power in concentrated markets, and the informational limits and asymmetries that exist when crafting decrees that aim to restore competition, the agency should disfavor decrees as a remedial tool. Instead, the agency should prevent market power from arising through targeting it in its incipiency.

In the context of monopolization cases, preventing firms from establishing monopolies through acquisitions and punishing monopolistic conduct through criminal penalties and firm break-ups can be more effective than conduct restraints. In the context of mergers, the agencies should block anti-competitive mergers beforehand, rather than seek to police anti-competitive conduct after the fact. Blocking these mergers would also reduce the chance of a firm acquiring the level of market power that would create risks of monopolization.

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[15] *Id.*
[16] Brent Kendall & Jacqueline Palank, *How the FTC's Hertz Antitrust Fix Went Flat*, Wall Street Journal, Dec. 8, 2013, *available at* https://www.wsj.com/articles/how-the-ftc8217s-hertz-antitrust-fix-went-flat-1386547951.
[17] *See* Decision and Order, *In re Cerberus Institutional Partners et al*, Dkt. No. C-4504, 18-31, https://www.ftc.gov/system/files/documents/cases/150702cerberusdo.pdf
[18] González, *supra* note 8; *see also* Complaint, *Haggen Holdings, LLC., v. Albertsons LLC., Albertsons Holdings, LLC.*, 1:15-cv-00768-UNA *38-54 (D. Del. Sept. 1, 2015) *available at* https://web.archive.org/web/20150919092745/http://media2.haggen.com.s3.amazonaws.com/website/temp/Haggen_Albertsons-Timestamped_copy_of_complaint.pdf.
[19] *See* Ángel González, *Judge approves sale of Haggen to Albertsons*, Seattle Times, Mar. 29, 2016, *available at* https://www.seattletimes.com/business/retail/judge-approves-sale-of-haggen-to-albertsons/.

QUESTION 2:

Are there situations where a violation of antitrust law should be remedied by behavioral conditions?

As discussed above, we believe that strong antitrust enforcement involves curbing the emergence of market power. For this reason, we are skeptical of behavioral remedies. They routinely fail to extinguish the conditions that result in a firm's ability to exercise market power; rather, they only delay or aggravate such misconduct. Furthermore, we find that behavioral decrees are difficult to administer and invite firms to circumvent their terms.

Below, we illustrate the problems inherent in this approach by cataloging four examples of behavioral consent decrees in two vertical merger cases and in two horizontal merger cases.

Vertical Mergers:

Eli Lilly and Company/PCS Health Systems (1995):

This case involved the acquisition of pharmacy benefit manager (PBM) corporation PCS Health Systems by drug-maker Eli Lilly.[20] PBMs administer prescription drug benefits for third-party payors, and negotiate with drug-makers to lower the cost of drugs.[21] Traditionally, independent PBMs pass back a part of these cost-savings to their plan members.[22]

The combination of the PBM and drug-maker, however, removed the incentive for PBMs to bargain with drug-makers; the combined entity was now "shadow-boxing," effectively competing against itself. The merger also resulted in the possibility that Eli Lilly could use PCS Health Systems to access the confidential and proprietary drug pricing information of competing drug-makers.[23]

Regarding this latter point, the FTC imposed a behavioral consent decree that ordered Eli Lilly to implement a "firewall" between its drug and PBM businesses, designed to prevent the sharing of this sensitive information.[24] The decree also ordered Eli Lilly to maintain an 'open formulary.' This meant that Eli Lilly's PBM could not advantage Eli Lilly's drugs over those over competing drug-makers.

While we don't dispute that these conditions curbed anti-competitive behavior, we question whether blocking the deal outright would have been a more practical and efficient use of agency resources. In particular, we question the costs the FTC spent on supervising and enforcing the

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[20] Federal Trade Commission, *FTC Gives Final Approval to Lilly Order; Pledges Continued Monitoring for Anticompetitive Practices*, (Jul. 31, 1995), https://www.ftc.gov/news-events/press-releases/1995/07/eli-lilly-and-company, [Hereinafter FTC Approves Lilly Order].

[21] Brian S. Feldman, *Big pharmacies are dismantling the industry that keeps US drug costs even sort-of under control,* Quartz, Mar. 17, 2016, https://qz.com/636823/big-pharmacies-are-dismantling-the-industry-that-keeps-us-drug-costs-even-sort-of-under-control/.

[22] *Id*.

[23] *Id.*

[24] Order Reopening and Setting Aside Order, *In re Eli Lilly and Company*, Dkt No. C-3594, https://www.ftc.gov/sites/default/files/documents/cases/1999/05/elililly.htm.

decree, which, in our estimation, would have required consistent monitoring of the company's internal drug formulary computing systems.

Indeed, the decision of Eli Lilly three years later to sell PCS to Rite-Aid illustrates the fruitlessness of the FTC's approach. The agency had expended valuable resources in an effort to sustain the newly "efficient" and "competitive" vertically integrated firm—yet it could have spent these resources elsewhere, had it just blocked the merger outright.[25]

Furthermore, the conditions of the behavioral consent decree do not appear to have applied when Rite-Aid acquired PCS. As a result, the same problems that emerged when upstream drug-makers combined with PBMs also manifested downstream—largely because the FTC failed to neutralize the industry's overall market power from the outset. Specifically, the combination of a PBM and a pharmacy allows the entity to advantage its drug stores for the filling of prescription drugs and to extract kickback and rebate schemes from drug-makers that are not in the best interest of patients.[26]

Lastly, the consent order effectively transferred the burden of oversight to third-party industry players, who were to alert the FTC of any violations.[27] This is perverse. Blocking the vertical merger outright would have avoided the need for public enforcers to rely on private entities to monitor compliance. As we stated above, we believe the most effective type of competition policy is to stop anti-competitive behavior in its incipiency, to target underlying market power, and to neutralize the incentives to abuse it.

Ticketmaster and Live Nation (2010):

This case involved the acquisition of concert promoter Live Nation by ticketing company Ticketmaster.[28] Ticketmaster provides ticketing services to more than 80% of major concert venues, and Live Nation is the largest concert promoter, earning more than $1.3 billion in revenue from U.S. promotions.[29]

In a typical contract between ticketing companies and venue owners, the venue owner agrees to use one company as an exclusive service provider.[30] In exchange, the ticketing company pays the venue a portion of the fees the company collects from selling tickets to concertgoers. Without any restraints, the vertical merger would effectively have prevented a rival at any stage in the ticket supply chain from transacting with the combined Ticketmaster-Live Nation entity.[31]

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[25] *Rite Aid in $1.5 Billion Deal for Lilly Unit* , New York Times, Nov. 18, 1998, *available at* https://www.nytimes.com/1998/11/18/business/rite-aid-in-1.5-billion-deal-for-lilly-unit.html.

[26] Feldman, *supra* note 21.

[27] FTC Approves Lilly Order, *supra* note 20.

[28] *U.S., et al. v. Ticketmaster Entertainment, Inc., et al.*, No. 1:10–cv–00139, 2010 WL 5699134 *1 (D.D.C. Jul. 30, 2010) *available at* https://www.justice.gov/atr/case-document/final-judgment-180.

[29] *U.S., et al. v. Ticketmaster Entertainment Inc. and Live Nation Inc.*, 75 Fed. Reg. 6709, 6710-6711 (Feb. 10, 2010)(Competitive Impact Statement).

[30] *Id.*

[31] *Id.* at 6713.

As part of its final judgment, the Antitrust Division imposed an "anti-retaliatory" clause. In theory, this was designed to prohibit the newly merged entity from retaliating against a venue owner that contemplated contracting with a competitor. Explaining the final judgment, then-Assistant Attorney General Christine Varney noted, "there will be enough air and sunlight in this space for strong competitors to take root, grow, and thrive."[32]

In practice, however, the opposite appears to have come true. Ticket prices are at record highs and Ticketmaster tickets 80 of the top 100 arenas in the country.[33] Live Nation, which manages the concert tours of over 500 artists, also is alleged to have pressured venues to contract with Ticketmaster for ticketing services.[34] Additionally, the company has leveraged its dominance to continue expanding its foothold, having been allowed to acquire control over venues in cities like Madison, WI; San Antonio, TX; and Boise, ID.[35]

We believe that blocking this deal outright would have more effectively promoted competition than crafting a consent decree that sought to prohibit anti-competitive conduct. Furthermore, we believe the "anti-retaliatory" clause is often toothless: unless the Antitrust Division has access to the internal decision-making of executives, the motive for "retaliation" is difficult to prove.[36]

Horizontal Mergers:

UnitedHealth Group and Sierra Health Services (2007):

This case involved the acquisition of Nevada-based insurer Sierra by national insurer United.[37] The deal was slated to give United a 94 percent share of the market for Medicare Advantage enrollees in the Las Vegas area.[38] Indeed, the deal would have eliminated the competition to sell plans that provide seniors with greater benefits than those traditionally available under Medicare.

The Antitrust Division imposed a hybrid consent decree which largely centered on United divesting its Medicare Advantage business, SecureHorizons, to Humana. In conjunction with the

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[32] Ben Sisario & Graham Bowley, *Live Nation Rules Music Ticketing, Some Say With Threats*, New York Times, Apr. 1, 2018, at A1, *available at* https://www.nytimes.com/2018/04/01/arts/music/live-nation-ticketmaster.html.

[33] *Id.*

[34] *Id.*

[35] *See, e.g.*, W. Scott Bailey, *Live Nation acquires managing interest in historic downtown San Antonio theater*, San Antonio Business Journal, Aug. 20, 2015, https://www.bizjournals.com/sanantonio/news/2015/08/20/live-nation-acquires-historic-downtown-san-antonio.html; Scott Gordon, *Live Nation buys itself a big chunk of Madison's concert scene*, Tone Madison, Jan. 11, 2018, https://www.tonemadison.com/articles/live-nation-buys-itself-a-big-chunk-of-madisons-concert-scene; *Live Nation Acquires CT Touring*, IQ Magazine, Jan. 20, 2017, https://www.iq-mag.net/2017/01/live-nation-acquires-ct-touring/#.Wto0IIjwZPY("Live Nation has become the exclusive promoter for several venues in the north-western United States, including Idaho's CenturyLink Arena (17,000-cap.) and Eagle River Pavilion (4,000-cap.)").

[36] Kwoka & Moss, *supra* note 7, at n47.

[37] *U.S. v. UnitedHealth Grp., Inc.*, 73 Fed. Reg. 12762, 12770-12774 (Mar. 10, 2008)(Competitive Impact Statement) *available at* https://www.gpo.gov/fdsys/pkg/FR-2008-03-10/pdf/E8-4393.pdf; *see also Nev. Attny. Gen. v. UnitedHealth Grp. Inc.*, No. 2:08-CV-00233-JCMRJJ, 2008 WL 5657751 (D. Nev. Oct. 8, 2008) *available at* http://ag.nv.gov/uploadedFiles/agnvgov/Content/About/Consumer_Protection/UnitedAmendedJudgment20110623.pdf.

[38] *UnitedHealth* Competitive Impact Statement, at 12763.

Nevada Attorney General, the decree also mandated a number of behavioral provisions.[39] While we are skeptical of the effects of this divestiture remedy—which appears not to have introduced more competition to the Medicare Advantage market in the Las Vegas area[40]—we are equally skeptical of the behavioral requirements, such as the provision that United provide a $15 million charitable contribution to various Nevada organizations and agencies.[41]

We believe this type of condition creates the risk of regulatory capture and worry that it incentivizes pay-to-play behavior; a corporation can pledge to donate money in the hopes of achieving a favorable outcome.

George's and Tyson Foods Chicken Plant (2011):
This case involved the acquisition of a Tyson chicken processing complex in Harrisonburg, VA by poultry processor George's.[42] Prior to the deal, George's, Tyson, and JBS/Pilgrim's Pride competed against each other in this area for the services of chicken farmers, known as "growers."[43] The deal reduced the number of competitors from three to two, and had the effect of creating monopsony power: the deal would give George's the incentive and the ability to force growers to accept lower prices and less favorable contractual terms.[44]

The consent decree ordered George's to invest in a variety of capital improvements: an individually frozen freezer with a rated capacity of 5,000 pounds per hour, the installation of a leg or thigh deboning line, and repairs to the roof of the processing plant.[45] The improvements were designed to "increase George's demand for grower services and thereby benefit Shenandoah Valley growers."[46]

However, by requiring investment in fixed costs, this behavioral decree only strengthened and entrenched the incumbent's power. It disincentivized upstart processors from attempting to compete against and dislodge George's, given the higher barriers to entry. We also are concerned that the effects of this decree may contribute to the prevalence of the "tournament system," a practice by which powerful buyers drive down the wages of chicken farmers.[47]

Exceptions—Non-Discrimination Provisions and Mandatory Licensing:

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[39] *Nev. Attny Gen.*, at 9-14.
[40] *See Nevada health insurance rates face proposed increases*, Las Vegas Sun, Jul. 1, 2017, https://lasvegassun.com/news/2017/jul/01/nevada-health-insurance-rates-face-proposed-increa/; *see also Premiums rising 34 percent for most popular health plan*, Las Vegas Sun, Oct. 25, 2017, https://lasvegassun.com/news/2017/oct/25/premiums-rising-34-percent-for-most-popular-health/.
[41] *Nev. Attny Gen.,* at 31.
[42] *U.S. v. George's Foods, LLC. et al*, 76, Fed. Reg. 38419, 38422-38426 (Jun. 30, 2011)(Competitive Impact Statement) *available at* https://www.gpo.gov/fdsys/pkg/FR-2011-06-30/pdf/2011-16354.pdf.
[43] *Id*. at 38420.
[44] *Id*. at 38421.
[45] *Id*. at 38427 (Proposed Final Judgment).
[46] *Id.* at 38423.
[47] *See* Dan Charles, *The System Supplying America's Chickens Pits Farmer Vs. Farmer*, National Public Radio, Feb. 20, 2014, https://www.npr.org/sections/thesalt/2014/02/20/279040721/the-system-that-supplies-our-chickens-pits-farmer-against-farmer.

Although we generally disfavor behavioral decrees, in limited and narrow circumstances they can serve as effective tools to structure competition. In particular we support the use of non-discrimination provisions and mandatory licensing. History shows that smart use of these decrees can help structure the creation of open marketplaces, enabling firms to compete against patent monopolists, especially in network and infrastructure industries where winner-take-all dynamics emerge.

Below, we catalog three examples where mandatory licensing promoted competition:

Eastman Kodak (1954):
The Department imposed a consent decree that abolished Kodak's monopoly of color film processing.[48] The remedy largely hinged on a provision that the company license for a reasonable royalty its pertinent processing and material patents to other industry players.

The move had two effects.[49] First, it broke Kodak's patent monopoly, incentivizing new entrants to enter the color finishing market; within four months of the final judgment order, nine regional and national firms had announced plans to start their own businesses.[50] Second, the decree stimulated investment in the larger photography market. One and half years later, eight additional companies had made investments of over $100,000 (a bit less than $1 million today, adjusting for inflation).[51]

AT&T's Bell Labs (1956):
In the middle of the twentieth century, antitrust enforcers charged AT&T with foreclosing competitors from the market for telecommunications equipment.[52] For example, AT&T possessed exclusive supply contracts with Western Electric, its manufacturing subsidiary,[53] and also engaged in exclusionary behavior by refusing to license its 7,820 patents, which spanned the transistor to the transatlantic telephone cable.[54] In order to address these harms, the Justice Department in 1956 crafted a consent decree that mandated AT&T make its existing patents available to other competitors without charge.[55]

The final judgment order spurred competition in the electronics industry and made available to all upstarts research from one of era's most innovative industrial laboratories. Indeed, the effects on competition were substantial. One peer-reviewed study notes that five years after the decree,

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[48] *U.S. v. Eastman Kodak Co.*, Consent Decree, C.C.H Trade Cases ¶ 67,920 (1954).
[49] Charles F. Phillips, Jr., *The Consent Decree In Antitrust Enforcement,* 18 Wash. & Lee L. Rev. 39, 51-52 (1964)(quoting *Consent Decree Program of the Department of Justice*, Antitrust Subcommittee, Committee on the Judiciary, House of Representatives, 85th Cong., serial No. 9, p. 433), *available at* https://scholarlycommons.law.wlu.edu/cgi/viewcontent.cgi?article=3452&context=wlulr.
[50] *Id.*
[51] *Id.*
[52] Martin Watzinger, Thomas A.Fackler, Markus Nagler, Monika Schnitzer, *How Antitrust Enforcement Can Spur Innovation: Bell Labs and the 1956 Consent Decree* *1 (CESifo Working Paper No. 6351, 2017), *available at* https://www.econstor.eu/bitstream/10419/155593/1/cesifo1_wp6351.pdf [Hereinafter Bell Labs].
[53] *Id.*
[54] *Id.*
[55] *U.S. v. Western Electric Co.*, C.C.H Trade Cases ¶ 71,134 (D.N.J. 1956).

follow-on innovation increased by 17 percent.[56] New enterprises cited Bell's patents more than 1,000 times in their own inventions, which included, for instance, transistors created by Texas Instruments, Motorola, and Fairchild.[57]

The DOJ also used the AT&T decree as part of a larger strategy to neutralize market power in the electronics industry.[58] In tandem with consent decrees that similarly mandated IBM and Radio Corporation of America to license out their patents, Department of Justice chief Stanley Barnes explained the decree was "part of one program to open up the electronics field."[59] Indeed, between 1941 and 1959, the Department of Justice required the compulsory licensing of almost 50,000 patents.[60]

This provision stimulated competition by neutralizing the power of companies that had used their patents to exclude competition, promoting industry know-how, and promoting innovation among upstart firms.[61]

Xerox (1975):

The DOJ designed a consent decree that opened up the market to new competitors in the copier technology market, which Xerox largely dominated through the holding of key patents.[62] In a peer-reviewed economics study, author Timothy Bresnahan found that 10 years after the consent decree, the industry "saw a great deal of innovative activity from entrants and Xerox." Faced with new competitors on all sides, he adds, "Xerox introduced new products in all segments."[63]

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[56] Bell Labs, *supra* note 52, at *2-3.

[57] *Id.*

[58] Barry C. Lynn, *Estates of Mind*, Washington Monthly, Jul./Aug. 2013, *available at* https://washingtonmonthly.com/magazine/julyaugust-2013/estates-of-mind/.

[59] *I.B.M. Trust Suit Ended By Decree; Machines Freed*, New York Times, Jan. 25, 1956, at A1, *available at* http://sco-vs-ibm.org/review/acrobat/560126.pdf.

[60] Lynn, *supra* note 58.

[61] *Id.*

[62] *In Re Xerox Corp.*, 86 F.T.C. 364, 368 (1975).

[63] Timothy F. Bresnahan, *Post-Entry Competition in the Plain Paper Copier Market*, 75 Am. Econ. Rev. 15, 18 (1985), *available at* https://www.jstor.org/stable/1805563?seq=4#page_scan_tab_contents.

QUESTION 3:

What role should purported industry reliance on an existing decree play with respect to the decision to eliminate or retain a perpetual consent decree?

The decision to eliminate or retain a perpetual consent decree should hinge on the degree to which the provision neutralizes the market power of concentrated industry actors and helps to create the conditions for an open marketplace in which new entrants can compete.[64]

For instance, we would support eliminating a perpetual consent decree that would have the effect of dislodging powerful incumbents and spurring entry into the market by upstarts. On the other hand, we would support retaining a perpetual consent decree that creates the conditions for a marketplace in which barriers to entry are low and dominant actors cannot use their market power to thwart competition.

In light of the new "Office of Decree Enforcement" formed by the Antitrust Division, we look forward to the public review of the nearly 1,300 perpetual consent decrees that the DOJ recently identified.

[64] This philosophy of antitrust enforcement was expressed by Judge Hand: "Throughout the history of these statutes, it has been constantly assumed that one of their purposes was to perpetuate and preserve, for is own sake and in spite of possible cost, an organization of industry in small units which can effectively compete with each other."*U. S. v. Aluminum Co. of America*, 148 F.2d 416, 429 (2d Cir. 1945).

Public Knowledge

April 24, 2018

Roundtable on Antitrust Consent Decrees
Written statement of Public Knowledge
Meredith Rose, Policy Counsel

Consent decrees are imperfect, but necessary tools to address systemic problems of misaligned incentives in certain marketplaces. To illustrate, I would like to briefly summarize the tensions of three standing consent decrees: ASCAP/BMI, and Comcast-NBCUniversal.

The structure of copyright law makes the music industry unique, even among media markets. First, of course, is the dual structure of musical copyright, with separate copyrights inhering in songwriters and recording artists. Second, the relatively short duration of most music means that many consumers will interact with a high volume of copyright interests on a daily basis. Third, these two factors together mean that many large commercial users and delivery services will, for efficiency's sake, obtain "blanket" licenses that cover as many works as possible. Fourth, to ensure they can fully participate in the market, most songwriters find it advantageous to make sure their works are included in such licenses.

These dynamics make collective action in the musical context appealing. Music users such as radio stations benefit from getting a small number of licenses that grant them access to a large repertoire, and songwriters benefit from being included in these licenses, which ensures they get paid for the use of their music. Thus, the creation of performing rights organizations, such as ASCAP and BMI, is in many ways a natural outgrowth of the legal and economic structure of music as a product.

This same collective bargaining, however, raises potential competitive issues. Music delivery is a multi-layered system that relies on non-fungible goods. While songwriters "compete" with each other at the composition stage, and PROs compete with each other to attract songwriters to their businesses, competition disappears when the end consumer appears. The individual consumer's access preferences are not determined the PRO affiliation of a given work; PROs are structurally invisible to an individual consumer. To accommodate consumer preferences, intermediaries must generally obtain licenses from *all* PROs. This creates natural incentives for collusion among PROs, who enjoy relatively captive buyers.

This situation eventually led to the imposition of consent decrees on the two major PROs. These decrees allowed them to continue to provide their valuable service while limiting some of the anticompetitive threats. Admittedly, this system has showed signs of strain in recent years; the kinds of uses music is put to have changed, and some artists have pulled out of the two major PROs, leading to a disparity in the legal treatment of different PROs which may be difficult to justify. However, the same basic tensions remain. Thus, whatever their flaws, the consent decrees should remain in place.

The consent decree regarding the Comcast/NBC-Universal transaction is another example of an imperfect set of rules that is nonetheless responsive to a real, and continuing problem—namely, increasing vertical and horizontal concentration in the video marketplace that could limit the development of new and lower-cost alternatives for consumers. Obviously, the efficacy of this particular consent decree has been hotly debated. Critics said that it did little to protect video competition, and supporters said that it worked as intended to curb the worst potential anticompetitive excesses Comcast/NBC might otherwise have engaged in.

Looking back, Public Knowledge believes that the consent decree did prevent Comcast from fully using NBC-Universal assets to harm rival distributors, or from fully using its distribution platform to harm rival programmers. Much of this seems to have been as much a result of the structural side-effects of the consent decree's very existence, providing major counterparties with ready legal recourse in the event of bad behavior. That said, the decree likely failed to protect potential new competition delivered by independent and smaller providers, as the dispute over the peer programming condition demonstrated.[1]

In fact, though the online video marketplace has continued to grow since the time of the merger, its development has not entirely been what was expected. Major online video services like Netflix and Amazon Prime Video have not evolved to become full-fledged cable replacements; rather, they remain complementary services that often create original programming. They are more like cable channels than cable systems. More recently, a number of cable-like services have been launched, including AT&T's DirecTV Now and DISH's Sling TV. But this market is dominated by video incumbents, with the notable exception of Google's YouTube TV—which serves only to underscore how expensive it is to enter the video marketplace.

On balance, the consent decree was predicated on the idea that Comcast could benefit from merger efficiencies without resorting to anticompetitive behavior. It is difficult to see why, if behavior was considered anticompetitive and disallowed in 2015 or 2016, it should be allowed in 2018 or 2019. Thus, late last year, Public Knowledge asked the DOJ to extend this consent decree. We recognize that the problems the decree addresses are not limited to Comcast and we share many of the concerns about the use of consent decrees in place of regulation. However, until there is a better alternative the DOJ should seek to keep its competitive protections in place.

[1] As Public Knowledge wrote with respect to this issue,

> [T]he "peer programming" condition ... was intended to ensure that Comcast-NBCU offered its video programming to online video providers on terms comparable to those of its non-vertically-integrated programming peers. Comcast was able to undermine that condition by arguing that in order to comply with it, it would have to review its competitors' confidential programming contracts. Its competitors naturally balked at this, and the peer programming condition did not successfully ensure that third-party online video providers had full access to NBC programming.

Petition to Deny of Public Knowledge and Open Technology Institute, in Applications of Comcast Corp., Time Warner Cable Inc., Charter Communications, Inc., and SpinCo for Consent to Assign and Transfer Control of FCC Licenses and Other Authorizations, MB Docket No. 14-57, at 56-57 (filed August 25, 2014).

CHAMBER OF COMMERCE
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April 26, 2018

The U.S. Chamber of Commerce (the Chamber) welcomes the opportunity by the Department of Justice (DOJ) to provide comments on the role of antitrust consent decrees as part of a roundtable series examining competition and deregulation. The Chamber supports the important role the consent process plays as part of antitrust enforcement. We offer these comments in support of that perspective.

1. The consent decree process does, and should continue to, play a vital role in U.S. antitrust enforcement

The use of civil consent decrees by the Antitrust Division of the U.S. Department of Justice is a critical component of the agency's enforcement mission and vital to the effective and efficient resolution of antitrust cases. Consent decrees allow the Division and private parties to resolve antitrust investigations without having to engage in costly and uncertain litigation. Each year, the Division implements the vast majority of its enforcement actions through these settlements, rather than through litigation.

Consent decrees are typically entered into before there is a finding of liability by a court. Accordingly, consent decrees are settlement agreements between the Division and private parties which are subject to negotiations and compromise. Consent decrees do not set precedent; however, upon occasion the Federal Trade Commission (FTC) has attempted to use consent agreements to further define its Section 5 authority as a means

to set a soft precedent. When this has occurred, the Chamber has expressed its concerns with such practice. The consent decree process will not work well if either the Division or private parties fail to consider any compromise.

2. Consent decrees should strike the proper balance between remedying the potential harm and allowing the parties to engage in lawful, and potentially pro-competitive, conduct

Consent decrees should strike the appropriate balance between remedying the competitive harm subject to the Division's investigation and allowing private parties to continue to engage in lawful behavior that can have pro-competitive benefits. Overly broad remedies can have unintended consequences and chill pro-competitive behavior.

3. Remedies in vertical deals should be more flexible to take into consideration the greater potential for pro-competitive effects

Combining firms that compete at different levels of the market through a vertical deal generally has more potential for pro-competitive efficiencies than a horizontal deal. Accordingly, there is a greater risk that a remedy, whether structural or blocking the deal entirely, will prevent the benefits that would otherwise stem from the transaction. Historically, both the FTC and DOJ have been willing to consider conduct remedies in vertical mergers.

4. Both structural and behavioral merger settlements have been generally effective

There is evidence that the settlement of merger antitrust cases – whether through consent decrees at the Division or through orders at the Federal Trade Commission – have been effective. An FTC study of the effectiveness of merger remedies published in January 2017 concluded that the agency's merger orders from 2006-2012 were generally effective. The study found that in the 50 orders studied, less than 20% could be considered as a failure – where the divestiture or conduct remedy did not maintain the level of pre-merger competition. The study did not attempt to examine post-merger market factors that could have led to the failure, including unforeseen events, but simply compared the pre-merger level of competition to that post-merger. The FTC concluded that the study supported its general approach to remedies and recommended several best practices that could improve its traditional approach,

including a preference for the divestiture of ongoing businesses, closer consideration of the transfer of back-office functions, and careful vetting of buyers.

While the vast majority of the mergers studied were horizontal – i.e., combining two competitors offering the same product or service – the FTC remedy study found a similarly high success rate for conduct remedies in vertical transactions – success in around 80% of the cases. The study did not recommend any changes to the FTC's approach to conduct remedies.

Both the 2004 and 2011 Division policy guides on merger remedies recognized the value of conduct remedies in appropriate cases. As stated in the 2011 Guide: "Conduct remedies are a valuable tool for the Division. They can preserve a merger's potential efficiencies, and, at the same time, remedy the competitive harm. . . . Conduct relief can be a particularly effective option when a structural remedy would eliminate the merger's potential efficiencies, but, absent a remedy, the merger would harm competition." Similarly, the 2004 Guide stated: "Standalone conduct relief is only appropriate when a full stop prohibition of the merger would sacrifice significant efficiencies and a structural remedy would similarly eliminate such efficiencies or is simply infeasible."

There have also been very few actions by the FTC or Division to prosecute alleged violations of merger consent decrees.

5. Consideration of potential improvements to the merger settlement process are appropriate, but the Division should be careful not to let "the perfect be the enemy of the good"

It would be virtually impossible to design a merger consent decree process that would be 100% successful. Even with the most robust divestiture package, stringent conduct requirements, and best buyer, the remedy may fail due to unforeseen changes in the marketplace or even the normal competitive process. Moreover, because merger enforcement is an inherently forward-looking, predictive exercise, the Division should consider how confident it can be that harm from the merger will occur and that the remedy will do more harm than good in addressing that potential harm and allowing any merger efficiencies to be realized. Under such circumstances, it may be difficult to materially improve the current high level of success rates with remedies without disrupting the settlement process and potentially preventing efficiencies from transactions that are capable of fixing.

6. Both a retrospective and prospective review of consent decree terms is warranted

As the Division has previously acknowledged, there can be significant changes in markets and technology after a consent decree is entered that impact the effectiveness of the continuing obligations. The parties subject to these obligations may be unnecessarily expending substantial resources to comply and are prevented from taking actions that could be pro-competitive and otherwise good for consumers. The Division most recently acknowledged this issue in March of 2014, when it announced a new streamlined procedure for parties to seek to modify or terminate perpetual decrees entered into before 1980. We would welcome the Division re-examining whether there are additional steps that could be taken to terminate unnecessary or harmful consent decrees that are still in effect.

We would also welcome the Division examining whether the current ten-year standard for consent decree terms is appropriate, at least in certain matters or industries.

7. The Division should also consider examining the appropriate use of other standard terms in merger consent decrees

The Division's consent decrees in merger cases often include the requirement that the parties use third-party trustees at their own cost in certain situations. The Division sometimes requires the appointment of monitor trustees who will be responsible for helping the Division to oversee divestitures or other ongoing obligations under the decree. These trustees can be very expensive and add another level of bureaucracy and process that can be at odds with the purpose of the decree. The Division also requires in most merger decrees that the parties agree to appoint a divestiture trustee if the divestiture assets cannot be sold by the required deadline. It can be very disruptive when a divestiture trustees take over the process and this can lead to even more delay of the divestiture than if the parties remained in control of the process.

The Division should also consider examining its approach to allowing ancillary agreements between the purchaser of the divested business and the merging parties, including supply agreements, other transition services agreements, and licenses. The current trend of disfavoring such agreements could lead to a significant expansion of the divestiture package and other complications that could run counter to the public interest.

8. We would encourage the Division to coordinate its consideration and potential implementation of changes to the consent decree process with the FTC to avoid possible divergence

Both the Division and the FTC have overlapping jurisdiction for most mergers and conduct matters. Historically, the remedies pursued by the agencies have been very similar, whether through consent decrees at the Division or orders by the FTC. It would not make sense for parties to face significantly different approaches to remedies based on which agency happens to investigate the particular matter. Accordingly, we would recommend that the Division coordinate its evaluation of consent decree modifications with the FTC as appropriate.

The Chamber thanks you for the opportunity to share our member's views on the role consent decrees play.

Sincerely,

Sean Heather
Executive Director, \ntitrust Policy
U.S. Chamber of Commerce



Third Roundtable

The Consumer Costs of Anticompetitive Regulations

Roundtable Agenda

Opening Remarks: Assistant Attorney General Makan Delrahim

Introductions and Statements from Roundtable Participants

Session 1: The Consumer Costs of Regulation and the Lessons from Deregulation
Focuses on our nation's experiences with regulation and the different approaches we have adopted over time. There is a vast academic literature focused on quantifying the costs of economic regulation and benefits of deregulation from lower prices (or rates or fares), better products, greater innovation, and more efficient industries. Building off those insights, this session considers how federal and state policymakers should account for the potential anticompetitive effects of regulation.

Session 2: Regulation and Barriers to Entry
Since the deregulatory wave that started nearly half a century ago, many of the remaining regulations are designed to control, restrict, or prevent entry, insulating incumbent interests from competition and innovation or, at least, having the effect of making entry substantially more difficult. This session considers the appropriate role of antitrust enforcers in efforts to bring more competition to markets still subject to regulatory barriers.

Closing Statements from Roundtable Participants

Roundtable Participants

American Antitrust Institute – Richard Brunell
American Bar Association, Section of Antitrust Law – Thomas Zych
Association of Corporate Counsel – Mary Blatch
Cato Institute – Ryan Bourne
Consumers Union – George Slover
National Diversity Coalition – Steven Sugarman
Open Markets Institute – Lina Khan
Public Knowledge – John Bergmayer
U.S. Chamber of Commerce – Gail Levine
University of Pennsylvania School of Law – Professor Christopher Yoo

Biographies of Roundtable Participants

Richard Brunell (American Antitrust Institute) is General Counsel of the American Antitrust Institute. He previously practiced in the Chairman's office at the Federal Trade Commission, the litigation department at Foley Hoag LLP in Boston, the Massachusetts Attorney General's Office, and at the Antitrust Division of the Department of Justice.

Thomas Zych (American Bar Association, Section of Antitrust Law) is a partner and chair in the Emerging Technologies Practice of Thompson Hine, with over 30 years of private practice experience in a wide range of data protection, intellectual property, consumer protection, social media, competition, and antitrust matters.

Mary Blatch (Association of Corporate Counsel) is the Director of Advocacy and Public Policy at the Association of Corporate Counsel. Before her work with the ACC, Ms. Blatch worked on regulatory advocacy and compliance issues for Deloitte Tax and was an associate at McKee Nelson and Hogan & Hartson.

Ryan Bourne (Cato Institute) is the R. Evan Scharf Chair for the Public Understanding of Economics at the Cato Institute.

George Slover (Consumers Union) is a senior policy counsel in the Washington Office of Consumers Union, the advocacy division of Consumer Reports, Washington office. He has three decades of federal government policy experience, including nine years at the House Judiciary Committee, two years at the House Energy and Commerce Committee, and eleven years in the Antitrust Division.

Steven Sugarman (National Diversity Coalition) is a Senior Adviser and Chief Counsel to the National Diversity Coalition. Mr. Sugarman began his career as a management consultant at McKinsey & Company and Lehman Brothers and has extensive experience in finance and management law, including community development and service to minority communities, including the National Asian-American Coalition.

Lina Khan (Open Markets Institute) is the Director of Legal Policy at the Open Markets Institute. She is a Visiting Fellow with the Information Society Project at Yale Law School.

John Bergmayer (Public Knowledge) is the Senior Counsel at Public Knowledge, specializing in telecommunications, media, Internet, and intellectual property issues.

Gail Levine (U.S. Chamber of Commerce) joined Uber as their Head of U.S. Regulatory Affairs, and now she's Uber's Director for U.S. Competition. Prior to working at Uber, Gail was Vice President of Public Policy at Verizon and previously worked as an attorney advisor to the chairman of the Federal Trade Commission and a trial attorney in the Federal Programs Branch here at the Department of Justice.

Christopher Yoo (University of Pennsylvania School of Law) is the John H. Chestnut Professor of Law, Communication, and Computer and Information Science at the University of Pennsylvania. His research focuses on how the principles of network engineering and the economics of imperfect competition can provide insights into regulation, particularly in electronic communications industries.

THIRD ROUNDTABLE:
The Consumer Costs of Anticompetitive Regulations

Thursday, May 31, 2018

Department of Justice ⁓ Attorney General's Conference Center

MAKAN DELRAHIM: Good morning. Good to see a lot of familiar faces, some friends, and old colleagues here. This is our third, at least in this first series of competition and deregulation roundtables. We still are at a square table. We need some round tables.

And this is an interesting one. I guess I don't really have a favorite of the three, but this is one I care deeply about personally. And so I think this is really important. I really appreciate you all being here and adding to the debate and to our thinking.

I'm joined at the table by several of my colleagues. Some of you who have attended these in the past know Bob Potter is the Chief of our Competition Policy and Advocacy Section. He, along with Daniel and Doug in that section, have really been doing some great work, lots of time and effort put into the various aspects of this. Thanks for putting up with a lot of last-minute changes and musings from me. In addition, Rene Augustine, our Senior Counsel in the Front Office, has been helping us stay organized and keep the trains running on time here.

[The prepared statement of Assistant Attorney General Makan Delrahim follows:]

This roundtable will focus on the consumer costs of anticompetitive regulations. The costs are, no doubt, significant. The Competitive Enterprise Institute's annual publication on federal regulations, aptly called "The Ten Thousand Commandments", notes that federal regulations cost each U.S. household almost $15,000 per year. To illustrate the significance of that amount, CEI notes this is second only to housing in spending categories for American families.[1] Today, we will consider whether and how regulation has handcuffed the invisible hand of the free market.

At the beginning of our last roundtable, I recounted General Ashcroft's comment that the Department of Justice is the only agency in the federal government with a moral imperative in its name. Antitrust — and its role in protecting competition — has long been a central part of our nation's moral imperatives.

The very first Assistant to the Attorney General for antitrust, William Day, was appointed by the legendary "trust buster" Teddy Roosevelt. More than half a century later, Justice Black, in the Northern Pacific[2] case, described the Sherman Act as "a comprehensive charter of economic liberty." Milton Friedman explained this in his 1962 work, *Capitalism and Freedom*, in which he wrote "the organization of the bulk of economic activity through private enterprise operating in a free market as a system of economic freedom and a necessary condition for political freedom."[3]

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[1] Clyde Wayne Crews Jr., *Ten Thousand Commandments,* COMPETITIVE ENTER. INST. 3 (2018), https://cei.org/sites/default/files/Ten_Thousand_Commandments_2018.pdf.

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

[3] MILTON FRIEDMAN, CAPITALISM AND FREEDOM 12 (1962).

These principles soon began to be applied in a wave of major industrial deregulation lasting at least two decades from around 1970.[4] The deregulatory wave brought many benefits for consumers: lower rates and prices, more choice, and higher quality. It also brought greater innovation, entry, and opportunities for many to create new businesses and, indeed, new industries, driving economic growth and increased productivity.[5] While the Department of Justice has accomplished a lot in the last half century of antitrust enforcement, there is still work to be done. And our sleeves are rolled up.

The Administrator of the Office of Information and Regulatory Affairs at OMB, Neomi Rao, better known as the Administration's "regulatory czar," recently conveyed that the Administration's current deregulatory initiative "is part of a larger effort to promote a more constitutional government and thereby to enhance individual liberty."[6] She said, "[G]overnment regulation . . . can serve vital health and safety goals, and . . . Congress has ensured that we already live in a highly regulated society. But even against that backdrop, government intervention should still serve a purpose. It shouldn't be a solution in search of a problem."[7]

Virtually every aspect of our lives is regulated in some fashion. I just read — I know some of you guys may have seen that in your news feeds — yesterday, somebody's lemonade stand was shut down because they didn't have the proper permits. I think these were six-year-old kids at the corner of their street.

Virtually every aspect of our lives is regulated. We eat food grown with chemicals subject to regulation, processed in regulated facilities, and sold with mandatory labels in stores subject to regulation. We live in homes and apartments for which their zoning, construction, and codes

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[4] This was a bipartisan effort. Deregulation was a key focus of the Carter Administration. Carter's chair of the Civil Aeronautics Board, the economist Alfred Kahn, who oversaw airline deregulation in the late 1970s, was an insightful proponent of deregulation. In his words, "airline regulation was government cartelization, plain and simple: the only sensible reform, it rather quickly became evident, was disassembly and abandonment." Alfred E. Kahn, *Telecommunications: The Transition from Regulation to Antitrust*, 5 J. TELECOMM. & HIGH TECH. L. 159, 164 (2006). Deregulation of the transportation industries (and others) continued under the Reagan Administration. In the 1990s, under Presidents Bush and Clinton, deregulation of electricity markets introduced market forces in another critical industry to American consumers.

[5] *See, e.g.*, RICHARD H. K. VIETOR, CONTRIVED COMPETITION: REGULATION AND DEREGULATION IN AMERICA (Belknap 1994); DANIEL F. SPULBER, REGULATION AND MARKETS (MIT Press 1989); Joseph D. Kearney and Thomas W. Merrill, *The Great Transformation of Regulated Industries Law*, 98 COLUM. L. REV. 1323 (1998), http://scholarship.law.marquette.edu/facpub/296; Clifford Winston, *U.S. Industry Adjustment to Economic Deregulation*, 12 J. ECON. PERSPECTIVES 89 (1998), https://www.aeaweb.org/articles?id=10.1257/jep.12.3.89; PAUL W. MACAVOY, INDUSTRY REGULATION AND THE PERFORMANCE OF THE AMERICAN ECONOMY (1992); ORG. FOR ECON. CO-OPERATION AND DEV., REPORT ON REGULATORY REFORM 252 (1997) https://www.oecd.org/gov/regulatory-policy/2391768.pdf (summarizing various sources); Robert W. Crandall, *Extending Deregulation: Make the U.S. Economy More Efficient*, BROOKINGS INST. (2008) (reviewing studies of specific industries), https://www.brookings.edu/research/extending-deregulation-make-the-u-s-economy-more-efficient.

[6] Neomi Rao, Adm'r, Office of Info. & Regulatory Affairs, What's Next for Trump's Regulatory Agenda: A Conversation with OIRA Administrator Neomi Rao, Brookings Institution 9 (Jan. 26, 2018), https://www.brookings.edu/wp-content/uploads/2018/01/es_20180126_oira_transcript.pdf [hereinafter Rao, What's Next]

[7] *Id.* at 10.

are highly regulated. Our children's schools teach material regulated by the state, sometimes the federal government, serve foods subject to regulation, and their playgrounds are certified based on government-mandated safety standards. As former federal judge Richard Posner observed, "regulation is pervasive, embracing the whole of criminal, tort, contract, property, labor, securities, antitrust, and environmental law, and a great deal besides."[8]

Twitter has an account exclusively devoted to amusing or absurd government laws and regulations. I haven't verified it, but according to this account, it is "a federal crime to sell earplugs if their noise reduction rating isn't written in Helvetica Medium,"[9] or "to sell wine with a brand name including the word 'zombie,'"[10] or "to take home milk from a quarantined giraffe."[11] Let's hope there are reasonable safety justifications for these.

While certain kinds of regulation are necessary, this role was never intended to be without appropriate limits. Thomas Jefferson, at his first inaugural address, observed that "a wise and frugal government, which shall restrain men from injuring one another, shall leave them otherwise free to regulate their own pursuits of industry and improvement, and shall not take from the mouth of labor the bread it has earned."[12]

Unfortunately, governments at all levels, encouraged by the success of appropriate areas of regulation, all too often encroach on other areas where unencumbered markets function best. John Stuart Mill observed: "Every function superadded to those already exercised by the government, causes its influence over hopes and fears to be more widely diffused, and converts, more and more, the active and ambitious part of the public into hangers-on of the government, or of some party which aims at becoming the government."[13]

Former Antitrust Division chief economist, and colleague on the Antitrust Modernization Commission, Dennis Carlton, and his colleague, Jeffrey Perloff, highlighted one example of the effects of unnecessary regulation. Until they were repealed in 2006, there were 310 separate rules, filling over 440 pages of federal documents, governing what goes on pizza. Yes, pizza! Under these regulations, the U.S. Department of Agriculture concluded that Wolfgang Puck's pizzas could not be called pizza because they didn't have tomatoes on them, compelling a change in his recipe. He also changed his labeling because the "country sausage on his pizzas was not made in a location that conforms to the regulatory definition of a rural area."[14]

More pernicious examples abound when state and federal policy makers have forayed into new areas of control. When special interests focus their influence on obtaining regulations that

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[8] Richard A. Posner, *The Effects of Deregulation on Competition: The Experience of the United States*, 23 FORDHAM INT'L L.J. S7, S7 (1999), https://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?/&httpsredir=1&article=2894&context=journal_articles.

[9] @CrimeADay, TWITTER (Dec. 4, 2017, 5:22 PM), https://twitter.com/crimeaday/status/937854668117508096?lang=en (citing 42 U.S.C. § 4909(a)(1), 4910 & 40 C.F.R. § 211.106(c)).

[10] *Id.*, (Mar. 25, 2015, 1:36 PM), https://twitter.com/crimeaday/status/580830706424766464 (citing 27 U.S.C. § 207, § 205(e) & 27 C.F.R. § 4.39(a)(9)).

[11] *Id.*, (July 8, 2015, 9:33 PM), https://twitter.com/CrimeADay/status/618956122330935296 (citing 7 U.S.C. § 8313, 9 C.F.R. §§ 93.400 & 93.414).

[12] Thomas Jefferson, First Inaugural Address (Mar. 4, 1801).

[13] JOHN STUART MILL, ON LIBERTY Ch. V (1869).

[14] DENNIS W. CARLTON AND JEFFREY M. PERLOFF, MODERN INDUSTRIAL ORGANIZATION 685 (4th ed., 2005); Jennifer Kabbany, *Armey Targets Waste in Federal Agencies*, WASHINGTON TIMES, Feb. 12, 1999, at A6.

promote their own positions, they often do so at the cost of others. Self-interested regulations can erect barriers that shut out new competitors and impose costs on existing competitors. As George Stigler put it in his influential article *The Theory of Economic Regulation*, "regulation is required by the industry and is designed and operated primarily for its benefit."[15] Whenever regulations displace market-based free enterprise, others in the economy are likely to suffer.

Areas of our nation's economy can, no doubt, wither under regulatory burdens. The President has issued an ambitious series of executive orders to reduce them.[16] OIRA is working across the federal government to reduce regulatory burdens. As Neomi Rao, the OIRA Administrator, recently said: "Many regulatory burdens are often put in place by big business or by powerful interest groups. Because regulation often creates barriers to entry, it can limit competition, and when it does, it can raise costs of ordinary goods and services, and it can blunt and stifle innovation." [17]

In keeping with the Antitrust Division's core function of enforcing the antitrust laws to preserve competition and protect consumers, it is important for the Division to identify circumstances in which regulations run counter to, or infringe upon its mission.

A familiar form of anticompetitive regulation can present itself in the form of occupational licensing. Back in 1971, Stigler found "evidence to suggest that [such] licensing exists not to protect consumers but to limit the availability of potential entrants to practice that profession."[18]

Forty-four years later, the Obama Administration, in 2015, issued a report on occupational licensing.[19] It found that the share of U.S. workers holding an occupational license has seen a *five-fold increase* since the1950s. It concluded that "the current licensing regime in the United States also creates substantial costs, and often the requirements for obtaining a license are not in sync with the skills needed for the job."[20] The report further noted that "there is evidence that licensing requirements raise the price of goods and services."[21] It found that while "most research does not find that licensing improves quality or public health and safety . . . the evidence on licensing's effects on prices is unequivocal: many studies find that more restrictive licensing laws lead to higher prices for consumers."[22] To take just two examples from the report, regulation of nurse practitioners "raises the price of a well-child medical exam by 3 to 16 percent," and on dental hygienists "increases the average price of a dental visit by 7 to 11

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[15] George J. Stigler, *The Theory of Economic Regulation*, BELL J. OF ECON. AND MGT. SCIENCE 3 (1971) [hereinafter Stigler, *Theory of Economic Regulation*]. The Bell Journal, published by the research wing of the telephone monopoly, became the definitive journal for advances in antitrust economics, producing much work that formed the basis for the lawsuit that led to its breakup.

[16] Exec. Order No. 13711, 80 Fed. Reg. 71921 (Nov. 12, 2015); Exec. Order No. 13722, 81 Fed. Reg. 14943 (Mar. 15, 2016); Exec. Order No. 13777, 82 Fed. Reg. 12285 (Feb. 24, 2017); Exec. Order No. 13789, 82 Fed. Reg. 19317 (Apr. 21, 2017).

[17] Rao, What's Next, *supra* note 6, at 8.

[18] Stigler, *Theory of Economic Regulation*, *supra* note 14, at 17.

[19] THE WHITE HOUSE, OCCUPATIONAL LICENSING: A FRAMEWORK FOR POLICYMAKERS, 3 (2015), https://obamawhitehouse.archives.gov/sites/default/files/docs/licensing_report_final_nonembargo.pdf.

[20] *Id*. at 3.

[21] *Id*.

[22] *Id.* at 13-14.

percent."[23] Former Acting Chairwoman and Current Commissioner of the Federal Trade Commission, Maureen Ohlhausen, has spoken on this issue and has done a lot in this area as well. Their efforts at the Federal Trade Commission should be commended on this front.

Just two months ago, the Antitrust Division filed a statement of interest in TIKD Services' suit against the Florida Bar, supporting the new entrant, TIKD, an innovative app to help people dispute traffic tickets.[24] The Ticket Clinic, a private ticket-defense law firm, filed complaints with the Florida Bar. It claimed that TIKD was practicing law without a license or providing false or misleading information to its consumers. The Ticket Clinic also filed grievances against lawyers who had represented TIKD customers, threatening to have them disbarred. The Board of Governors of the Florida Bar accepted a recommendation from a committee of lawyers backing up the Ticket Clinic's position.

The State bar asserted that it is entitled to protection against antitrust claims without having to satisfy either the "clear articulation" or "active supervision" requirements of the state action doctrine, notwithstanding the Supreme Court's most recent state action decision in *North Carolina State Board of Dental Examiners*.[25] In that case, the Supreme Court recognized that when "a State empowers a group of active market participants to decide who can participate in its market," there is a "structural risk" that they will pursue "their own interests" instead of "the State's policy goals." We should be vigilant in making sure private-market participants don't use states as tools for their anticompetitive goals.

This is just one example of an innovator using new technologies to bring transformational change, facing opposition by incumbents pushing for regulation aimed directly at keeping out the innovator. Other notable examples are the byzantine Certificate of Need regulations that hamper competition in health care markets. Certificates of Need, or CONs, require health care providers to get approval from state regulators before offering new services or building additional facilities. Though the provider already determined it makes business sense to enter, in some cases making investments to do so, it then faces the hurdle of going through the CON process. Incumbent providers can take advantage of the CON process to thwart or delay their rivals. The Division has been active in providing its expertise in this area through comments and testimony on state legislation, whenever possible, supporting repeal or curtailment of state CON laws because of their anticompetitive effects.

Similarly, nearly every state regulates new car dealerships. All states but one protect dealers from competition by awarding exclusive territories, limiting or banning carmakers from selling directly to consumers, and limiting carmakers' ability to terminate franchises. These regulations have been shown to cause higher retail prices and higher distribution costs, at the expense of both consumers and manufacturers — particularly U.S. carmakers.[26]

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[23] *Id.*at 14 (citing Morris Kleiner, Allison Marier, Kyoung Won Park, & Coady Wing, *Relaxing Occupational Licensing Requirements: Analyzing Wages and Prices for a Medical Service*, NBER Working Paper 19906 (2014).).

[24] Statement of Interest of the U.S. Dep't of Justice, TIKD Services LLC v. Florida, No. 1:17-cv-24103-Cooke/Goodman (S.D. Fla. Mar. 12, 2018), https://www.justice.gov/atr/case-document/file/1042666/download.

[25] *N.C. State Bd. of Dental Exam'rs v. FTC*, 135 S. Ct. 1101, 1115 (2015).

[26] Empirical studies on the anticompetitive harm from state car dealership franchising regulations have been carried out by franchising expert Francine Lafontaine of the University of Michigan. *See, e.g.*, Francine Lafontaine and Fiona Scott Morton, *State Franchise Laws, Dealer Terminations, and the Auto Crisis*, 24 J. ECON. PERSP. 233 (2010).

A particularly troubling example of how incumbents can work to craft regulations laser-focused on preventing entry took place in Michigan, home of the Big Three automakers. The state legislature brought up legislation aimed at Tesla. The bill prohibited carmakers from selling, as the bill was drafted, "any new motor vehicle directly to a retail customer other than through its franchised dealers."[27] Tesla noticed that the language as drafted would still allow them to sell because they didn't have any franchise dealers. Unfortunately for Tesla, as the bill worked its way through the process, the bill was amended with the word "its" removed from the language, thus closing the unintended loophole for the one carmaker at which the regulation seemed to be directed.[28]

Another significant area in which regulation can impact consumers is in real estate. Buying or selling a home is the largest financial transaction most Americans will ever undertake, and in many cases, the largest single investment. The Division has made it a priority to protect consumers in real estate markets, in part because regulators have been aggressive in preventing new business models and protecting incumbents from entry. For example, the National Association of Realtors states on their website that they were key in securing a rider in the 2009 Omnibus Appropriations Act that imposes a blanket ban on financial institutions from entering into real estate brokerage and management businesses. The Antitrust Division's website on competition and real estate describes the Division's multifaceted work in this area — the next installment being our joint workshop next Tuesday — with the Federal Trade Commission to explore competition issues in the residential real estate brokerage industry.

Another regulated area that impacts competition and consumers is the nation's milk pricing and distribution system. A recent article by the American Enterprise Institute's Daniel Sumner, on the consumer harm from federal milk marketing orders and other regulations, is often cited by the Antitrust Division's economic staff. He describes the industry as being "dominated by an 80-year-old array of price regulations of mind-boggling complexity" which "set minimum prices" and "increase[e] price risk for farms and processors" while "putting incentives for innovation behind a heavy veil of regulations."[29]

There may be legitimate policy reasons for many of these regulations. I want to point out the market-distorting aspects and anticompetitive effects that these regulations could have and suggest we need to examine them to see if these regulations are justified.

The Department of Justice has played an active role in supporting administrative and legislative initiatives to open regulated industries to competitive forces whenever appropriate. The Division works to share with regulatory agencies and state legislatures its expertise in these markets and its rich economic-based analysis.

As Anne Bingaman, the former Assistant Attorney General of the Antitrust Division, said in 1995, "[A]s we move forward with deregulating more industries — such as telecommunications and railroads — we should keep in mind that the goal of deregulation is to promote and protect competition, not to replace regulated monopolies or cartels with unregulated ones. The best

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[27] H.B. 5606, 97th Leg., Reg. Sess. (Mich. 2014). The bill as passed by the Michigan House contained the word "its," which was deleted in the version as passed by the Michigan Senate.

[28] Will Zerhouni, *Tesla Takes on Michigan*, CATO INST. (Feb. 27, 2018), https://www.cato.org/publications/policy-analysis/tesla-takes-michigan.

[29] Daniel A. Sumner, *Dairy Policy Progress: Completing the Move to Markets*, AM. ENTER. INST. 1 (Jan. 2018), http://www.aei.org/publication/dairy-policy-progress-completing-the-move-to-markets.

way to achieve that goal is to provide a decision-making role in the deregulatory process to the agency that is the competition expert — the Department of Justice."[30]

Through the Antitrust Division's competition advocacy, we will focus on regulations that hamper competition without offsetting public-health or safety benefits. The goal is to unleash, to the greatest extent possible, the creative energies of the American economy, by giving the greatest possible scope to economic liberty inherent in the free market.

We have assembled here today the thought leaders on these issues, representing a variety of viewpoints and industries. I look forward to the discussion of the factors that cause policymakers to displace competition with regulation, and the impact those regulations have on consumers. I also welcome the public to bring regulations, or new attempts to regulate, or legislation to the Division's attention.

[End of the prepared statement. The roundtable transcript continues:]

We have announced, and we now do have, a robust amicus program through our appellate shop. I see John Thorne in the audience there. I can personally tell you that, probably 15 years ago, he single-handedly had more impact in this area. It was the Antitrust Division that had the impact, but his advocacy at the time, I think for the *Trinko* case, and his legal reasoning to support that, had a lot to do with why the Supreme Court correctly ruled the way it did. That was not a formalized way, but that experience back then before I arrived at the Division taught me that we should be more robust and identify the proper cases that are finding their way through the district courts and appellate courts. And we'll do that.

Likewise, in the regulatory area, where we find regulations before they're implemented and promulgated that have a market distorting effect, I think it's the Antitrust Division's responsibility to make sure that those policymakers know the impact, and if there is a solution to them, a less market-distorting effect while still achieving the policy goals it might have, and health-safety goals. It's our job to do that, and we would encourage you guys to bring those matters to the Division's attention.

With that, let me turn it over to Bob Potter to help us conduct the day and introduce the folks.

ROBERT POTTER: Our first speaker today will be George Slover, who is representing Consumers Union, which is the advocacy division of *Consumer Reports*. George is an old friend, having been at the Division for a number of years. He also worked on the Hill. He is Senior Policy Counsel in Consumer Union's Washington office. George.

GEORGE SLOVER: Thank you. We very much appreciate getting invited to participate. Listening to Makan just now, I believe I agreed with essentially everything I heard him say, so if anything I'm about to say sounds like it contradicts any of that, it is not intended to.

This roundtable is a mirror image of the first one, about displacing antitrust, and our answer is the same today: Competition and regulation work best when they work hand in hand.

We are strong supporters of antitrust, but we do not embrace unlimited business freedom. Our goal is a marketplace that consumers can trust to be safe, fair, and just. Competition helps, because giving consumers the leverage of choice can help align business incentives with

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[30] Anne Bingaman, Assistant Att'y Gen., Antitrust Div., U.S. Dep't of Justice, *Injecting Competition into Regulated Industries and Utilities*, Remarks as Presented before the Pub. Util., Comm'ns and Transp. L. Section, Am. Bar Ass'n (Apr. 20, 1995).

consumer interests. But experience teaches that free-market forces do not ensure that businesses focused on their bottom line will always act in the interests of consumers.

Our advocacy goes far beyond supporting free-market competition. A free market is not going to ensure that products are safe, or that consumers are not cheated, or that privacy is not violated and exploited. It is not going to ensure that consumers are not left vulnerable because a business, in a rush to get to market and make the sale, cuts corners and takes undue risks. We need the FDA and EPA, the FCC and FTC, the CPSC and the CFPB.

To name just a few consumer protections: a ban on lead paint in children's toys; a ban on hazardous drop-side cribs; safety standards for meat and poultry; seat belts; the do-not-call list; prior consent before your cable company can collect and share your personal information; your right to see your credit report and correct it. Granted, the free market might eventually lead some businesses to offer some of these protections. But should we let a toy maker decide if it makes business sense to use lead paint?

We always want to find that sweet spot where the rules protect the public without unduly burdening business. Excessive burdens impose unnecessary costs, and divert productive resources, but inadequate protections lead to avoidable harm, and often to unjust enrichment. The businesses being regulated seem able to get their point of view across to the legislature, to the agency, and to the courts.

One factor can be whether a regulation would be anticompetitive, but let's be careful what we mean by that. In antitrust circles, we understand "competitive marketplace" in terms of a healthy rivalry among businesses. In the looser parlance of business circles, "competitiveness" is often understood to convey something different, like "strength," or "making bigger profits."

As to the antitrust understanding, the antitrust community and antitrust agencies have unique experience and expertise and credibility to offer. The antitrust agencies have provided valuable advice to Congress, state legislatures, and federal and state agencies on alternatives for achieving a regulatory objective without unduly restricting competition.

Sometimes it's about a direct barrier to entry, such as the joint DOJ-FTC advice to various states on certificate-of-need barriers for new or expanded hospitals, or the FTC's advice to Ohio in March on occupational requirements for dental hygienists and therapists. In those kinds of cases, an antitrust perspective can be quite useful — recognizing that countervailing policy interests, like safety, may justify what might be viewed, through a strictly antitrust prism, as a restraint of trade.

Congress has the prerogative, as do states under state action, to decide a particular restraint is reasonable. When I worked at House Judiciary, we spent a good deal of effort stopping other committees from tossing an antitrust exemption into their bills as a sweetener. Of course, Congress enacted the antitrust laws, and can decide to create antitrust exemptions, but we thought the place to decide that was the Judiciary Committee, with its experience, expertise, and appreciation for antitrust.

By the same token, saying antitrust is not second class doesn't mean it's top of the heap, or that we retreat from regulation, on faith that the free market will protect us. And, the further away we are from assessing direct effects on competitive rivalry, the less reason for the antitrust agencies to be advising the rest of government. Explaining how regulatory compliance costs can be harder for new and smaller companies to absorb is not an antitrust insight.

That still leaves lots of room where the antitrust community and the antitrust agencies do have something important to say.

Even with a direct restriction on competition, there's typically a safety or other concern at play. The question is whether a less restrictive alternative would still be effective. That's where an antitrust perspective can sometimes help, though maybe not always carry the day.

I was going to say something about telecom and media being in a highly specialized class by themselves, but I think I will leave that to John. Thank you.

ROBERT POTTER: Thank you, George. Next up, representing Public Knowledge, is John Bergmayer, their Senior Counsel specializing in telecommunications, media, Internet, and intellectual-property issues. Welcome back, John.

JOHN BERGMAYER: Thank you. Public Knowledge believes that regulation can promote competition and protect the public interest, but that changes in technology and business models require that regulations periodically be rethought. In my oral remarks, I will focus on some areas in particular in the media and broadcast space where regulations are not serving the public interest before adding some general remarks.

The relationship between cable providers and broadcasters has been subject to FCC oversight for decades. Some of the assumptions of current FCC rules are that pay TV providers have leverage over broadcasters, that without FCC involvement they would be freed to pirate signals from wherever they chose, and that broadcasters provide local information not available elsewhere, and these are outdated assumptions.

Due to ownership deregulation, large broadcast chains have emerged. As the Department well knows, Sinclair Broadcasting is now even trying to get bigger through its purchase of Tribune. While I may have little sympathy for Comcast or Charter, there are many pay TV providers who lack leverage against broadcast chains of this kind. Increasingly, multiple stations within a market and across different local markets are grouped together during carriage negotiations, leaving smaller providers in a take it or leave it negotiation where they would be significantly harmed if they allowed such a large number of broadcast stations to go dark on their systems.

This points to one area where government's background rules negatively affect competition. Broadcast stations are designated by statute as the sole parties that can authorize carriage of their signals, even when they are not the copyright owners of the programming they carry. Over the years, a complex system involving compulsory copyright licenses and retransmission consent has been enacted to govern the relationship between cable and satellite TV providers and broadcasters, and these statutory categories tend to preserve the status quo and make new entry into the market by players with new business models more difficult.

Public Knowledge has therefore long supported the gradual elimination of the compulsory license and retransmission consent system for pay TV to be replaced with private negotiations and copyright licenses that most likely will resemble those that already exist for pure cable channels. However, in this case, a too-sudden deregulation would simply empower parties who benefit from the current skewed regulatory system, and in the interim, and then as part of gradual reforms, Public Knowledge also believes that the FCC should declare that certain acts in retransmission consent negotiations are *per se* bad faith and therefore unlawful, such as restricting online video and consumer device usage, ceding control over negotiations to third parties, timing blackouts to coincide with marquee events, and demanding per-user fees for nonsubscribers, and the FCC should establish a process for challenging anticompetitive demands on either side of the negotiation. And similarly, the FCC should interpret the statutory definition of multichannel video programming distributor to mean what it says and not to arbitrarily exclude new categories of technology.

Regulations giving broadcasters special protections in the law should generally be eliminated, at least for large broadcast chains. A few years ago, led largely by now Chairman Pai, the FCC, on a bipartisan basis, eliminated the sports blackout rule, and this rule gave cable and broadcast companies a way to use the FCC to enforce their private contracts. These rules served no legitimate public purpose, and the predictions of doom from the broadcast industry that attended their elimination have all proven false.

It is time for the FCC to finish the job and eliminate similar protections such as rules against distant signal importation and syndicated exclusivity. Then-chairman Tom Wheeler proposed the elimination of these rules in 2015, but according to industry reports pulled back the proposal after significant congressional pressure. Indeed, many of the special protections for large broadcast chains that continue to exist do so because of congressional champions on both sides of the aisle. This does not mean that they are sound policy.

Having specific rules about specific business arrangements has contributed to the rigidity of the video marketplace. Regulations that guarantee exclusivity enforcement means that broadcasters do not have to bargain as hard for it, and during a time of broadcast consolidation and general deregulation, it simply makes no sense for the FCC to step in and give large broadcast chains legal tools and leverage not available to other media companies. Eliminating them might produce more alternatives for viewers and, to the extent that pay TV providers would gain the new ability to obtain lower cost programming from these sources, lower bills.

Also, and this one surprises people, but the Commission's basic tier buy-through rules require that cable operators include broadcast stations in all of the programming packages they offer. That means that full a la carte offerings by cable providers, whether or not you think they would be a good thing or not to provide, are actually illegal. The FCC's rules go further than the statute requires, and they needlessly restrict a la carte. There's no reason why viewers who wish to subscribe to cable service should be required, as opposed to having the option, of paying for over-the air programming that they could get for free with an antenna. And obviously this critique does not apply to stations that are carried without charge, such as public broadcasting.

In other cases, Public Knowledge believes that some rules should not be eliminated but modified to promote competition or other values. The retransmission consent regime mentioned is one example of an interim step. Another area is media ownership rules generally.

Currently, different broadcast stations that operate essentially as a single enterprise through joint sales agreements count as different companies for the purpose of ownership rules. To the extent that the FCC expressly allows collusion between competitors in the local marketplace, they may be immune to antitrust review. Local stations no longer have to have their main studio in the community they purportedly serve. Multiple stations in a single market may share a common owner, and large broadcast chains such as Sinclair are transforming what were once local broadcast stations into something more like a national broadcast network or a national cable-news outlet.

It's time for a broad rethinking of broadcast policy that is informed by the function broadcasters are intended to perform. If the purpose of broadcasts is to ensure that viewers have access to free TV, then the FCC's rules should be updated accordingly. If the purpose of broadcasts is to ensure that local communities have access to programming tailored to their specific needs, then broadcast rules should also reflect that, preferably through a structural approach.

Public Knowledge is typically seen as an organization that is generally in favor of different kinds of media and communications regulation, and I would not dispute that characterization. And there are plenty of areas where I think that the solution is not deregulation but more rules

or stricter enforcement of the existing ones, but I can leave those for another day, because well-run regulatory systems don't just have a lot of rules, but the right ones. In many cases the rules around the broadcast industry, and in particular the carriage of broadcast signals by pay TV providers, no longer provide the right balance.

And the specific example cited here are far from the only instances where regulations either stand in the way of competition or should be updated to promote it, but I believe that they are illustrative examples that can inform policymakers in many contexts. Thank you.

ROBERT POTTER: Thank you, John.

Our next speaker is representing the U.S. Chamber of Commerce, Gail Levine. Nice to see you again, Gail. She joined Uber as their Head of U.S. Regulatory Affairs, and now she's Uber's Director for U.S. Competition. Prior to working at Uber, Gail was Vice President of Public Policy at Verizon and previously worked as an attorney advisor to the chairman of the Federal Trade Commission and a trial attorney in the Federal Programs Branch here at the Department of Justice. Gail.

GAIL LEVINE: Thank you. It's great to be back. Thank you very much.

I'm delighted today to be the invited guest of the U.S. Chamber of Commerce, but of course I speak today on behalf of Uber.

In the earlier part of my career, when I was at the Federal Trade Commission, I helped set up roundtables like this, so I want to say thank you. I know how much work goes into creating these events, and I am grateful to you guys for putting together such an impressive panel today, in fact for all three of these panels, and for the vision of spotting this issue and taking it on. I just think it's a tremendous effort, so from one who's done it on the other side of this table, I thank you for what you're doing here today.

Before turning to the costs of regulation, which is today's subject, I thought it might be helpful to give a reminder of the benefits of private companies' entry into highly regulated markets, and maybe, given where I sit, using Uber as an example of that would be helpful.

Uber, as you know, provides a software app that operates an Internet-based platform that connects passengers with drivers in real time. You've all used Uber, right? Good.

Our innovations have created huge value for drivers, for riders, for users, sometimes in the face of strong regulatory initiatives or in a tough regulatory environment. Let me explain some of the benefits of new entry into highly regulated spaces for us. Affordable, reliable rides at lower prices — the price of a basic UberX tends to be considerably lower than taxi or limo pricing. Wait times are lower. Our app can get the driver to where the rider is in a minimum of wait time. We've got an expanded geographic availability of service. Our platform originates trips where the rider is, and that is not always necessarily where a hotel is or where an airport is. We've been able to expand our service into sometimes underserved corners of the community that didn't have those transportation options before.

In New York City, for example, we have really good service to the Bronx, Queens, Staten Island, Brooklyn, places where, traditionally, taxi was not serving those areas well. The 538 blog analyzed our data and found that in a three-month window in 2014, 22% of New York City Uber rides originated outside of Manhattan; 14% of yellow and green taxi rides originated outside of Manhattan, and our own internal data shows that over half of our trips in New York now originate in the outer boroughs. That's compared to 5% of yellow taxi trips which originate in those areas. So in other words, we're delivering rides to corners of the city where there really hadn't been effective access for on-demand transportation before.

We are trying to get more trips, in fewer cars. Our basic technology just allows for more-efficient matching than other transportation services. And more efficient even than that is Uber

Pool. Uber Pool is a service that puts more than one rider from more than one origination point in the same car going in the same direction.

In 2017, drivers served 35 million riders in Pool trips. If those riders had gone by themselves, we would have been talking about an additional 314 million vehicle miles and another 82,000 metric tons of carbon dioxide exhaust.

Uber and businesses like us are TNCs, transportation network companies (as in telecom, everything in my industry has a three-letter acronym as well; TNC is the acronym used to describe our service). With TNCs available, vehicle registration has gone down. In 2015, 9 million cars fewer were registered as vehicles to drive. That's a statistically significant figure of 3.4% United States-wide.

We partner with transportation agencies as well. As consumers figure that they don't need their own car, they can use a TNC to get around. They also recognize that they may want to use public-transportation services a little bit more too. So we have been partnering with public-transportation agencies to help fill empty seats on buses and trains, especially when it comes to first-mile and last-mile solutions — getting you to the metro, getting you home from the metro, etc.

For example, we expanded our Uber Pool coverage in DC when the Metro a couple of years ago was operating on SafeTrack, having those rolling closures that didn't allow for full service. And just this month we sponsored late-night Metrorail service after the Caps game so that fans could get home safely.

We are the new late-night option when bars close. Demand spikes for Uber in Pittsburgh at 2:00 AM, which is when the bars close. And in Chicago, we get a disproportionate number of weekend late-night Uber requests from companies that have liquor licenses. About half occur during the peak closing times of 10:00 PM to 3:00 AM. So we just offer a safer opportunity to get home.

We have increased security for both riders and drivers. When you're riding in our cars, your app lets you know who picked you up; lets your friends know who picked you up; lets your friends know, if you click on the option, where you are; lets you share your location; lets you share your estimated time of arrival with your friends so they can see where you are. And we've also provided drivers with new earnings opportunities and flexible hours to earn them.

George Mason University economist Tyler Cowen summarized the consumer benefits of one of our services a couple of years ago with a quote I just have to read because it's delightful. "For a typical dollar spent by consumers on UberX, they receive $1.60 worth of gain. That's an unusually high amount of consumer surplus. UberX produces daily social value of about $18 million. That is comparable to having an excellent French impressionist painter produce a beautiful work a day and give it away for free."

In the past, local transportation regulations have restricted entry or controlled price or limited innovation. Sometimes you see regulations that cap supply. Think about a requirement that transportation providers have to have one of a fixed number of medallions bolted onto the hood of the vehicle. Other regulations regulate prices, like rules that require taxi meters that charge fixed prices to all users.

And new entrants, like us and like others, have to sometimes thrive in a challenging regulatory environment with this kind of legacy regulation. Sometimes it's at the behest of the incumbents. For example, in 2015, in St. Louis we challenged a set of regulations from the St. Louis Metropolitan Taxicab Commission. They made it, as a practical matter, pretty much impossible for Uber to operate in the city. About half the commission was made up of active taxi-industry participants, and the regulations that the commission promulgated required TNC

drivers to get a taxi cab or livery permit and made only a severely limited number of them available. They were on a lottery system. Just 20 new permits in 2014, 26 new permits in 2015.

Other times we have regulations that are just as harmful but indirectly proposed. For example, in 2013, the trade association of local transportation regulators drafted a model regulation that proposed rules like you can't charge a lower price than a taxi's charging, or your rides have to be prearranged in advance of the trip, and municipalities picking up on that proposal would typically identify that as being something like 30 to 60 minutes ahead of time.

The problem isn't unique to the United States. Think about our situation in Greece, for example. In Greece, taxi-drivers associations went on strike this spring and argued that new entrants were creating unfair competition at the expense of licensed drivers. So they pushed and got some legislation that does things like require every ride share to begin and end in the fleet partner's garage. So I can't pick up you and then pick up you and then go home to the garage. I need to go back to the garage each time. Or that every ride-share ride must be three-hours long.

These rules are just so burdensome that we had to force some of our business to a halt in Greece. I know it will get better. I know we're working actively on a cooperative relationship, and I'm optimistic for the future, but in the meantime it leaves our local partners, our local riders with fewer options.

Other troubling stories have happier endings, like Seattle. In Seattle, the city council a few years ago passed an ordinance under which independent drivers would be collectively bargaining for terms, including price, in their contracts with Uber. But price fixing is illegal, and the Chamber of Commerce joined us in suing to block the ordinance.

And let me give a big thank you here to the Department of Justice's Antitrust Division who, with their colleagues at the Federal Trade Commission, filed a supporting amicus brief with us in the Ninth Circuit. You wrote that the collective bargaining by independent competing drivers in that situation would be price fixing and that that was plainly unlawful and that the state of Washington hadn't clearly authorized the city to suppress that kind of competition.

You know better than anyone that just this month that advocacy bore fruit and the Ninth Circuit agreed and said the state did not authorize and wasn't actively supervising that kind of restraint on competition. So thank you not just for what you've done for us in that one instance but what you have been doing for all of us as not just economic actors in the market but as consumers to promote competition in spite of barriers to innovation and to competition.

Unfortunately there's more work for your agency and for all of us to keep doing, more opportunities to engage in competition advocacy, and enforcement of the antitrust laws to eliminate anticompetitive regulation. Two thoughts as I close about thinking where to deploy your scarce advocacy and enforcement resources.

First, on the harm side, local government restrictions on competition are especially pernicious. You cannot outcompete local government regulations, and that's a reminder that the scope of the state action doctrine really matters. As you, the Antitrust Division, said earlier this year in your Supreme Court brief, public entities are not owed special solicitude under the state action doctrine, that the anticompetitive regulation is only permitted for genuine exercise of the state's sovereign power. Your advocacy makes a difference in the real world, so I appreciate what you're doing on the first point.

Second point on benefits: the benefits to consumers from removing the regulatory competition barriers are huge. A couple of years ago, the Senate Appropriations Committee, when they were talking about local transportation and smartphone apps, said that removing

public restraints on competition, as this three-part workshop is focused on today, is the ideal sort of low-hanging fruit to be going for.

Antitrust advocacy and enforcement is particularly important because we are just at the beginning here of new markets. We are seeing an extraordinary pace of innovation to improve safety and transportation and reduce costs. An extraordinary amount of capital worldwide being invested in new transportation technologies. Significant cost reductions are expected in the near future, and we're only just beginning to penetrate the addressable market for the kind of transportation solutions that companies like mine provide.

So thank you for what you're doing to help consumers, help riders, help drivers by removing those public restraints on competition and innovation. Thank you.

MAKAN DELRAHIM: Thanks Gail. I think the Ninth Circuit case is a good example of not just that particular case in Seattle. That was a test regulation in one municipality or locality where had they been successful — and I guess that's still technically up to the Supreme Court — and who the heck knows what happens there? — but let's assume that the court properly ended the misguided aspects of that regulation. Had that been successful, that would have not been the last city where we would have seen bad regulation. It would have been popping all over the place. That's why it's really important to try to address these, address them early when they're popping up.

What I would love to see would be a Twitter account or some kind of a blog of the international kind of silly regulations that relate to this because, whether it's international or local regulations, the more that is subject to sunshine, the better it would be not only for debate but probably would put a restraint on some of the new localities from putting in things that are not supported by the police powers of safety and health and others, but it's just purely intended to protect an incumbent.

GAIL LEVINE: Thank you.

ROBERT POTTER: Thank you, Gail.

The next speaker is representing the National Diversity Coalition. It's Steven Sugarman. He is a Senior Adviser and Chief Counsel to the Coalition. Steve began his career as a management consultant at McKinsey & Company and Lehman Brothers and has extensive experience in finance and management law, including community development and service to minority communities, including the National Asian-American Coalition. Steve, welcome.

STEVEN SUGARMAN: Thank you very much. Thank you for this opportunity to speak today. I wanted to use the time to talk about something really important to us and our members, which is consumer welfare and the Antitrust Division's approach and support for a flexible and dynamic consumer welfare standard that's equipped to face threats to competition that not only exist today but over time.

Today, the standard is premised on the idea that the consumers benefit from free-market competition because it increases economic efficiency, often in the form of lower prices or increased output. Courts and agencies of the United States have traditionally analyzed consumer welfare based on whether restraints or mergers may raise prices or reduce output. The National Diversity Coalition agrees with this approach.

However, too often, traditional antitrust analysis listens to the voice of scholars, academics, statisticians in lieu of consumers. Ironically, this can leave consumers, especially disaffected and underserved communities, feeling voiceless in a process purporting to determine effects on consumer welfare. In fact, it can appear that some historical processes for assessing consumer welfare go to significant lengths to avoid direct consumer engagement. Current jurisprudence

likewise can favor centralized analysis sanitized from direct consumer interaction and input over a broad consumer perspective on the marketplace.

Today, the National Diversity Coalition seeks to speak for the simple proposition that the voice of consumers must, as part of antitrust oversight and enforcement, be inalienable from an assessment of consumer welfare. It is necessary to incorporate evidence gathered directly from consumers into antitrust analysis in order to unlock the power of efficient markets.

We are emboldened by the Division's increased openness under this assistant attorney general to include the voices of consumers and their advocates in its work. For instance, we commend the Division and the staff for including us in this discussion, and also we acknowledge that the Division has recently recognized the need to consider ways to increase the voice of the consumer in antitrust analysis. For instance, we support the Division's recent call for "[a]cademics and enforcers to consider whether tools such as [Net Promoter Scores] and similar benchmarks are useful for measuring quality as a byproduct of competition." As that example from the Division notes, there's a search for incorporating the voice of the consumer into the antitrust product.

We support quantitative inputs like these assessments into ways to assess consumer welfare on such things as a merger's impact on product quality. However, we also believe that such statistical approaches must not be misunderstood as a substitute for direct-to-consumer engagement. Currently, we are concerned that there can be a disconnect between academics and enforcers on the one hand and consumers on the other. Increasing direct engagement with consumers remains essential. Consumers play an immutable role in the efficient functioning of markets that can't be replaced through discussions, at least discussions in their absence.

Likewise, their voices must be prioritized when determining the consumer impact from certain mergers and restraints of trade. As an example, the National Diversity Coalition recently visited with a large telecom company who indicated that there was no place in the enforcement process for consumers to be involved. This raises the specter that there's a misunderstanding of what an antitrust enforcement process seeks to undertake. And there is a confusion about whether large corporations, technology companies, retailers should be building large staff in offices in DC to interact with the government or invest similar resources to interact with consumers that are affected by acquisitions, mergers, and such behavior.

We've recently visited and had good discussions with many of these larger corporations, and we found that the voice of the consumer is often absent from their organizational structures. The interactions and the effects of competitive behavior and mergers and acquisitions often addresses academics, regulators, enforcers, but not disaffected communities and those communities most at risk of harm.

To that end, we offer the following recommendations for consideration. First, that the Antitrust Division should seek to ensure that the consumer voice is properly part of all three phases of antitrust oversight — assessment, enforcement, monitoring. We recognize that there are ways for consumers to impose themselves on the process. However, there still continues to be confusion amongst the main participants of what the consumer role is.

We would recommend a consumer advisory board that helps the Division consider consumer impact from a broad range of consumer voices in the assessment phase. In the enforcement phase, we would recommend the Division, through its word, help clarify that consumers are an important part of antitrust considerations and to provide clear public guidance to that effect.

Additionally, we would recommend assessing other regulatory regimes that play a crucial role where the consumer voice and consumer welfare is important. We would highlight the

California Public Utility Commission, which has provided a forum where consumers can directly engage in concerns during that regulatory process to ensure that no harm comes. We would also look to some of the processes in financial services and banking that exist.

And then lastly monitoring — so post-transaction where the corporation, whether without enforcement or post-enforcement makes certain promises, representations, and commitments on how they will implement their business in a way that it will not have an anticompetitive effect. There's limited monitoring or role post-transaction for the consumers, and what we found in different sectors is oftentimes promises made during an application or during a submission are not promises kept as soon as the deal gets approval and closes.

And the consumer can play a really important part in monitoring and tracking. Unfortunately, they tend to be the least well financed of all the stakeholders in the antitrust process, so there tends to be very little post-close monitoring where the consumers can be engaged based on the power of financial wherewithal.

The second thing — with those recommendations, we believe that corporate actors and enforcers and all market participants could feel comfortable and can have clarity that they really need to think about the impact on consumers, and in particular minority, low-income, at-risk consumers that these transactions will have. And it's not about financing centralized academic studies. It's about really engaging and that that will have a transformative effect not just during a merger but during their decisions throughout the lifecycle of the company.

Again, we're encouraged by the outreach efforts from the Division, really appreciate it, and its recent support for greater ways to measure consumer welfare based on the actual voices of consumers. We believe that the proposals we make can make for a stronger, more durable, and also more flexible and dynamic because antitrust and the implications change over time, even for the same business that goes through its business life cycle. And the best way to understand what's really happening in a dynamic fashion is to get ongoing and dynamic impact from those who are touched directly, which tends to be the consumers. So thank you.

MAKAN DELRAHIM: Thank you. You might also be pleased to know — it probably gets lost in a lot of the noise we make here at the Division — recently, the announcement of the creation of the Office of Decree Enforcement, which will be just dedicated to proactively enforcing the commitments of various parties to mergers or other behavioral decrees that exist. We're doing an overall review of all of our consent decrees. But in addition to that, we have just created a new enforcement office that will be monitoring and following up to make sure, rather than waiting around for the accidental discovery, of violations of decrees.

STEVEN SUGARMAN: Well thank you for that.

ROBERT POTTER: Thank you.

Next speaker representing the American Bar Association's Section of Antitrust Law is Tom Zych a partner and chair of the emerging technologies practice at Thompson Hine. Tom has over 30 years of private-practice experience in data protection, intellectual property, consumer protection, social media, competition, and last but not least, antitrust.

THOMAS ZYCH: Thank you. As with others, I want to express my appreciation for the invitation to be here to participate in this roundtable. My partners always hasten to remind me, I do not speak for them necessarily or our clients, and I cannot speak on behalf of the entire American Bar Association, but in my role as an officer of the Section of Antitrust Law, by way of gratitude not just to come here, as we do, asking things of the Division but to offer, and that is our continued support, as we have articulated repeatedly, on the efforts of the Division to protect competition and to protect consumers as well.

And in that regard — and we can skip over this part of the discussion so easily — is that we want to express our continued support to the Division and your colleagues in the federal agencies in the efforts to preserve the antitrust laws from inroads: from nibbling at the ankles at attempts to reduce the effectiveness and the application of the antitrust laws through regulation, legislation, or otherwise. And so it will continue to be the section's point of view that preserving the corrective role of antitrust laws means supporting the Division and the commission and other enforcers' ability to effectively make sure those laws are carried out and implemented, both directly and indirectly, from policy to budget. So that's something that the section has long supported the Division and we will continue to do so.

That being said, I think it is a timely discussion, but when I say that, I note that probably in my lifetime there's never been a time it was not a time of discussion to speak about the role of competition and regulation, and while we are not an ideological body — we do not have a specific axe to grind other than supporting the competition laws and the consumer protection laws, and we're mindful of the limitations of our brief. That is we rarely are in a position within our mission to advocate for or against a specific regulation. Understanding the discipline of competition and understanding the discipline of consumer protection, I think we can provide and would urge a certain structure, a certain way of looking at the regulations so that we measure the costs, as we can do empirically as best we can, and then weigh them, as George and others have advocated. There's a way of doing so that is less ideological and more, as we believe the competition laws are, data driven, fact specific, and reality based.

So there are many ways to slice the picture, but we suggest one, and that's to think of maybe three buckets for regulations, and we can calibrate our skepticism and indeed sometimes presumptions that can be applied to the regulations.

There are those that have been mentioned already that are directly and honestly aimed at changing the structure of a market, and that is, we go back to the failed experiment in this country of fair-trade laws. I think of the first Afghani consumer-protection law a number of years ago where our section was asked to comment upon when it came to price regulation and how we advocated that the imposition of static rules on dynamic competition in the long run would help nobody.

So when you look at regulations that are aimed explicitly to change the structure of a market by manufacturers, distributors, or others, there's a healthy skepticism because I believe both the academic and real-world experience is that it's hard to find justification for those. We dealt with, as far back as the '80s, the motor vehicle dealer statutes that Makan mentioned that limited the ability of a car manufacturer, an automobile or truck manufacturer or farm machinery manufacturer to get product to consumers in the most efficient way. This is even pre-Internet. This is just basically affecting the structure.

And when you had states prohibiting online price advertising, online distribution, you see that it's not hard to find the evidence quite quickly that that distortion of the market is hard to justify. There's almost a presumption that one can apply, not for ideological reasons but simply because we've got the experience with these markets and know what happens. I think there's a role that we can all play.

And we cannot say there's no structural intervention that is justifiable. That, I think, would be a bridge too far. But we can say that in that instance the level of skepticism has to be quite high because of the problems of static regulation in dynamic markets and the political reality of who benefits from these. It's not hard, for example, in 1970s to look at motor-vehicle-dealer statutes and find where those laws originated from. If doesn't take much of a political genius to

get that. So if you look at both motive and effect, there's a level of skepticism for those direct structural reorganizations that provide an approach.

Kind of in between is those laws that are aimed at protecting consumers, purchasers of goods and services based upon the source of the goods or services. I live near the Cleveland Clinic. I am happy, probably, even though I haven't used their services yet, that the cardiothoracic surgeons at the Cleveland Clinic have a certain level of expertise that is demanded before they can crack open my chest.

We understand that there is in that area, in that arena a role to play. However, again, this is a problem of static regulation of dynamic markets — certainly in the health-care market we see that — so this skepticism is one that needs to be applied over time so that assumptions that are made about capability of market entrants can be reviewed analytically and to see.

We've used the word nurse practitioner already. That's a category of health-care practitioner that's gone from almost forbidden to being protected and in between. My physical this year was provided by a nurse practitioner, perfectly fine. I did not need the MD for my physical.

And so if we look at these over time as training, as education develops, as certification develops, we can look and see, that's something that is an ongoing review to make sure. Because, again, there is political protection for them.

And in all honesty, I come from a regulated profession: I'm an attorney. I had to go to law school. I had to pass a bar. If I'm going to go to certain states, even at my advanced age I've got to pass the bar again.

Now if I'm a capital defendant in a criminal case, it's probably a good thing that the person standing next to me is a skilled advocate and can keep you from the death chamber if I don't deserve it. At the same time, as we have new services that are designed to bring legal help to those who cannot afford it that our distribution model doesn't serve, we need to look at anachronistic regulations that may get in the way of that.

So even when there's a situation where we see that the barrier to entry of licensure may be justified, it doesn't mean any barrier is justified. So again, the competition analysis and the data disciplines we can have can help us make those decisions even in the face of countervailing beneficial societal ends that are being served. So the economics, again, and the antitrust discipline provides a helpful approach.

The third — and I think George may have mentioned it, and it's one where there may be less of a role and that antitrust humility is called for but not antitrust abdication. Again, to be anecdotal, my office looks on the Cuyahoga River. It was unfairly pointed out in the 1960s, but it was true that the river caught fire. It was not the only one. And the pictures on TV actually are of Pittsburgh, not Cleveland, but that's an old problem.

You have a toxic river that is no longer toxic, and one can eat perch that is fished from Lake Erie. Four per week probably maximum is what's advertised. But at the same time what we have is the effect of the Clean Air and Clean Water Act. We no longer have sulfur dioxide sunsets in Cleveland. They were pretty, but they were toxic. And so we can look at these, and I would challenge anyone to say that the Clean Water Act was a net harm to society.

At the same time, that doesn't answer the question. If there are regulations that affect fewer than all of the product or service substitutes, then you can have a competition concern in the implementation of the law.

If you look at one set of controls without consideration of others that may be more market based, you may not have a fully nuanced and fully appropriate regulatory scheme that is both sensible over time and that won't be running against the tide of economics every single day. People make consumer decisions, and you take this into effect. So even in those where the

humility of the antitrust laws would be, this is not necessarily our brief, there is a role to make sure that whether it's through the private-litigation mechanisms, through government enforcement, or advocacy, wherever you are in those weapons, that there's a role to play even in we've got noncompetition and one would say largely noneconomic.

The Afghani experience is another one. It was a consumer-protection law aimed at preserving consumers from fraudulent advertising. There was to be a prohibition on comparative advertising. It was thought to be bad taste and in that culture something one did not do.

Our point was simply that while protecting consumers with regard to pricing information, key to economic activity, that if you act to deprive consumers of information, they're not likely to make the best decisions, so the law ought to favor more information in the hands of consumers rather than less. That's an experience of the United States law and our economy. And we've passed it on to the Afghanis, who I'm told were grateful for the advice.

And so we can look even in those regulatory schemes that are not competition based that would not seem to be within the Antitrust Division's initial purview. There is a role for the antitrust in competition advocacy, and I would say even consumer-protection advocacy with regard to consumer welfare. So I think if we take kind of a disciplined approach to this and less ideological and view the antitrust laws as fact based and data driven, that the rule of reason is there for a reason, I think we can approach this in a useful way and maximize the impact that we can have.

And the final comment I'll make out of personal privilege is I thank staff for doing this in an order other than alphabetical by surname, as I sometimes face, but thank you.

ROBERT POTTER: Thank you.

MAKAN DELRAHIM: Professor Yoo.

ROBERT POTTER: Our next speaker is Professor Christopher Yoo, the John H. Chestnut Professor of Law, Communication, and Computer and Information Science at the University of Pennsylvania. His research focuses on how the principles of network engineering and the economics of imperfect competition can provide insights into regulation, particularly in electronic communications industries. Professor.

CHRISTOPHER YOO: Thank you to Makan Delrahim and the Division for organizing this roundtable. I also thank you for not just ordering it by surname or by institution, because either way I'd be last or darn near last.

I think that Makan's opening speech set the perfect tone by emphasizing that there's a proper province for regulation. It's appropriate sometimes, but it also has a cost. In short, Makan's advice is to think in terms of balance, and to me, that's a term that's often lost.

There's a tendency sometimes to romanticize regulation. I actually think all legal interventions have their limits, and something we've learned as lawyers is that just because we see a problem and we want to fix it, the law does not necessarily make it better. We've learned that's not always the case. The fact that the proposed fix is always imperfect as well means that we really have to engage it as a problem of comparative second bests and to try to really understand this better.

What strikes me is that those of us who actually spend a long time thinking about the history of regulation realize that past efforts weren't always so great after all. I'm going to focus my remarks primarily on traditional economic regulation of price, which has probably been the most interventionist approach and has the most impact for antitrust. I find that there's a tremendous romanticism of price regulation. We forget that in the '80s and '90s, for example, the FCC and NTIA had enormous proceedings to talk about how the traditional rate-regulation

system was failing and why we needed to fix it. That history has been lost to much of the debate.

So what does this history teach us? First, there's a problem with regulation raising rivals' costs, a strategy with which we're all familiar. To say simply that regulation can raise costs isn't sufficient. We have to go back to the notion of balance. We must note that there's actually some potential benefit to regulation as well. We have to think of it that as a tradeoff.

There's also an enormous literature on how price regulation facilitates collusion, which I think has largely been lost; it standardizes products, it makes price visible, it limits firms' ability to engage in unsystematic price discrimination, which breaks down cartels, it actually allows competitors to challenge rates for deviating from preset levels, and it actually creates a cartel enforcer who actually will create enforcement of prices.

And interestingly, under the filed rate doctrine, regulation does not just set maximum prices. It also sets minimum prices. And so we think of rate regulation as putting ceilings on prices. Price regulation actually sets floors as well, and anyone in the antitrust business knows that something that makes sure prices stay up is inherently suspect.

Second, we forget that traditional price regulation raised huge problems by creating disincentives to conserve on expenses. Most price regulation schemes were cost-plus regimes, which are inherently inflationary. We had this idea of price caps that would solve all the problems, but they didn't.

We also had the Averch-Johnson effect, which is something that's rarely discussed, but is critical to anyone who studies price regulation. Simply put, all regulatory schemes create biases. And we actually see that there's an enormous history here that there's problems associated with price regulation.

There's also the general notion that price regulation hurts innovation, because innovators gain no real upside for the risks they take. They have to telegraph all of their innovations. There's a literature that's explored whether that's good or bad for consumers.

The other thing that's fascinating to me is the whole notion of partial deregulation under the filed rate doctrine can actually leave consumers without any remedies at all. If an industry is partially deregulated, but not fully deregulated, it's still in that world where regulation dictates the exact price. And so you still end up deferring to the rate as the entirety of the contract even when the provider promised someone a lower price in bad faith. You have to go to the regulated rate even when the provider promised a price that was 10% lower. Too bad. Regulation displaces everything, and what's striking is that unlike for state regulation, in the federal context, there is no clear articulation requirement for regulation to displace competition. There is also no active supervision requirement. So you can end up having practices evade all scrutiny, either by the antitrust authorities or by the regulatory authorities.

The last thing that's really striking to me is how the shadow of regulation can actually affect antitrust law, and particularly what I have in mind is merger clearances. The example I gave in my prepared remarks that struck me the most is the impact of the statute that authorizes the FCC to set a cap on the percentage of the country that a cable operator can reach. The FCC has twice tried to set the national cap at 30%, and each time the FCC failed to justify its decision in court, and courts struck the FCC's orders down as arbitrary and capricious. Yet the shadow of a failed regulation that could not withstand judicial scrutiny continues to affect every merging party in the cable industry. They come and promise to divest resources to get below this *failed* 30% guideline. So even though the regulation isn't legal, it still has an impact.

In fact, you see this constantly. If people are working in areas that have traditionally been regulated, they're afraid of the impact on antitrust scrutiny, regardless of the strict letter of regulation. That's not a direct effect but clearly a consequential effect.

The focus of my remarks has been on economic regulation. A lot of the other comments have focused on health and safety regulation. I will say that is an important province of regulation and, in fact, will remain so even in the advent of competition. I will note that in most cases the remedies for health and safety regulation are informational, like the CPSC, the Food and Drug Administration, and the like. Informational remedies actually don't conflict with antitrust laws in the same way as price regulation and don't raise the same sort of problems. There are some other forms of health and safety regulation that potentially do, such as OSHA and the minimum wage, but they rest on a slightly different footing. But at least we can narrow the scope of potential conflicts between regulation and antitrust considerably.

I'll close by actually mentioning a framework that I've actually grown to like a lot that was encapsulated nicely by Howard Shelanski. As most of you know, Howard is the former Chief Economist of the Federal Communications Commission, former Director of the Bureau of Economics of the FTC, and the former head of OIRA. He emphasized the importance of framing the regulatory decision as a second-best analysis in that we shouldn't pretend regulation is costless. If you're comparing unregulated monopoly with regulated monopoly, unregulated monopoly performs so badly that we should regulate, and the balance tips that way. But as we shift from monopoly to oligopoly, eventually the market performs better — never competitively, never perfectly, but better — and there's a number at which point the costs of regulated oligopoly cause it to perform worse than unregulated oligopoly. Different commentators may pick a different number at which point there are enough players that unregulated oligopoly performs better than regulation. It's hard to know what that number is.

Howard has a number. He has said it in this article in the *Yale Journal of Regulation* that his number is three. Once you get three competitors, the government should get out of the business of price regulation. Now you can quibble over that. That said, Howard is not a kneejerk deregulatory person by nature. He's also a very good scholar, and I take what he says seriously, but whatever anyone thinks is the right number, Makan's point is that there is a number, and when regulators think about intervening, we should remember that unregulated markets actually do provide a certain level of protection for consumers, and we should think about this in a more dynamic, supple way that has consumer welfare at the center.

MAKAN DELRAHIM: Thank you. I'm surprised that Sprint and T-Mobile have not brought his paper over to us yet. [LAUGHTER] Such a magical number.

CHRISTOPHER YOO: I'm not in a position to discuss matters currently pending before the Division.

ROBERT POTTER: Thank you Professor. Our next speaker representing the American Antitrust Institute is Rick Brunell. Welcome back Rick. He's AAI's General Counsel. He previously practiced in the chairman's office at the Federal Trade Commission, litigation department at Foley Hoag in Boston, and the Massachusetts attorney general's office, and here at the Antitrust Division as well.

RICHARD BRUNELL: I want to reiterate our thanks for being invited and thanks for holding these roundtables. Not only is that topic quite important but the way in which the panelists have been invited with a great diversity of viewpoints I think is quite commendable.

AAI itself is a frequent competition advocate before regulatory agencies, and we're frequently involved in airlines and telecommunications and energy, and we've been critical of many of the things that the Division has been critical of, including some of the points that

Makan mentioned — unjustified occupational licensing regimes, dealer protection laws that limit the ability of innovative car manufacturers to distribute directly to consumers, and certificate of need laws. So there's a lot of consensus about problematic areas.

On the other hand, we think we need to be mindful that regulation that restricts competition may be fully justified to correct market failures or may involve legitimate tradeoffs that antitrust enforcers should respect. Moreover, regulation can also enable competition in ways that the antitrust laws cannot. And so we suggest a few principles to consider in defining the Division's role as a competition advocate.

First, one of the concepts previously mentioned is this idea of antitrust humility or competition humility, which we think is important, and it's important in the current environment involving the criticism of the antitrust enterprise and the criticism of antitrust's focus on consumer welfare where the claims are made that antitrust really should take into account other values such as the welfare of workers, inequality, democracy, privacy, and community welfare, among other things. If antitrust enforcers are to resist such calls as beyond the ken of antitrust, I think they must avoid the perception that they reject such concerns altogether. When regulators do tackle social problems with regulations that have the effect of restricting competition and make tradeoffs that reflect a reasoned balancing of interests, antitrust enforcers should be circumspect in challenging those tradeoffs. Which is not to say the Division doesn't have a role in identifying the costs of the tradeoffs — by nature, that's what a tradeoff is — but in terms of how you value protecting, let's say, workers versus consumers outside of the antitrust world, there should be some humility.

One example that Gail isn't going to like is the issue of collective bargaining by gig-economy workers as a way to protect labor. Of course folks have written about the gig economy and what happens when everybody is working as an independent contractor and they have no benefits; are they put behind the eight ball? We can debate whether such bargaining would constitute an unreasonable restraint of trade among independent contractors. Perhaps it does, but states could enact laws that would authorize such conduct under the Parker doctrine.

In the Seattle case, the state of Washington did not. We can question whether allowing collective bargaining by gig-economy workers or drivers is worth the cost to consumers and perhaps whether the competition by platform companies is sufficient to protect workers, but this isn't an instance, at least as far as I'm aware, where you're talking about incumbent firms excluding or regulating rivals. It's about the division of the surplus between labor and business.

It's perfectly fine, in our view, to argue that, under the state action doctrine, the state was not clear about its intent to regulate in the way that the city of Seattle wanted to regulate, and that's within the traditional role of antitrust advocates, but on the policy question of whether allowing collective bargaining is a good or bad thing, I think we would urge some circumspection to avoid the perception that antitrust doesn't really care about workers.

Second, the Division should continue to recognize the importance of regulation in promoting competition. Regulation has been an essential enabler of competition in network industries like telecom, electricity, and natural gas that involve elements of natural monopoly or bottlenecks, and open access and unbundling requirements imposed on incumbent network operators have facilitated the development of vibrant competitive ancillary markets. A global regulatory solution to the access problem is often preferable to piecemeal antitrust remedies that target particular instances of anticompetitive discrimination. We could debate net neutrality and whether that kind of regulation is preferable to antitrust enforcement when talking about discrimination in content.

Third, the Division should be the advocate and avatar of vigorous antitrust enforcement in deregulated industries. Makan mentioned this earlier. One of the lessons of deregulation is that deregulation without vigorous antitrust enforcement fritters away the gains to consumers. And we would argue that perhaps that occurred in the airline industry where deregulation has provided great gains, but the merger enforcement policy in the industry has, we believe, frittered away some of those gains. Wholesale electricity markets subject to market-based rates is another example of a deregulated market that requires close attention from antitrust enforcers, among other things, to ensure that we don't have this gap in enforcement where the filed rate doctrine prevents antitrust enforcement, but yet there's no real regulation of prices.

Fourth, the Division's amicus advocacy with respect to regulation should focus on exemptions and immunities. Historically, the Division has been a strong advocate for limiting antitrust exemptions and immunities. We are pleased to see this advocacy continue in its recent filings. We would suggest caution, however, in investing scarce resources to file briefs in support of invalidating anticompetitive state regulations on other grounds, such as perhaps the Dormant Commerce Clause or Substantive Due Process. Those are controversial waters, not themselves within the competition expertise of the Division, and we think it may weaken public support for the Division's core mission to wade into those waters.

Finally, we urge the Division to increase its competition advocacy before federal agencies. In industries like electricity, natural gas, telecommunications, and airlines, the Division has particularly valuable expertise to offer federal regulators, and that has been a core function of the Division for many years. And looking at some of the numbers of the filings before federal agencies, for some reason it appears that the number fell during the Obama administration. So we would urge the Division to take up that avenue of advocacy with more vigor.

I look forward to elaborating on these suggestions and participating in the discussion.

ROBERT POTTER: Thank you. One thing I'll mention about the numbers is we often do a lot of work behind the scenes without filing, so don't take the numbers as necessarily representative of the efforts.

Our next speaker representing the Open Markets institute is Lina Khan, Director of Legal Policy. Welcome back, Lina. Lina has experience representing homeowners against financial institutions and worked with the Consumer Financial Protection Bureau.

LINA KHAN: Thank you. And thanks to the Antitrust Division for inviting Open Markets and for organizing these terrific discussions.

I'll start by underscoring the call for competition humility. Open Markets believes that, in select instances, it may be appropriate for the Division to identify those public regulations that serve private interests at the expense of both competition and the public interest, but that at this time the Division should focus its efforts and resources on antitrust enforcement and that devoting resources to critiquing the work of public regulators generally should not be a priority at this time.

We believe this for three reasons. First is that the U.S. political economy is currently seeing historically high levels of merger activity alongside signs of persistent and prevalent market power. I believe companies have spent over $2 trillion in merger and acquisition activity already in 2018, and both the pace and volume is kind of set to outdo previous records. This means that the Antitrust Division's tools and resources are critically needed to block anticompetitive mergers and to investigate, remedy, and deter anticompetitive conduct. The focus should be on identifying exercises of private power that violate the law rather than exercises of public power whose policy judgments the Division may question.

Second, the institutional mandate is to enforce the antitrust laws. We worry that engaging in competition advocacy would take the Division away from its core mission. And indeed playing competition advocate risks putting the Division in the position of making policy judgments more suited for a legislator or a regulator than a law enforcer, a hazard that Assistant Attorney General Delrahim has warned about in other contexts.

Third, we think the concern about the costs of public regulation may also serve to distract from the costs of private regulation. Dominant actors with market power are often able to set the terms within a specific marketplace, thereby dictating outcomes for other businesses. Such unilateral exercise of private power is also very much a form of regulation. As legal scholar Robert Hale wrote, "There is government whenever one person or group can tell others what they must do and when those others have to obey or suffer a penalty." Especially in digital-technology markets, certain dominant firms now exert regulatory control over the terms on which others can sell goods and services. These private regulations established by "functional sovereigns" and the costs that they impose on different sets of customers I think invite closer attention from antitrust authorities, and they suggest potential abuse and maintenance of market power.

I'd like to follow up with a couple additional points. First is, I think given the framing of this topic, it's worth discussing a little bit the relationship between markets and regulations. Open Markets believes that markets are created and structured through law. There's no such thing as a market "free" from government intervention. In fact, government is a precondition for a functioning market. Markets can't function without property rights which government defines and enforces, and markets also rely on state authority to settle disputes through contract law and other tools.

For this reason, I think looking at regulations and competition as opposite misses the fact that markets aren't freestanding organic entities and that regulations can also play a critical role in promoting competition.

There are at least four types of procompetitive regulations that we'll discuss briefly and that we expand on in our written comments. First are separation rules which place limits on business activity, and by limiting forms of integration, these ease barriers to entry in adjacent markets. The second is common carriage rules requiring carriers to treat all customers equally and transparently. Third is rules that reduce switching costs. The FCC's number portability rule is one example of this, and interoperability requirements generally are another example. The fourth is price transparency regimes. Requiring firms to display all fees upfront helps promote competition on the merits. This is something that we've seen in airline markets as airlines have been required to show all of their pricing and fees at the point of sale. Described as competition catalysts, these regulations have traditionally been applied in network industries or sectors where a small number of private actors have captured control over an essential input or critical infrastructure.

I think a final example of procompetitive regulation that I'll touch on briefly is the USDA's GIPSA rules, the Grain Inspection, Packers, Stockyard Administration rules. These were proposed in 2010 following joint national workshops held by the Antitrust Division and USDA, and the rules would have helped redress the buyer power that packers and processors enjoy over farmers and ranchers. As the Antitrust Division's own record of the workshops show, there are significant monopsony issues in agriculture markets, especially in poultry, and given the decision not to pursue enforcement action, the GIPSA rules would have been important in helping mitigate the effects of that monopsony power.

Last year a few days before the rules were set to go into effect, USDA decided to withdraw the rules. We see this as an instance where the Division's competition-advocacy work, insofar as it's going to engage in competition advocacy, should have encouraged it to publicly support the GIPSA rules as being procompetitive. We described in our written comments how the Division should also focus on certain private regulations that we think suggest market power and are distorting market outcomes.

To close, I think insofar as the Division engages in competition advocacy, we would encourage you to look at promoting procompetitive regulations, especially given that there is a broader deregulatory agenda that the administration is pursuing through other means. And we think targeting market power will also help the Division identify anticompetitive forms of private regulation, which is at the core of the Division's mission. Thank you.

MAKAN DELRAHIM: Thank you. I remember one of my favorite sayings, which I 100% disagree with, was the great old professor Jonathan Kenneth Galbraith who said, "Antitrust is for the weak of the mind." He did not much like antitrust enforcement. He preferred regulation. You might recall in the FDR administration, he was credited largely with the Office of Price Administration. Fortunately one of my great heroes in that same administration, Robert Jackson, who was the head of the Antitrust Division, but worked in that same office, won in the intellectual debate about whether the Price Administration should continue on or should we have strong antitrust enforcement and let the markets decide.

So it's a good history to go back. And there was another young guy in that same little cabal by the name of Thurman Arnold, who was actively involved in those debates back then. Thank God Robert Jackson won.

ROBERT POTTER: Our next speaker representing the Cato Institute is Ryan Bourne, the R. Evan Scharf Chair for the Public Understanding of Economics. Ryan.

RYAN BOURNE: Thank you. It's great to be here. And thank you to the Assistant Attorney General and the Antitrust Division for this invitation.

The Cato Institute and libertarian scholars generally have long been concerned with anticompetitive regulations and their effect on consumers. And one of the reasons why is kind of a flip side to our general skepticism also of antitrust, which is that we believe that markets tend to be incredibly dynamic, and entrepreneurs and market forces work over time to undo monopoly or cartel-like behavior, but anticompetitive interventions imposed by the force of law can prove much more enduring.

That said, I think before we look purely at the cost of regulations in order to assess whether they truly undermine competition and harm consumers, it's first necessary to remember their purpose. Most regulations are justified in economic terms as efforts to correct perceived market failures. In economics textbooks, market failures are said to occur when the level of transactions are not efficient, lowering net social welfare.

And this can theoretically arise for a number of reasons. We've heard about externalities from trade, natural monopolies, a good being a public good in the sense that it's non-rivalrous and non-excludable, or the existence of significant asymmetries of information between buyers and sellers. So most proponents of regulation start from the premise that the market in question fulfills one of these criteria. They then propose a government regulation to correct for it, taking us to some form of socially optimal level of consumption or production.

Now if that were true and the government was all knowing about the external effects of all transactions, that would be the end of the story, but there are good economic reasons, some of which we've already heard, to think that the market-failure paradigm itself has major problems.

Markets fail to deliver public goods much less often than the invokers of regulation or government provision suggest.

As I've alluded to, entrepreneurship has a tendency to eliminate many inefficiencies over time, meaning regulators are often backward looking. The government can miscalculate the scale of taxes and regulations and itself fail. Regulatory agencies can be captured by vested interest groups. And almost all activities have external consequences, meaning that correcting for externalities really is carte blanche for almost unlimited amounts of intervention.

So what I'd urge is rather than just looking at the cost to consumers of regulation, we really need to make this a two-pronged question when considering regulation. Is there a market failure in the first place, a robustly defended accusation of market failure? And then secondly, does the regulation in question actually deliver in solving that market failure? And I suggest across a number of industries and in many cases these concerns about market failure tend to be overblown, and as such, most regulation tends to be more redistributive and lowers economic efficiency rather than being market-failure correcting.

Now there are two types of anticompetitive regulations, very broad types of anticompetitive regulations — those which control price and entry, including the structure of the industry or whose licensed to operate in the industry on the one hand; and then also as we've heard from Professor Yoo, those which impose significant kind of compliance costs with the unintended consequences of creating barriers to entry and affecting industry structure.

I'll talk about a few different examples and then wrap up. Now one area where state and local governments regulate extensively with the aim of solving market failure is in the childcare sector. Most states impose staffing-qualification requirements and minimum ratios of staff to children in formal care, infant-care settings, and they do that on asymmetric information and quality grounds. The idea is that the more staff we have per child and more staff per number of children, the more interactions you'll get, the better child development, which has strong social benefits, and likewise from staff being highly qualified.

In fact, this is an example of a regulation which doesn't consider the market as a whole. It considers the formal care sector but it doesn't envisage the other care options for people tend to be parents looking after their own children, having informal types of care, perhaps daycare and whatnot, and when you look at the academic evidence in the sector, there's good evidence that actually far from raising the overall quality of child care that the children themselves face, these regulations can actually lower quality by pricing out particularly poorer consumers from being able to afford formal care in the first place.

Even modest relaxation, for example, of staff-child ratios has been estimated to lead to annual savings for annual infant costs of around $500 a year or more. Not only does that affect the price that consumers face, which is the direct effect we're talking about, but lots of these regulations have broader economic impacts. And in this case, obviously making it more difficult for people to find affordable care for their children makes poorer households much less likely to move into the labor market in the first place. It can reduce job mobility as well, so a double negative.

We've already talked about some of the examples of regulations affecting industry structure — car-dealership laws, for example. It's not entirely clear these days, even on my first question, what market failure they're aimed to solve, particularly with the proliferation of internet-based services.

Occupational licensure is a much more difficult and thorny area in some cases where one could envisage substantial harm from bad-quality practice, but in lots of sectors in which there's extensive occupational licensure, it's not clear what these big, harmful costs would be, and in

many cases it appears that regulators are seeking to replace consumers in making the price-quality tradeoffs that they would otherwise like to make. And again, that tends to hurt especially poorer consumers who often value more affordable products as opposed to products which are perceived by others to be high quality for them.

I just want to put on record, it's worth remembering that some of the most egregious anticompetitive price and regulatory policies occur in trade policy. It might be beyond the scope of our discussion today, but it's important given recent events.

Now clearly other regulations, environmental and health and safety legislation, is more difficult. There are clearly external effects that must be considered in many instances. But what I just note here is that often regulatory approach goes against best practice, and the existence of things like grandfathering arrangements suggests that certain firms or industries can capture that process of the imposition of a regulation rather than this kind of economically pure market-failure-correcting regulation being imposed.

I'll stop there. There are broader historical examples, whether it be natural monopolies or public-goods provision, which again suggests that market failure tends to be overblown. But I'll just conclude by saying I think that thinking through this from first principles and actually trying to identify, first of all, is there a clear and obvious market failure we're trying to correct, and then secondly, really analyzing in detail whether the specific regulatory intervention can solve that to any meaningful extent without this big harm to consumers is this the right way to think about this from an economic perspective before we get on to the question of what to do about it.

ROBERT POTTER: Thank you. Our last speaker for the opening will be representing the Association of Corporate Counsel. It's Mary Blatch. Welcome, Mary. She's the Director of Advocacy and Public Policy there. Before that, Ms. Blatch worked on regulatory advocacy and compliance issues for Deloitte Tax and was an associate at McKee Nelson and Hogan & Hartson. Mary.

MARY BLATCH: Thank you. And ACC also thanks you for your efforts in organizing the roundtable and inviting ACC to participate.

ACC is a global bar association for in-house counsel with more than 40,000 members who work for more than 10,000 organizations in 85 countries. Our members work for businesses of all sizes across all industries, and as in-house counsel, our members are often charged with maintaining corporate compliance with antitrust rules and providing proactive advice on business transactions and acquisitions in order to avoid antitrust violations.

Many of our members' companies are affected by anticompetitive regulations, both positively and negatively. We solicited our members for comments to share at today's roundtable, and I have the following experiences to relate.

The first experience comes from the alcohol industry. Most states maintain a three-tiered system of alcohol regulation that prohibits cross ownership between retailers, distributors, and producers. This particular member's company was applying to the state alcoholic beverages board for a distribution license, but the application was denied because the member's company is owned by corporate conglomerate that also owns a very small company that is an alcohol retailer in that state.

This is an example of an outdated regulation where the regulation of the alcohol industry has not kept pace with the increasingly complex corporate structures that are present in today's businesses. This state has no clear percentage threshold for when ownership in a different tier will result in a regulatory problem. In this case, it's not the idea of regulation itself that is

problematic but rather the fact that the regulation has not been modernized and results in potentially inconsistent and absurd results when applied in its current form.

The second experience I'll share is from the health-care industry and addresses federal regulations of the Centers for Medicare and Medicaid Services, or CMS, relating to procurements for Medicare Administrative Contractor services — another acronym, MACs.

In 2010, CMS instituted a contract award limit policy for its procurement of services from MACs across a variety of jurisdictions. The policy directs that, with limited exceptions, CMS will not award more than 26% of the national MAC workload to a single corporate entity and will not award more than 40% of the workload to any single set of affiliated companies. The policy is anticompetitive and unnecessary and results in qualified, proven, successful MAC contractors being passed over arbitrarily.

CMS's statutory authority to administer the Medicare program derived from the Medicare Prescription Drug Improvement and Modernization Act of 2003, or MMA, requires that CMS employ full and open competition with contracting. The workload caps imposed by the policy contravene the statutory mandate and result in competitive injury to MACs seeking to win these contracts.

CMS justifies the workload caps as addressing the agency's concerns about maintaining a dynamic competitive marketplace and avoiding overreliance on a single MAC should a disaster event occur. CMS cannot use the procurement process to regulate competition in the MAC market for future procurements unrelated to the government's current needs and based on speculation and guess work about how the government can optimize competition down the road.

Even assuming that the workload caps are necessary to prevent a scenario in which only one or two MAC contractors compete for future work, the Competition in Contracting Act, CICA, expressly provides agencies with a mechanism by which to increase or maintain competition or to assure the continuous availability of a reliable source of supply. But that mechanism does not allow for workload caps.

Instead, CICA, in part six of the Federal Acquisition Regulation, or FAR, authorizes an agency, under limited circumstances, to exclude an offerer from a specific procurement. FAR part six specifically directs, then, an exclusion made in order to increase or maintain competition or to ensure the continuous availability of sources shall not be made on a class basis. These workloads caps are an exclusion made on a class basis. They apply to any offerer across all MAC procurements that may exceed a specific workload threshold. The workload caps violate CICA and FAR part six and are an impermissible anticompetitive restriction."

Those two prior experiences were related on an anonymous basis and represent the views of two of our members. But on the other side of the spectrum, we have a member who is a staff attorney with the National Association of Boards of Pharmacy, and she had the following statement to share: "The topic of anticompetitive regulations and regulatory barriers to entry is a subject I and my organization…." I'm sorry, did I say that she is with the National Association of Boards of Pharmacy? That would be very useful information if I didn't. "This topic is a subject I and my organization are very concerned about as it relates to health care and patient safety. NAPB's main mission is to assist our member state boards of pharmacy for the purpose of protecting public health. Occupational-licensing reform and the elimination of barriers to employment is inherently a worthy endeavor from a purely economic standpoint. However, there are downfalls to applying this approach too broadly.

"Global application of this approach across all licensed occupations, with sweeping reforms that eliminate state regulations, could pose high risk to consumer safety. Regulatory reforms

must be careful and precise. Professions such as doctors, nurses, and pharmacists need to have the education, experience, and knowledge to help assure that a patient or a consumer is not irreparably injured or, much worse, killed by uneducated actions taken by those professionals.

"State regulations and occupational licensing verify through the licensing process that before a doctor, a nurse, or a pharmacist interacts with a patient or a consumer, that professional will not cause the patient or consumer harm. Consumers rely on their state regulations and licensing to protect them from individuals that don't have the ability to correctly treat the consumers in a way that will not injure or kill the consumer. Through state regulations and licensing, the consumer has confidence when they're being treated by a doctor, nurse, or pharmacist that the professional has been verified by the state.

"A risk-based analysis needs to occur prior to eliminating regulations and licensing of a profession. That analysis must determine the amount of necessary training and expertise that is required in a profession compared to the level of risk or potential harm to the consumer if the regulation or licensing is eliminated. Therefore, if there is a low level of risk or harm to the consumer, then the regulations and licensing should be reduced or eliminated.

"There are other occupations where state regulations and licensing are a barrier to entry and which are not necessary for public safety due to the low risk of injury to the consumer. NAPB agrees that these types of reforms to reduce the barriers to entry should be appropriately applied in the case of a profession where the services provided do not pose a high risk or potential of harm to a consumer."

ACC's own position on anticompetitive regulations focuses on the regulation of the legal industry, and it is explored more fully in our written submission for this round table. Our position stems from the unique situation of in-house counsel as both providers of legal services and clients of legal services. They are affected by legal-industry regulations both as a regulated professional and as consumers of legal services.

And our members' experience as corporate legal providers and consumers has led us to the conclusion that within the legal industry, there are two primary regulations that stifle competition and increase the cost of providing legal services. Those are the prohibition on the unauthorized practice of law, or UPL, and the prohibition on non-lawyer participation in investment in law firms. Although both of these prohibitions are meant to protect the public from harm, their continued application has not adjusted to the realities of the modern world or the critical need for affordable legal services for individual consumers.

A restriction on competition should be justified by a valid need such as protecting the public interest and also be narrowly tailored to minimize its impact. It is questionable how much these restrictions protect the public interest, and at least as applied to the consumption of legal services by the sophisticated businesses for which ACC's members work, these restrictions are clearly not narrowly tailored.

Taking a broader view, starting the process of reform in the legal industry with services that are provided in the corporate legal market could give the legal industry an opportunity to experiment with new rules for the profession in a way that presents virtually no downside for individual consumers. For example, state bars could design a regime that provides for lawyer mobility by eliminating UPL violations for licensed attorneys and start by applying this regime for sophisticated business consumers within the corporate-legal-services market before later applying it to the individual-legal-services market. Getting regulators comfortable with new rules and modes of regulation in the corporate-legal-services market can open the door to further reforms that more directly benefit the market for individual legal services.

In closing, we want to thank the Department of Justice for its active practice of commenting on the anticompetitive implications of regulations within the legal industry. We hope someday soon that the regulators of the legal industry will begin to consider how to welcome competition within the industry to better serve all consumers of legal services. Thank you.

MAKAN DELRAHIM: Thanks. I'd also question whether we need seven years of education to do what we do. In most other parts of the civilized world, you can get an LLB and practice law. The newest justice on the Supreme Court during his confirmation hearings raised yet another example, which was the representation of children and families in IDEA cases for special needs and whether or not the requirement of somebody who has a law degree, as opposed to somebody who's an expert in that, makes any sense.

Thank you. Those were very helpful. And I'll go back to Bob.

ROBERT POTTER: I want to thank everybody for their opening statements. I think, due to the time, what we'll do is a 10-minute break now and then come back for approximately one hour worth of discussion. Thank you.

[First and Second Sessions:]

ROGER ALFORD: Thanks very much, everyone, for those great opening remarks, and that leads us nicely into some of the specific sessions. We're going to try to do this, because of time, collapse the two sessions into one, and just focus on some of the highlights that were discussed in the opening remarks, and just tee up further discussion with respect to those.

I want to talk about antitrust advocacy on the issue of deregulation. And if you will concede the point that there should be some advocacy with respect to deregulation, it might be very formal, it might be informal, or it might be part of the interagency process, but if you were to suggest that the Antitrust Division should be engaged in advocacy with respect to deregulation, what specific regulation, federal or state, do you think harms competition the most that we should be focusing on? And I just throw that open to everybody. Conceding Lina's point, though, that maybe we shouldn't be doing advocacy at all, but —

THOMAS ZYCH: If you'll permit me quickly to repeat is that we jump to sectoral regulation, or specific applications of regulation. I think it's well within the Division's purview, and something we would greatly support to remember that there are attacks on antitrust, itself. That is, there are efforts to explicitly displace competition policy and discipline with something else, and I think that is well within the sweet spot, and there should be almost no controversy whatsoever that that's something that the Division should be doing and it should enjoy support for. Whether it's the ancient immunities, whether it is when we do healthcare deregulation, and the ACA, we want to look at McCarran-Ferguson. There are places where competition has been displaced. Competition law has been displaced, and that's something the Division, with its special expertise, along with the Federal Trade Commission and other agencies, I think ought to be weighing in pretty explicitly.

CHRISTOPHER YOO: I think that there's a roadmap in the antitrust doctrine on essential facilities, which is, there is a standard move in regulation to mandate access to facilities when entry is infeasible. The problem is that increasingly entry is feasible, and we have outmoded regulation. The problem is there, if you then rate regulate down the incentives, you'll never see the entry that would be possible, and so what you need is to have some form of regulation that takes the foot off the brakes.

Unfortunately you put into the regulatory processes all the interested parties. What we're starting to see is, for example in telecom we used to just mandate access to monopoly loop, and

now people are competing, as Makan said very nicely, in quality. Consumers are not going to see benefits in price reductions; they're going to see it in higher bandwidth. And unless there's a return on investments in higher bandwidth, you're never going to see them.

I'm working on a federal advisory committee that is studying utility poles, which is one of those networks that you thought you would never invest in. In a wireless world, they're having to build taller poles and stronger poles that will carry more wireless attachments. And that's a fundamentally different world that the old regulation isn't positioned to take into account.

RICHARD BRUNELL: I think the biggest bang for the buck is taking the industries that have been deregulated and making sure that we have vigorous antitrust enforcement, and limiting the immunities in those industries, and demonstrating that deregulation can work. But as an adjunct to that, you need to have antitrust enforcement in those deregulated industries.

JOHN BERGMAYER: I'm not an expert on every area of regulation, but of the things I mentioned, I will just highlight, again, this basic tier buy-through rule, which seems arcane, and it's the rule that traditional cable companies can't offer a broadcast-free tier, which basically effectively makes full a la carte illegal. I think getting rid of that makes a lot of sense. Not just in terms of the fact that it might just give some cable operators the option to give people lower cost packages, which would be good, and more choice, but it also would incentivize the creation of even new categories of devices that can take cable channels and over-the-air channels, and present them in one unified interface. There's no reason to make that device now, because there's no market for it because of this regulatory intervention, and I think a rule like that, it seems very small, but I think that could have some pretty good effects in terms of an immediate and measurable impact on consumer welfare in terms of lower costs.

GEORGE SLOVER: I would say, in general, focus on areas where there is a proposal, so that you're not out roving and looking for things that you can stir up a recommendation on, but proposals to impose new regulations and proposals to scale back regulations, or to reform them, and to focus specifically on things that would implicate the Antitrust Division's enforcement mission, creating a situation where right now you would be able to bring an enforcement action against it because it's a restraint of trade, and the regulation would block your ability to do that, or complicate your ability to do that. Or that, on the other side, scaling it back would open that up.

I think that's a good use of Antitrust Division resources, whereas the broader sort of "we're going to help with the deregulatory effort" is not a good use of your resources, and muddies your brand, really, which I think is a very strong one, and has a lot of bipartisan support in Congress, and support in the community, which we are trying to continue to help build for you, and it's easier if you all stay in the stuff that you're good at.

ROBERT POTTER: Just following up on that, I would recommend that if people know that things are a policy proposal that is being ripe for comment, I invite people to bring that to our attention so that we are aware of it.

STEVEN SUGARMAN: I'd just add, and we talked about it a little bit earlier, with Makan and the post-acquisition consent orders. There's a second aspect to that, which is during your interactions around mergers and acquisitions, corporations often submit plans or justifications as to why it won't impact negatively consumer welfare, and they make commitments as to the fact that they won't be taking actions that are negative for consumer welfare, and oftentimes that results in no enforcement action. And oftentimes it's during the scope of an enforcement action, like we saw that you had some settlements just recently, where you try and define post-enforcement behavior.

But when they make these commitments that affect the public discourse, and even may have the Division not take action after the deal's approved, there needs to be a mechanism to evaluate whether those things they said in their legal filings, and their expert opinions, and as business plans are actually what happened. You often see even a disposition that's then replaced a couple years later with hiring or growth that kind of overcomes that disposition. You see a lot of promises about how there won't be a price effect or quality effect, and that's great, but without post-acquisition monitoring and governance, our view would be that enforcement or oversight of that once would probably have a very impactful effect that holds corporations and participants to a standard of honesty and follow-through, generally.

THOMAS ZYCH: If I could very quickly just take a little different point of view than George. I think there is something to not only look at de novo attempts at regulation, that there are old regulatory schemes that either were poorly thought out at the beginning, or time has made them completely obsolete. And I think the distribution restrictions are square in the middle of that. We can have whatever belief we want to why the motor vehicle dealer statutes were passed in the first place, and we can debate that. What we know now is the costs they impose, and as technology has caught up, whether or not it ever had a good justification, we're in a better position now to review those and we can calculate the cost to consumers of the inability to have an efficient distribution network in a major purchase, a large purchase situation. So I think there is a role to step up in those instances, even when the regulatory regimes are old and in fact may be archaic.

ROGER ALFORD: Can I ask a broader version of the same question, which is to say, are there certain categories of regulations, similar to the three that you identified in your discussion, in which there's really not going to be a left-right split? There will be some uniform consensus that this is problematic.

I was struck when I attended the Chicago Booth conference a month ago, and Tim Wu, at Columbia, made the comment that there's no greater barrier to entry than a captured agency doing the bidding of an incumbent. And so, I thought that was a really interesting comment, and I actually tweaked it for a speech that I gave a couple weeks later in the international context. But I'm curious if that's an area where general conservative deregulatory types, and then generally persons on the other side, that are really concerned about corporate power and the rise of corporate power might find common ground?

RICHARD BRUNELL: Yes. I mean the *North Carolina Dental* decision articulates a view of suspicion of incumbents using regulation to feather their own nests, and I think that's a view that Cato shares with AAI. Which isn't to say that just because there's the incentive to feather their own nests, or an incumbent is advocating, that there aren't necessarily legitimate reasons for regulation, but it's certainly enough to raise your suspicions that this is not in the public interest.

CHRISTOPHER YOO: What's interesting is that the *North Carolina* example reflects the suspicion that state regulation is more likely to be captured than federal regulation. In fact, the old breakup of AT&T reflected the same concern. But you see an interesting asymmetry when antitrust law is looking at federal instead of state regulation, which is because of the difference in the doctrines. Antitrust courts don't apply the same degree of scrutiny. And part of it is comity. You don't want the Division or a court saying that because there are federal agencies that are regulating badly, this agency needs to go do something.

The consensus in favor of deregulation may come apart a little bit depending on the question you're asking, Roger. I was thinking in terms of the network neutrality debate. Right now, the move the FCC has made is to shift responsibility for enforcement to antitrust. The general

assumption a lot of people have is agencies that are specific to one industry are more likely to be captured just because the repeat play nature of the focus on the agency. Shifting enforcement responsibility to general antitrust enforcement would be less subject to that particular dynamic you're talking about.

There is a politics around network neutrality, where some people object to the decision to rely more an antitrust law. That has an aspect about it that's controversial. Some of it's about substantive antitrust law, which is a good debate to have, but I think some of it's purely on institutional grounds as well. I think there's a very good argument of shifting oversight of anticompetitive activities to general-purpose agencies. And I think that there is a good literature that says industry-specific agencies are more likely to be captured. But I know other people disagree

THOMAS ZYCH: If you go to very specific instances — and I'm an Ohioan, so don't take this as an attack on Pennsylvania — but there are a series of regulatory regimes in Pennsylvania, having come from there, the milk pricing, the distribution of beer and alcoholic beverages —

CHRISTOPHER YOO: Liquor licenses.

THOMAS ZYCH: — liquor licenses, and the whole range — and these may be small beer, pardon the pun, but there are specific instances in which it's hard to align when you understand where the capture really comes from, at the state or local level, and bit by bit disassembling some of those restrictions. It's hard to think there's a political ideology that's in favor of people spending more for milk, as opposed to an industry interest in maintaining a price structure.

I think, and again, Pennsylvania is by no means alone in this, but I think there are plenty of instances in which the ideological divide just disappears when you look at a hard analysis of what the effect is and who the few that are benefited.

JOHN BERGMAYER: Okay, there is an ideology here, but it tends not to be a traditional left-right. It's just when forms of regulation are framed as being property rights, I think that sometimes there are some people who are just more likely to see challenges as somehow challenges to a government-created property right, itself, being an excessive regulation. I would suggest that one area to look at is when forms of economic regulation are cloaked as property rights, for instance, patents. We just had a 7-2 Supreme Court case, the Oil States decision, where the argument was about whether when the patent office grants a patent mistakenly, a patent that does not meet the standards for patentability, a patent that should not exist, whether it should go away. The claim was, well it's a property right, and therefore you can't take it away from me. It has to go before an Article III judge. And the Supreme Court rejected that.

But to say that there's a particular kind of regulation, which is what a patent amounts to, it's a government-created right that doesn't exist under natural law or anything, should get this extra special deference I think is very destructive in a number of areas, where the fact that the government is always already involved in the creation and structure of the rights in dispute. I just think that historically government offices and church offices were seen as forms of private property. The right to collect taxes was a form of private property that couldn't be stripped away, and this happened all the time.

I think in a lot of intellectual property debates, the pro-market individual is seen as supporting patent rights because therefore you're supporting the free market. When in reality it's already an artificial right, so a government action to somehow limit or define the scope of how that right may be exercised and then limit it from abuse, does not really strike me as purely regulatory. Or rather, it is regulatory, but it's regulatory all around. There is no non-regulatory solution involving, for example, patent or copyright law.

And as Gail reminded me, taxi medallions are another example. Like maybe it's a good idea or a bad idea for a city to limit the number of taxi drivers that may operate within its borders. But framing it as a property right in creating these medallions, which can then be bought and sold as commodities, has been absolutely ruinous. Because now, with the advent of new forms of competition, you have people who invested their life savings and more into these taxi medallions which are now absolutely worthless. That's an example where framing something as a property right was a terrible mistake, and making that point has nothing to do with whether or not there should be limits on entry into the market. It's just about the way that you do it.

ROGER ALFORD: On that point, that last point, I encourage you all to look at the OECD papers that are being published this week. There will be a whole series of discussions on the taxi industry and how the different countries around the world are addressing that question, so I think that's a great example.

CHRISTOPHER YOO: John and Lina make the point that because the government's involved, it's all regulation. I think that there's some truth to that, but I think it's a bit overdrawn. We probably should think about government involvement as a spectrum. There is no order of any kind without governmental, military protection, policing, and other services that the government provides. As such, we could call everything regulation. In fact, what we see is a varying level of commitments to markets. In some sectors, you have direct price regulation, which is the most extreme form of regulation and where private ordering has less province. In other places, you create property rights, but we now think of them as bundles of rights.

I wouldn't say that just because a system requires judicial enforcement of rights, contractual or property rights, that makes it inherently regulatory. I don't think that's helpful. What's more interesting is to talk about a range of possibilities, some of which are more regulatory and some of which are more conducive to facilitating private ordering, on the understanding that through government regulation, through zoning, and even land where we take it, we do nip and tuck at private activity even in areas predominantly governed by markets. But the fact that that nips and tucks occur doesn't make it inherently purely regulatory. It still leaves more room for private ordering and less room for regulation, and that's how we should think about it.

ROGER ALFORD: There is a whole spectrum of different types of government activity with respect to an area. As a former contract professor, I always think of contracts simply as promoting efficiencies and choice by allowing people to have effective promises with one another. It's not really regulation, but it's an incredibly important role for the government to try to promote that in terms of a coordination function.

RICHARD BRUNELL: To add one more gloss to that. Antitrust itself we talk about as supporting the free market, but others think of it as just another form of regulation, which it is. But the characterization can be important and contested.

JOHN BERGMAYER: One example here would be non-competes and employment agreements. He might say, well, that's purely private ordering. It's like, great, privately order it amongst yourselves and keep the courts out of it, which is what California does. It just says, we're not going to enforce this, and is the enforcement or non-enforcement of non-competes regulatory or deregulatory? Maybe it isn't a useful way of thinking about it, and I think the useful way of thinking about it is that non-competes are bad and should not be enforceable across the board, and I don't really care which is the regulatory side and which is not.

ROGER ALFORD: Well, we're doing what we can in that regard with respect to no-poach. That's all I'll say.

RYAN BOURNE: I completely concur with what Professor Yoo said about the spectrum of government involvement in markets. There also seems to sometimes be this misdiagnosis as

well, that we're talking about regulation on the one hand, or no regulation or complete absence of regulation on the other. In fact, most consumers in markets desire and demand safe products, safe outcomes for themselves and their families, and there's lots of within-market institutions that have arisen historically in financial services, and through accreditation agencies, certification agencies. You see this across countries in areas like I've described, like childcare, intermediate agencies, where childcare providers voluntarily sign up as a signal of their quality to consumers.

We see it with Uber, as well. You might regard Uber as being less regulated than the taxi industry, but within the app they have their own regulatory structures, including the ratings, including being able to see the license plate, face of your driver, name of your driver, being given his phone number. So, where I disagree with — I think George mentioned in his opening comment that in the absence of certain regulations — perhaps I'm mischaracterizing, but in the absence of certain regulations, firms wouldn't necessarily deliver safe products and things. But in a repeat market, when you're looking for repeat customers, provided that the consequences of absence of regulation are not catastrophic, we see lots of private firms and private industries providing within-market regulations that get to the outcomes that we'd like to see.

THOMAS ZYCH: Although just to quickly note it, the fact that the 51st person is saved does no comfort to the first 50 who perished by the unsafe metered lights. I think we have to be careful in calibrating how we judge the appropriate approach to actually looking at how markets function.

GAIL LEVINE: And I'll just echo the point that Ryan was making about questioning whether new entrants are regulated less or more than the existing company. To put an example to the hypothetical you were raising, in the State of Maryland about a year and a half ago, Uber was at risk of going dark and just withdrawing from the state because we were being asked to comply with an old form of verifying that our drivers were who they say they were.

There was a new digital way of doing the same thing. In fact, it would do it better with a lower risk of false positives and false negatives, but it wasn't exactly the same as the old regulatory way. The incumbents had already built systems to comply with the old. We hadn't. We wanted to do it the new digital way or ensuring the drivers were who they said they were. And in the end, the State of Maryland, I'm proud to say, came around to allowing us to comply with a safety-oriented regime, but through a new digital technology.

It can happen, but I wouldn't oversimplify by assuming that the new entrant is going to have to deal with regulations in a less burdensome manner than old industry. Old industry has built itself around those old regulations, and a new incumbent will bear the heavy load of complying with old regulations or urging regulatory reform to allow more efficient means of doing business.

ROGER ALFORD: Okay, let's go to another topic. I'm fascinated with the idea of regulation versus market forces in terms of the cost-benefit analysis — a lot of discussion about that in the opening comments. How do you do a cost-benefit analysis in the context of dynamic competition, though?

I'll give you two examples. Motorized vehicles have to stay on the roads; bicycles can go on bike paths. But there is this new emerging market of electronic bikes, which my wife owns and absolutely adores. Technically speaking, she's not supposed to go on the bike path, but it's clearly a bike, not a motorcycle. But the dynamic innovation would suggest that the regulation prohibits what she's doing, even though it's much closer to a bike.

Another example would be regulations requiring all restaurants to have bathrooms in them, and then the innovation of food trucks. Should every food truck have a bathroom attached to

the end of the truck? Or should we allow dynamic competition to allow a food truck to provide their services even though there's not a bathroom attached to it? Those are the examples, very, very simple ones, of dynamic competition in doing these cost-benefit analyses. How do you do regulatory analysis in the context of dynamic competition?

CHRISTOPHER YOO: I think that there are certain problems that are never going away. Your bike example is a category problem, and we're always going to face that. I think that we can have flexible standards, and we can say laws would be written better, but words have their limits.

I keep thinking about the example John gave about the desire to include over-the-top video in conventional cable regulation. This is something the former Chairman of the FCC, Tom Wheeler, wanted to do. The problem was that the statute was written for a different context, and the words don't fit well with that interpretation, and it's not because the agency trying to obstruct it. It's just an accident how the words fall, because no one really had the Internet in mind when Congress wrote those words. And so, I understand Wheeler was very sympathetic to the idea of interpreting the statute that way. He just couldn't get there as a matter of statutory interpretation. As a lawyer, I think he's right that he couldn't get there, and the statute needs reform. That problem of making old statutes fit with new technologies isn't going to go away.

What I thought you were going to say is a different one, which is that dynamic competition is often framed not as reallocations along the production possibility frontier; it's framed as investments in new technology that pushes out the production possibility frontier. Dealing with dynamic efficiency has been a thorn in the side of antitrust and economics generally. We don't have great models for this. This is the hardest problem for me. Category problems are difficult, but they're kind of always going to be there, and the problem of updating obsolete statutes is always going to be there.

The bigger problem I think we're going to have, in terms of regulation, is whether we are going to have regulation that allows us to invest in innovations where competition is not so much about price and quantity but about out-investing each other. You see this in the R&D side. I think about the old Gilbert and Sunshine proposal for innovation markets. That was huge problems in terms of product, supply-side and demand-side substitution. But a much bigger problem lying at the bottom of innovation markets is the old fight between Schumpeter and Arrow. We do not know the relationship between scale and innovation, and until we can say something about that empirically, we don't know whether blocking scale is going to help or hurt consumers, and the inability to say which would be better for consumers on a dynamic basis is kind of crippling, because we don't really know which way to jump.

I'm actually working on an article right now looking at this in the data context. Scale matters, but there must be diminishing returns. Until we know something more intelligent than the two forces that I just mentioned, it's going to be very hard to craft policy to understand how to make that work. That's why we need better empirics, and the problem is going to be intractable until we get them, but this problem is potentially solvable with better data.

ROBERT POTTER: But in the absence of that data, isn't the default mechanism that the benefits are going to be undervalued and the costs are going to be overvalued?

CHRISTOPHER YOO: I would say yes, and that's why the traditional rule of reason puts the burden of proof on the person challenging the practice. There is a line that Angela Merkel sometimes uses, but it's not hers, but I love it. She asks, what's the difference in innovation in the US and the EU? This is in the context where everyone's wondering, where is the Google of Europe. In Europe, everything that's not permitted is forbidden. In the US, everything that's not forbidden is permitted. That puts the thumb on the scale on the side of innovation. It's built on a

confidence that if a problem comes up, we have antitrust to actually deal with the practices and deal them in appropriate ways. But we should allow people who have some great new idea that cracks the categories to try.

There is a precautionary principle that if the adverse consequences catastrophic or irreversible, maybe you can make a justification for blocking ambiguous practices. Most of the stuff we're talking about doesn't fit that description.

DANIEL HAAR: Can I ask a follow-up question? Taking that principle as given, I understand how it might apply in, let's say merchant enforcement or something like that, but when we were talking about analysis of a regulation, what about in a simple case, where a regulation simply blocks entry and protects an incumbent? Are you willing to make some kinds of gross characterizations about effects that might have on innovation? It seems to really block it off from pressures that would otherwise force it to innovate to stay aloft.

CHRISTOPHER YOO: I, personally, would come very close to saying those kinds of things should be illegal. The best data-based example I know is when municipalities block overbuilding by cable systems. They gave cable exclusive franchises. Potential entrants wanted to overbuild in direct competition with the incumbent, but the law stopped them.

My reaction is that empirical studies of where this has happened have shown that a price war between two firms is brilliant for consumers. It doesn't get any better. What may be happening is that the new entrant has made a bad decision. Their shareholders are going to lose a lot of money, but antitrust is not here to save shareholders from bad decisions. That's not a policy issue. And the incumbent is going to say that they're going to lose money as well. That's not the problem for enforcement officials either. The flip side is that if entry was a good proposition, and someone was trying to go in, the cost of blocking entry is that you just lost entry in a competitive situation in industries where costs are dropping and that used to be uncompetitive, but now is potentially competitive. You're going to lose that.

So my reaction is that if some company's foolish enough to enter a true natural monopoly and they're pissing away all their money, are the losses of the wasted duplicative fixed costs so large that they're going to overcome the static, short-run welfare benefits from price competition? The evidence suggests no. The best thing that a consumer could have is a price war, and particularly between two firms with large fixed-cost investments. And so that is an example of an entry restriction I think was just really bad for consumers. I can't say that I've studied everything, but I have a hard time thinking of an entry restriction that's actually good for consumers.

ROGER ALFORD: I want to make sure we have time for others. Regulation is necessary because of market failure. That's the premise. So explain how you deal with that in the context of dynamic competition. Obviously, if there's market failure, then even dynamic competition didn't work, right? Comments from others?

THOMAS ZYCH: I think we have to be careful. Stating it that way, you have to define market failure so broadly that it almost lacks any meaning. If you're talking about distribution market regulation, absolutely, there's a way classically, economically, thinking about a market failure, when you have unclean air, maybe it's because the market has failed to produce clean air, because the market's never going to do that. That's a different issue. So, I think finding where the market failure analysis most clearly applies is a good gating question.

ROGER ALFORD: That's a good example, too.

STEVEN SUGARMAN: I'd just weigh in briefly about a topic that I don't think we've discussed yet, but is relevant, which is governance. Oftentimes market failures and dynamic competition

are a function of corporate governance, or governance that doesn't include, or reflect, the consumer population and include voices of all stakeholders.

The US Treasury and the CFPB, one thing that they've agreed on over the last few years is they've looked at some programs that require community representatives to be involved in governance of organizations with the idea that people won't be predatory against themselves. People who reflect the communities they serve, who reflect the consumers, don't need to be regulated as strongly because they have a governance structure that can be trusted.

So a lot of these market failures are that there's a lack of trust between regulators, enforcement, and companies, and oftentimes that comes down to an earned lack of trust, because you look at corporate boards, you look at diversity, you look at representation of at-risk consumers that they serve, you look at any structures they have that actually has an authentic, real voice of the consumer as part of this that when there's an acquisition, or when there's a competitive decision, there's someone there to speak for the consumer. When that's absent in governance, which it often is, it's very hard, if not impossible, to trust a lack of regulations and dynamic competition situations, because the company can go off the rails the day after the regulation.

And so the question that I'd turn back is, how do you resolve these antitrust matters with a lack of strong governance and dynamic competition? Because you're putting a point in time without knowing what happens the next day, and so often what's missing from the conversation, even these settlements, is a control mechanism where these companies — they get the scale and this potential power that's trying to be used for good — aren't asked to include the voices of everyone in their governance, and they don't have a governance process that can be trusted.

ROGER ALFORD: I'm curious if people think that market failure and dynamic competition is too small of a box to do the analysis. Is it possible that we should be saying, well the market will never capture questions about environmental harm, and therefore, you need regulation because whatever kind of competition you have, it's just never going to focus on protecting water, or protecting air, or things like that, or is that captured in the market cost-benefit analysis?

RYAN BOURNE: Environmental issues have always been one of the preeminent market failures, and something falling within that framework through the externality discussion. One interesting thing, just kind of rolling back on some of the other discussion, is regulators tend to define a market in terms of the nature of the producers. We hear about the milk market, for example, or the childcare market, which really just means the formal childcare market.

I tend to think about these issues from the consumer market. If you think about newspapers, for example, there might be, from a production side, a market in newspapers, but really the consumer market is reading news, and you can do that on internet sites, and the options available to consumers is much broader than the market which might be regulated by a regulator. Same as in the childcare sector. I think it's foolish to think about the childcare sector in terms of formal infant center care when the alternative can quite often be a family member looking after a child, child going to daycare, child being looked after by the parent, themselves.

So I think the market failure framework is useful, but I think in lots of cases regulators think about it, think about the market itself, in too narrow a sense, and that leads to quite often overregulation of the formal sector, which raises prices to consumers, who then opt for more of the informal sector, which in some cases can be lower quality. So, even though you improve the quality in one subsector of the market, actually the overall quality of the outcomes for the consumers, themselves, can fall.

GEORGE SLOVER: I would say that there are different kinds of market failures, which you kind of alluded to, and that the appropriate focus for antitrust and competition authorities is the failure of a market to deliver competition the way competition should work. And do you need some construct to substitute for delivering those benefits? And the other kinds, like environmental, health, safety, those things are really in a different category. That's what the whole premise of my testimony is. Let's not wander off into turning antitrust into promotion of removing all regulations.

JOHN BERGMAYER: One thing that could certainly be helpful is, if you see an anticompetitive regulation out there, to not just say, well this is anticompetitive and therefore bad, but also think through what is it trying to do? What is it trying to correct?

For example, I agree, I'm not a big fan of the exclusive franchise model, but it was designed to make sure that a cable provider served the entire franchise area, even those areas that would not be economic by itself. So it's like okay, here's the deal, you're going to get to serve these densely populated, richer areas, and the cost of that is you also have to serve these other areas that might not otherwise be economic, and we're going to grant you a monopoly so that people can't come in and cream skim just the rich areas off of you, and that was the bargain. You might think, oh, it didn't actually work out. It's not the best way to do that. What is the best way to do that? You can question the premise. Maybe rural areas shouldn't have cable service, because that's the cost of living in a rural area. Or you think maybe we could have a government-constructed network in areas that otherwise are not economically viable.

But I think some of the difficulty comes about if you just challenge regulation without suggesting an alternative. And I think this just happened now, with the Uber issue in the Ninth Circuit, where what was challenged has been seen as a mechanism for drivers to raise the amount of money that they get in the face of what is portrayed as a monopsonistic labor market, and then the Department or the FTC come in with their very abstract legal theory about state action doctrine, why that's not allowed. And then the drivers think, okay, what am I supposed to do? Like, is the answer that I'm just getting paid what I deserve now? And therefore, suck it up? Or is it, okay, there are also other problems that can be addressed? I think focusing on the anticompetitive effect while ignoring what the intended benefit was I think can leave some people with a bitter taste in their mouth.

LINA KHAN: I just meant to say, we've been talking a lot about the consumer costs, but antitrust is also supposed to care about monopsony issues, which can involve effects on producers. One reason I brought up the GIPSA rules is because that was very concretely looking at the buyer power issues between processor, packers, and farmers and ranchers. And the GIPSA rules are one instance where it's possible that - there are different aspects of the rule, but one aspect would have prohibited mandatory arbitration clauses to enable farmers and ranchers to try and bring private suits when they felt that there was anticompetitive conduct. It's possible that allowing that to go through would then require the processor and packers to change their practices in ways that would actually raise prices for consumers.

But I think it would be misguided to say, well, it's clear how antitrust should come out on that kind of regulation. Because there are ways in which rectifying anticompetitive issues at the buyer side could lead to higher consumer prices yet still align with the antitrust mission.

CHRISTOPHER YOO: Roger, I'm entirely sympathetic to the way you framed it, personally, which is, I would define regulation largely in terms of market failure. As a historical matter, common carriage has never been limited to that. There is no market power filter to common carriage in economic regulation, and in fact, in the old railroad days, for long haul between

Chicago and San Francisco, there were three routes. It was competitive. We still regulated it as a common carrier.

I would suggest there's another way to think about this, which is, I'm citing my new colleague, Herb Hovenkamp. He says that regulation is a political decision to withdraw something from the province of competition. The politics may or may not have been motivated by market failure, but regardless, once the regulations come in, they said, we're not going to allow markets to govern this area of the economy. We're going to do building codes. Or we're going to do something like that. When you think of regulation that way, the recourse is political, and that's an alternative way to conceive of it that actually fits better descriptively with the history of common carriage, which is the heartland of traditional price regulation.

People have tried for years, going back to Hale in the early 20th century, to fit market power and natural monopoly onto common carriage. It's largely failed. Because innkeepers and taxis, it just doesn't work. And historically, there seems to be something else motivating it.

ROGER ALFORD: We have time for one more person, and then we'll do closing comments. Anyone else? Great. Okay, so we started with opening comments here. Can we start with closing comments here? Do you want to start, Mary? Or you can just say this was great.

MARY BLATCH: Yeah, this was great. Thank you.

ROGER ALFORD: Everyone, could say the same thing and we could end quickly.

RYAN BOURNE: Just, on the behalf of the Cato Institute, thank you for inviting us. I think this is a vitally important discussion. I would just urge- I guess this is where all sides kind of agree. We should be thinking this through from first principles, trying to look at, well what was the purpose of the regulation within some framework? I prefer the market failure framework, others may prefer other frameworks. What are we trying to achieve? Does it achieve the objective? If there are net costs to consumers and the consumer cost is high relative to those benefits, then thinking about how we can use your power, your advocacy, to go in and improve the situation.

LINA KHAN: I would echo the thanks for inviting the Open Markets Institute. I would just say that I think, given what's happening in our political economy, I think that the Antitrust Division, specifically, has one of the most important roles to be playing right now, and has a fantastic set of tools that, given the enforcement actions that we're seeing, are really being put to use, and I would just hope to see continued focus on enforcement. I think these kinds of issues are important, but there are a lot of other agencies also in the game, and the FTC also has more regulatory-like powers which I think mean that focusing on enforcement right now could make a lot of sense.

RICHARD BRUNELL: Thanks again for having us, and I think it's been a worthwhile discussion. I won't reiterate our suggestions about where to focus, but I just wanted to note another area of consensus related to your question about market failure. I think there would be a general consensus that most market failures for which there is a regulatory justification don't justify eliminating competition as the solution to the market failure. If we want to reduce the use of cigarettes, we have externalities. We don't say, well okay, we'll let you collude to raise prices.

So, I think it's an example of the way in which antitrust stays within its lane and gains. And although at the dinner table, your spouse might say, well why not? Higher prices are good. We don't want people to smoke, but the answer is, antitrust is designed to keep markets open, and if there's a regulatory problem it should be solved by regulators, or tax, or whatever.

By the same token, in advocacy, I think the main frame should be that the Division is an antitrust enforcer and has expertise in industries based on its enforcement, and can lend its

support to regulatory agencies to make sure that the regulations do make sense and to promote competition.

CHRISTOPHER YOO: Thank you for doing this, and I think your focus on finding consensus is the right one. I think that it does somewhat exist on broad ground. I think Thomas brought the perfect example. Those of us who live in Pennsylvania, until recently, could not buy beer in a grocery store, and you could only buy it in case quantities from beer distributors. That's not a politics of left and right. That's just bad for consumers. And if you go to most restaurants, they're still BYOB because liquor licenses can't be had. It's just a startling type of regulation that a broad consensus opposes, and I think that that consensus you're looking for does exist.

THOMAS ZYCH: I'd also add that forcing people to buy beer in mass quantities is not promoting health. [LAUGHTER] But two comments, one procedural, the other more substantive. To procedural, I think on behalf of the Section, I can say that we applaud this bringing us all together and having the open dialogue, and the Division, in our experience, has always been tremendously open to these dialogues. The point is that we don't just do this once, that it's a terrific idea and that we appreciate the chance to give you input.

The other is, we've talked a great deal about regulatory humility. Former Acting Chairwoman Ohlhausen made that point well, repeatedly, but that can be taken too far. We can recognize what a lane is, but at the same time the Division ought to be applauded, encouraged to be very aggressive, and very enthusiastic within that lane. The Section would continue to support that. Thank you.

STEVEN SUGARMAN: The National Diversity Coalition has been blessed under this leadership at the Antitrust Division that you've welcomed ongoing and regular communications about consumer impact, and so, we want to thank you. I think the core of our message today is that that's something that the Division should be proud of, and that all stakeholders that come to the Division should understand that the Antitrust Division values consumer input, and that they are a key stakeholder in the antitrust process. So the confusion is eliminated, and so that we can get to a better result no matter what the circumstance.

GAIL LEVINE: On behalf of Uber and the Chamber, thank you very much for hosting this roundtable series. I think this is invaluable, not just so we can provide our input, but so we can be hearing from you about the kind of issues that you're thinking hard about. The only closing comment I might offer is don't forget your international leadership role. Other nations are respected fellow sovereigns, and they're going to do what works for their populations, but if there's a way to, with deference and respect, offer them the learnings that you've gained in the American context about the importance of competition, the importance of innovation, and the role of regulation when there's market failure, and the risk of overregulation and its costs. If you are able to bring that message overseas, I think that will be very helpful for the global economy.

ROGER ALFORD: Thank you.

JOHN BERGMAYER: Thank you for having Public Knowledge not just here today, but at the other roundtables. I guess my concluding thought would be I think sometimes the line between health and safety, economic regulation, property rights, and antitrust can be unclear. There are obvious examples that everyone would agree to, but there are areas where it's a bit more murky.

I would say, without saying anything substantive, in the privacy debate today, some people want a more European behavioral regulation model. Others proposed more transparency requirements, and other people are proposing the creation of a new kind of intellectual property rights of some kind in personal data. And you can tackle the same problem through a variety of

different ways, and I think when you're looking at an area where people are seriously considering new forms of regulation, you can see these different framings being played out in real time.

ROGER ALFORD: George.

GEORGE SLOVER: I'll also say thank you very much for holding this, and for inviting us to participate in it. I'll just repeat quickly the point that I've made before, that the Antitrust Division and the antitrust community have done a tremendous job over the years in helping to shape regulation in a procompetitive way, to look for alternatives that can be recommended to redirect regulatory efforts in a way that preserves the benefits of competition where that's possible.

My organization is engaged on a wide variety of fronts now, trying to, some would say fight, some would say contain reasonably, what we perceive as an overly aggressive deregulatory effort. We hope that it ends up landing in the right place. We do think there are reforms that can be beneficial all the way around. Those issues are important to discuss, but we hope they do not become antitrust issues. I think there's enough for the Antitrust Division and antitrust community to do without taking a broader focus on how we free up business to do things without having to deal with regulation.

ROGER ALFORD: Great. Let me just have a quick closing comment myself as well. I want to make sure that I give credit where credit is due in terms of all of the incredible work of the staff at the DOJ. Bob Potter, Douglas Rathbun, Daniel Haar, Rene Augustine, Bill Rinner, they did a huge amount of work. But there's also a lot of other people behind them that also did a lot of work about these roundtables, and I want to give them credit where it's due.

I also want to thank all of you for the time and effort that you put. Your papers are really, really helpful. This is the last of our third roundtable, but I'm sure we'll be doing continued dialogues. I also want to really emphasize that one of the great side benefits of these events have been developing relationships with the different groups and really broadening our perspectives from the different organizations. And that was quite deliberate, that we really wanted a broad range of perspectives.

We encourage you to keep that dialogue open with us. Invite me to coffee. I will say yes. You know Makan may not say yes, but I'll say yes. No, I'm just kidding. But we really do want to have more dialogue, more discussion, more engagement. If you read Makan's speeches, he talks a lot about civil and robust discussion and debate. We really do mean that.

Invite us to speak at your events. On June 12, Makan is speaking at the Open Markets Institute as a keynote, and then a week later, he's speaking as a keynote at the Federalist Society. So you know he really is serious about wanting to be engaged and active. And so, thank you all, and we look forward to further discussions offline. Thanks. [APPLAUSE]

[Roundtable Three Submissions Follow]

The Role of Antitrust Analysis in the Regulatory Process

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Presented to the U.S. Department of Justice Antitrust Division
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I. Introduction

At a most basic level, regulation and antitrust have the capacity to play complementary roles. Antitrust law and policy seeks to ensure that private market actors compete and that they do not gain or maintain market power other than by competition on the merits. As Justice Thurgood Marshall famously put it, "Antitrust laws in general, and the Sherman Act in particular, are the Magna Carta of free enterprise. They are as important to the preservation of economic freedom and our free-enterprise system as the Bill of Rights is to the protection of our fundamental personal freedoms."[1] The ABA Section of Antitrust long has stated its position that competitive market forces and structures are best suited to maximize consumer welfare. The experience of the past forty years in the United States has shown that deregulation has provided significant economic benefits, and regulatory disruptions of markets should be avoided and, where determined to be necessary, should be designed and implemented in as narrow a fashion as possible.

Regulation (to varying degrees) seeks to directly achieve desired market outcomes and further non-economic policy goals through (more or less) direct interventions that are designed to correct market failures.2 Among the recognized market failures that may justify regulatory intervention are "the existence of monopolies and oligopolies, externalities, information failure, and inability to provide for the public or collective good."3 The regulatory process also may involve political or ethical considerations (or both) not adequately captured by free-market processes.4

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1 *United States v. Topco Assocs., Inc.*, 405 U.S. 596, 610 (1972).

2 See generally Michael E. Kraft & Scott R. Furlong, PUBLIC POLICY: POLITICS, ANALYSIS, AND ALTERNATIVES 22-27 (6th ed. 2018) (describing purposes of government intervention).

3 *Id*. at 24.

4 *Id*. at 22-23

Like any endeavor, regulation can have both positive and negative efforts. As then-Judge Stephen Breyer observed, regulation can suffer from excessive focus on a single goal ("tunnel vision"), random agenda selection, and inconsistency. 5 At the same time, well-designed regulatory regimes administered by dedicated and expert public servants can provide the "rationalization, expertise, insulation, and authority" necessary to effectively tackle social problems.[6] A major decision in any regulatory consideration is how far the government should go in directly regulating conduct to achieve a desired outcome as opposed to allowing free markets subject to antitrust law to operate and come to socially optimal outcomes without government intervention.[7]

While antitrust responds to certain types of market failures (particularly the tendency of unpoliced markets to give rise to collusion, monopolization, and merger and acquisition activity that represents an attempt to avoid competition on the merits) it has evolved in the United States as a set of more or less discrete criminal and civil offenses rather than as a comprehensive body of regulation. This is reflected in the antitrust agencies' view of themselves as principally law-enforcement agencies rather than regulators. That means antitrust does not necessarily have the capacity to achieve specific regulatory goals.[8]

Regulation often can account for competitive concerns, and a key issue for regulatory decision making is whether regulation or competition will best achieve the desired policy goals. Regulation tends to have a more comprehensive character with reliance on rulemaking processes and institutional expertise of regulatory agencies to provide more detailed guidance and direction to market participants, but it can also be the case that deregulation paired with antitrust enforcement, changes in tax policy, systems of marketable rights, and other approaches can achieve policy goals more effectively and with less distortion of the competitive process.[9]

The comments presented here focus on how antitrust analysis can productively interact with regulatory policy making. Part II of this submission discusses the role competition analysis can play in the regulatory process, both with respect to formal antitrust enforcement actions and as regards competition advocacy. Part III discusses certain examples of regulatory goals and how antitrust considerations may be incorporated into different types of regulatory activities. Part IV

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5 Stephen Breyer, BREAKING THE VICIOUS CIRCLE: TOWARD EFFECTIVE RISK REGULATION 10 (1993).

6 *Id*. at 61.

7 See Richard H. Thaler & Cass R. Sunstein, NUDGE: IMPROVING DECISIONS ABOUT HEALTH, WEALTH, AND HAPPINESS 183-96 (2008) (discussing more and less interventionist approaches to environmental regulation).

8 See, e.g., Michael Boudin, *Regulation & Competition*, 49 U. CHI. L. REV. 1098, 1107 (1982) ("Regulation has long been seen as a substitute for policing industries through antitrust laws. . . . Existing antitrust doctrine, however, is not always well suited to industries that have evolved under classical regulation.").

9 See Stephen Breyer, REGULATION AND ITS REFORM 191 (1982).

provides suggestions on priorities for competition advocacy based on recent comments from the American Bar Association ("ABA") Section of Antitrust Law. Part V offers a brief conclusion.

II. The Role of Antitrust & Competition Analysis in Assessing Regulations

(a) Antitrust law can police the use of delegated regulatory authority by industry participants in certain situations

One role for antitrust in the regulatory process is for enforcement actions to interdict anticompetitive regulatory interventions. To further this important enforcement priority, the ABA Section of Antitrust Law has consistently argued for keeping exemptions and immunities to the antitrust laws associated with regulatory interventions tightly cabined. For example, in a statement to the Antitrust Modernization Commission, the Section argued that "Congress should grant antitrust immunities and exemptions rarely and only after careful consideration of the impact of the proposed immunity on consumer welfare," that "Congress should only grant those immunities that are drafted narrowly, so that competition is reduced only to the minimum extent necessary to achieve the intended goal," and that "Congress should grant antitrust immunities only when the proposed immunity achieves a Congressional goal that trumps the aims of the antitrust laws in a particular situation," as well as advocating for narrow construction of immunities and for the antitrust agencies to have input into any immunity proposal.[10] This is consistent with the view that free markets protected by antitrust enforcement are generally preferable to regulation, and that regulation should be used sparingly and deregulation and elimination of antitrust immunities should be pursued wherever possible.[11]

Nevertheless, it is well established that *Parker* immunity precludes imposition of antitrust liability if the conduct is the product of state action.[12] However, what constitutes state action is not always clear. Courts must evaluate whether "the challenged restraint [is] clearly articulated and affirmatively expressed as state policy [and] the policy must be actively supervised by the State itself."[13] This is necessary to ensure that states do not exempt certain activities or interest groups from scrutiny under the federal antitrust laws by simply granting broad exemptions. At the same time, *Parker* immunity preserves the state's ability to pursue its own policy and regulatory objectives without undue federal interference.

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[10] ABA Section of Antitrust Law, *Comments of the ABA Section of Antitrust Law on General Immunities and Exemptions In Response to Request for Public Comment by the Antitrust Modernization Commission* 7-11 (2005), available at https://govinfo.library.unt.edu/amc/public_studies_fr28902/immunities_exemptions_pdf/051130_ABA_Immunities_final.pdf.

[11] *Id*. at 5-7.

[12] See, e.g., *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 104 (1980).

[13] *Id.* at 100.

Recently, the Supreme Court has reiterated the necessity of the active monitoring requirement by the State for a finding of *Parker* immunity. The Court has emphasized that "[w]hen a State empowers a group of active market participants to decide who can participate in its market, and on what terms, the need for supervision is manifest," meaning that "a state board on which a controlling number of decision makers are active market participants in the occupation the board regulates must satisfy [the] active supervision requirement in order to invoke state-action antitrust immunity."[14] Absent such continuous supervision by the State, the private market actors cannot avail themselves of the *Parker* immunity defense and they will face the same scrutiny under the antitrust laws as unregulated private market actors. This opens the door to significant enforcement activity in the area of occupational licensing and in certain healthcare markets that feature heavy state regulation.[15] It has also opened the door to antitrust-based challenges to municipal regulations against new platforms and business models.[16] Here, then, antitrust provides a useful check on potentially protectionist regulation while respecting sharing of powers inherent in our federal system.

(b) Antitrust Analysis Can Inform Regulatory Decision Making In The Appropriate Contexts

The analyses relevant to enforcement of the antitrust laws can also provide key insights into the economic costs and benefits associated with any proposed regulatory policy even in the absence of a basis for an enforcement action. While economics cannot inform how non-economic policy objectives should be valued by policymakers, economics can inform the discussion about the economic costs and benefits of proposed regulatory action or inaction. This measuring of expected economic costs and benefits then can be used by policymakers when weighing all of the consequences to arrive at the ultimate decision regarding the implementation or continuation of the regulation.

A "[r]egulation is broadly defined as imposition of rules by government, backed by the use of penalties that are intended specifically to modify the economic behaviour of individuals and firms in the private sector."17 The tools and targets of regulation typically include "[p]rices, output, rate of return (in the form of profits, margins or commissions) . . . ."18 A regulation's rules disrupt the natural market for goods and services by restricting the market participants' ability to undertake certain activities in much the same way that anticompetitive conduct affects

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[14] *North Carolina State Bd. of Dental Examiners v. F.T.C.*, 135 S. Ct. 1101, 1114 (2015) (internal citations omitted).

[15] *FTC v. Phoebe Putney Health Sys., Inc.*, 568 U.S. 216, 236 (2013).

[16] *U.S. Chamber of Commerce v. City of Seattle*, No. 17-35640, --- F.3d ----, Slip. Op. at 16-37 (9th Cir. 2018) (holding local ordinance allowing collective bargaining for Uber and Lyft drivers is subject to scrutiny for Sherman Act preemption).

[17] OECD Definition, available at https://stats.oecd.org/glossary/detail.asp?ID=3295.

[18] *Id.*

market participants' activities in an effort to affect prices, output, rate of returns, and the like. The economics analysis undertaken in antitrust matters focuses on the same economic factors, price, output levels, and rates of return as are relevant to regulations.

Antitrust economics provides us with a deep understanding of how certain actions by private market participants affect competition, barriers to entry, market concentration, the likelihood of collusion, and pricing and output decisions by firms. Given the substantial overlap in subject matter, antitrust economics can be applied to the regulatory context to inform expectations about the effects of the regulation on barriers to market entry, market concentration, pricing and output decisions, etc. Policymakers can utilize these insights afforded by the antitrust analysis to determine the expected economic costs and benefits of a given regulation, which then will be considered in light of the value of the policy objective sought.

The evaluation of the distorted market incentives resulting from the regulation also may inform whether the regulation affects market participants in such a way that the regulation leads to unintended effects that may frustrate the overall policy objective or reduce overall economic welfare. All of these considerations must then be weighed by the policymaker when making a determination about the desirability of the regulation.

(c) Antitrust Economics and Competition Analysis Cannot Assess Non-Competitive Effects and How They Should Be Weighed Relative to Competitive Effects

Strictly speaking, Antitrust economics and competition analysis have little to say on the relative weight that should be given to various policy priorities. They can, however, provide insight into the expected economic costs and benefits to consumers and firms from a proposed regulation and perhaps identify any unintended economics effects that may arise.

Regulatory action undertaken by states can be for myriad of moral, social, economic or political reasons. While antitrust analysis can provide needed insight into the costs and benefits of a potentially anticompetitive regulation, it has no special brief in assessing the value of achieving the associated non-economic objectives. Antitrust analysis only focuses on the economic effects and consequences of particular actions taken by market participants.

In antitrust, the Rule of Reason[19] analysis, broadly speaking, weighs the pro-competitive and anti-competitive effects on a particular market. If the former outweighs the latter, then the challenged conduct is deemed reasonable. However, antitrust does not provide a determinative tool for evaluating the competitive harms of a proposed regulation against the non-competition benefits. In fact, antitrust analysis tells us very little about how to evaluate these consequences to determine whether a regulation is desirable. This is because antitrust analysis cannot determine the economic value of non-economic policy objectives. Furthermore, even if it could, antitrust analysis cannot tell us how to weigh the various economic effects against the non-economic policy objectives.

[19] See, e.g., *Nat'l Soc. of Prof'l Engineers v. United States*, 435 U.S. 679, 691 (1978).

Policymakers ultimately must weigh various economic costs and benefits against their own valuations of the moral, social, and political objectives, which are not economically quantifiable. Thus, the policymaker must engage in a complex weighing of the non-economic benefits and costs of regulatory intervention against the economic benefits and costs of the regulatory intervention. The complex weighing of these competing interests and values is relatively uninformed by antitrust analysis. Antitrust commentators and enforcers therefore should not assume a finding of likely anticompetitive effects necessarily rings the death knell for a regulation. A suitable degree of humility must exist on the part of those who employ the tools of antitrust analysis to regulations given the multitude of other relevant considerations in play beyond merely the competitive effects.

While these limitations of antitrust analysis are important to identify and consider, they should not be construed as undermining the utility of antitrust analysis to assess the competitive and economic consequences of a particular regulation. Rather they should be construed as adding economic information to the policymaker's calculus when weighing the economic and non-economic effects of the regulation.

III. Regulatory Issues Implicating Competition Law Concerns

(a) Regulation can have a wide variety of purposes and effects

As already noted, policymakers can give effect to a broad set of moral, social, economic, and political goals through regulatory intervention. Some regulatory efforts, such as the Pure Food and Drug Act, had a distinctly moral character in transposing the common law's traditional exceptions to private ordering—health, safety, and morals—into the then emerging administrative state. Other regulatory programs, such as the Federal Trade Commission's consumer protection mission, have a more social purpose in ensuring that consumers are protected from fraud and other deceptive conduct that undermines market efficiency by distorting the information consumers use in making purchase decisions. Further still, some regulation is economically focused and aimed at fostering economic growth and technological progress. Of course, other regulation has a readily discernable political nature, and seeks to pick winners and losers in the market in the service of a purported national interest.

These various forms of regulatory purposes—moral, social, political, and economic—are not mutually exclusive, and can have a wide variety of effects—some of which might undermine other policy preferences. In an attempt to address issues related to poverty and basic notions of human decency, morally based regulation can risk negative effects on overall economic efficiency and innovation. Fraud based regulatory schemes in turn risk negative moral consequences, such as restricting an individual's rights to economic autonomy. Efforts at promoting economic growth, in turn, may sufficiently account for political concerns, such as the distribution of wealth. Finally, industrial policy regulation, in addition to resulting in inefficient market outcomes, often risks offending basic social notions about fraud and fairness by enabling regulatory capture.

In addition to tensions among high-level regulatory objectives, regulation may also conflict with competition law principles. Morals based regulatory regimes that impose heavy-handed requirements on business can create barriers to entry that indirectly hinder a competitive process that could have cured the ills at issue through the introduction of new products. The same is true of consumer protection regulation which, in the case of occupational licensing, directly restricts entry. In seeking to promote long run growth, some economic regulation may fail to strike the optimal balance between long-run and short-run economic welfare and undermine competition law's consumer welfare objectives. Indeed, industrial policy measures often directly frustrate competition law's goal of protecting the competitive process to maximize consumer welfare. As discussed in more detail below, competition analysis can aid in assessing these categories of regulation, even if it cannot be the sole measure for determining whether a regulatory intervention makes sense.

(b) Health and Safety Regulation

Health and safety regulations were one of the first policies to arrive as a result of the reformist spirit of the Progressive Era and the subsequent rise of the administrative state. Today, they include a broad set of policies ranging from agriculture and limits on the allowable level of contaminants in food products, to protecting the environment by limiting the ability of private actors to build nuclear power facilities. However, by imposing costs upon firms that must comply with these regulations, even the most morally sound regulatory scheme to promote health and safety raises the costs of firms seeking to enter these regulated markets, which can reduce the introduction of new and safer products that might also yield to a morally superior market outcome. Still, the recognition of health, safety, and morals as exceptions to private ordering is deeply rooted in the common law, and there is broad consensus that these values and the corresponding regulatory regimes that embody them provide benefits to society that outweigh competitive concerns.

However, the existence of a regulatory regime purporting to serve the interests of health, safety, and morals, should not necessarily be immunized from the important scrutiny competition law can provide policy. Indeed, finding that the benefits to health and safety outweigh harms to competition can involve a highly complex analysis, and may not always be evident from the perspective of public consensus and accepted norms. In these types of cases, rigorous economic analysis of the competition implications of a regulatory regime can be useful in assessing the costs and benefits of a particular regulation aimed at promoting health and safety. In general, however, regulatory policies aimed at achieving a healthier or safer society are the least likely to be heavily scrutinized on competition policy grounds.

(c) Consumer Protection Regulation

Regulation aimed at protecting consumers from fraud or other deceptive practices has a long history at all levels of American government. Consumer protection or fraud based regulatory schemes serve a crucial purpose of ensuring that consumers have adequate information to engage in welfare enhancing market transactions. Much of the interaction between consumer protection regulation and competition law has involved occupation licensing imposed at the state level. As a general matter, licensing requirements for learned professions help ensure that anyone holding themselves out as a practitioner of, for example, law or medicine

has at least a minimum level of knowledge, training, and moral character in a way that would be difficult for non-specialist consumers to verify otherwise.

Another established example of consumer protection regulation are labeling requirements. These regulations make sure that consumers are aware of what products contain and, in some contexts, what their proper uses are. Simply put, whereas occupational licensing requirements ensure that consumers have adequate information when purchasing services, labeling requirements ensure that they are adequately informed when purchasing goods. In both cases, therefore, consumer protection law and antifraud regulation serve a crucial social role in correcting market failures such as incomplete information and helping markets and the competitive process to function effectively.

For this reason, when done properly, consumer protection regulations can promote competitive outcomes by ensuring that buyers have the information they need to make rational purchasing decisions. Accordingly, state licensing schemes are generally given antitrust immunity pursuant to the *Parker* doctrine as discussed above.

However, like health and safety regulations, consumer protection laws can also create barriers to entry and therefore hinder a competitive process that could provide increased quality or, more relevant today, greater privacy in a way that would effectively negate the need for regulation. Indeed, because competition itself functions as a discovery process that brings information to the marketplace, as a general economic matter, consumer protection regulations are typically open to a higher level of scrutiny than those aimed at health and safety. As such, many have questioned whether the proliferation of requirements in areas such as occupational licensing is necessary or beneficial. Importantly, the FTC as both a competition and consumer protection agency has been taking an active role in shining light on licensing regulations that are consumer welfare reducing.

(d) Long-Run Economic Policy Regulation

In addition to moral or social concerns, regulation often involves measures to encourage long-run economic growth. Economic policies aimed at promoting dynamic competition through grants of intellectual property are, for example, fundamental to the values of the Constitution and promoting the innovation crucial to long run economic growth. However, at the core of intellectual property rights is the limiting the ability of others to make use of ideas and inventions for some period of time, which is justified in order to ensure a sufficient incentive for innovation. Other economic regulations aimed at spurring long-run growth include tax incentives for behaviors like home purchasing, to incentivize the continued growth of the labor force through the family unit, and lower capital gains rates, to ensure that capital is put to good productive use.

The economic and welfare maximizing orientation of these policies gives competition law a greater role for scrutiny than in either the case of consumer protection, and certainly health and safety. To achieve the optimal legal environment for maximizing overall economic welfare, non-competition economic policies must be balanced with competition policies. Achieving this balance is particularly important in the area of intellectual property law. While an owner of intellectual property may exercise market power that is contained within the scope of the patent,

they may not leverage that market power to harm competition in a way that is beyond the scope of that allowed by the intellectual property. That is, competition law plays an important and direct role in ensuring that the intellectual property rights—just as with other property rights—are not used to extend market power into other areas, as distinct from extracting the market power lawfully obtained.

(e) National or Industrial Policy Regulation

Regulation can also be used in the service political or geopolitical ends, such as distributive justice or industrial policy respectively. Examples of these types of regulations include price controls, bans or onerous requirements on certain industries or business models, subsidies for favored industries, and other direct dictation of market outcomes by governments. In so doing, these regulations tend to, in one form or another, pick winners and losers—whether it is helping consumers against producers, upstream producers against downstream firms, or even a particular producer against a competitor. For this reason, regulations furthering political ends represent the most dramatic and problematic interventions from the perspective of competition policy. The directly supplant *ex post* the competitive process itself rather than, in the case of long-run economic policy such as intellectual property rights, promoting dynamic welfare through *ex ante* grants of property rights. Thus, by their very nature, these regulations are justified by non-economic and political values and can have substantial unintended consequences.

Whereas measuring tradeoffs between long run dynamic and short run static welfare gains can be difficult, the economic inefficiencies of politically motivated regulatory interventions are readily cognizable using the analytical tools of antitrust economics—specifically, neoclassical price theory. In so doing, competition law can greatly help to illuminate the extent to which regulations like price controls or subsidies may result in negative economic consequences. As such, regulations aimed at serving political ends should be subjected to rigorous competitive effects analysis so as to protect consumers and the competitive process.

(f) Regulatory Capture Problem

Even when taking competition concerns into account, it is without question true that all the forms of regulation discussed above can be used to advance the common good and have a role in the political economy. However, the harms resulting from a broad view of the permissible scope of regulation can be magnified by—and indeed, facilitates—regulatory capture. As political economic literature has highlighted, individual policymakers can act as rent-seeking agents rather than in the public interest, and enact policies that reward the special interests that act as their effective principals.[20] Rather than serve the public good, where there is regulatory the powerful machinery of government can be used to reward those who can purchase access. From the perspective of competition policy, such behavior carries with it a particularly acute concern that regulation can be manipulated by entrenched economic firms as a way to use public restraints on trade to exclude competitors and, in so doing, distort the competitive process and undermine the free market economy.

[20] See generally George J. Stigler, *The Theory of Economic Regulation*, 2 BELL J. ECON. & MGMT. 3 (1971) (describing theory of regulatory capture).

For this reason, competition law analyses, when properly done, can provide one non-exclusive framework for disciplined thinking about the problems associated with regulation from the perspective of special interest capture. By evaluating the ability of a public restraint of trade to raise the cost of rivals and grant established firms in the industry increased market power, rather than benefit consumers, the antitrust analysis of exclusion can be a helpful tool for determining whether a regulation is actually in the public interest.

IV. Possibilities for Antitrust Division Involvement in the Regulatory Process

The ABA Section of Antitrust Law has commented frequently on regulatory issues, including advocacy for reduced barriers to entry and licensing requirements. Among the most important recent statements in this area is the Section's January 2017 Presidential Transition Report, which provided a comprehensive review of the recent activities of the antitrust agencies and suggestions for antitrust enforcement policy going forward.[21] In that report, the Section commented:

> The Agencies have long advocated against efforts by regulators to limit the application of the antitrust laws. The Section encourages the Agencies to continue to review and comment on federal legislation and regulations that affect competition policy, agency jurisdiction, and procedures, or the ability of agencies to effectuate their missions (including agency budgets). The Agencies should also continue to be vigilant in monitoring state actions and regulations that may be anticompetitive or designed to protect incumbent firms from competition. The Agencies should continue to provide their expert input with respect to state laws that: (1) involve occupational licensing; (2) add unnecessary new barriers to entry to platform and sharing companies, like Uber or AirBnB; (3) place anachronistic distribution requirements on innovative, vertically integrated companies (e.g., laws to exclude car manufacturers from operating in states without physical dealer locations); and (4) circumvent the antitrust laws in the healthcare area, including, but not limited to, Certificate of Public Advantage (COPA) laws and Certificate of Need (CON) laws.[22]

These priorities represent areas in which there is a broad consensus that recent regulatory interventions reflect an excessive concern for protecting the interests of incumbent actors. While many aspects of licensing regimes, regulation of traffic and housing policy, and other market regulations lie outside of the expertise of the antitrust agencies, the agencies are uniquely credible in articulating the harm to competition and to consumers caused by protection of market incumbents from competition.

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[21] ABA Section of Antitrust Law, *Presidential Transition Report: The State of the Antitrust Agencies* (Jan. 2017), *available at* https://www.americanbar.org/content/dam/aba/publications/antitrust_law/state_of_antitrust_enforcement.authcheckdam.pdf.

[22] *Id*. at 10-11.

The antitrust agencies should focus their efforts in these areas. Both the Division and the FTC have an admirable tradition of bringing antitrust principles to bear on the regulatory process. Whether enforcing against anticompetitive activities by regulatory boards composed of unsupervised agency actors or advising legislators of the likely competitive consequences of legislation under consideration, the agencies have played an important role in ensuring that regulatory processes are not used to undermine the competitive process. These activities further the important goals of protecting consumers and preserving competition.

As with enforcement matters, the antitrust agencies should set priorities, given the limited resources available to support intervention in regulatory matters. With this in mind, the Division and the FTC should pay particular attention to decisions by regulatory boards composed of industry participants to ensure the decisions do not exceed their proper limitations. This means strict enforcement of the requirements that any intent by state governments to displace competition be clearly expressed, and that the work of regulatory boards be appropriately supervised by the state government. Encouraging close supervision of regulatory bodies by states helps ensure that regulatory decisions are accountable to political processes, and competition law enforcement in this area protects consumers from self-interested industry regulations that limit competition.

The Division and the FTC also can productively advise Congress, state legislatures, and state and federal agencies on the competition implications of legislative or regulatory actions. Such advice can highlight issues that decision-makers may not have considered, including the extent to which intervention may raise barriers to entry or encourage rent-seeking behavior.

Care must be taken to respect the limitations of antitrust and competition analysis discussed above. For example, the Division and the FTC likely lack the expertise to assess non-competition issues in regulatory decision-making, and excessive emphasis on competition analysis can fail to address the fuller range of purposes that policymakers may have for adopting a particular regulatory approach. While it can be helpful for decision-makers to be attuned to competition concerns, the process of policymaking is ultimately a matter of values and priorities that the political process is better suited to vetting.

Additionally, specific areas of expertise in regulatory bodies concerning, for example, energy or telecommunications issues may not be replicable in the antitrust agencies. While many staff at the antitrust agencies have backgrounds in different areas of regulation, specialized regulatory bodies will often have scientific, technical, or other expertise built up over the course of long periods focused on specific policy issues. Tradeoffs between competition and other values ultimately must be weighed by elected officials and expert agencies acting in accordance with their legislative mandates.

V. Conclusion

The interaction of competition analysis and regulatory policy is an important area where both the Division and the FTC have a long history of productive enforcement efforts and engagement with policymakers. The antitrust agencies should continue acting within this

tradition of vigorous competition advocacy in a way that protects consumers, respects federalism and separation of powers concerns, and balances the important values of free and open competition against the understanding that policymaking may serve multifaceted ends.

AAI AMERICAN ANTITRUST INSTITUTE

Comments of the American Antitrust Institute Prepared for the Antitrust Division Roundtable on Anticompetitive Regulations

May 31, 2018

The American Antitrust Institute (AAI) is pleased to participate in the Antitrust Division's Public Roundtable Discussion Series on Regulation and Antitrust Law and this third session which focuses on "consumer costs of anticompetitive regulation."[1] AAI is an independent, nonprofit organization devoted to promoting competition that protects consumers, businesses, and society.

AAI frequently engages in competition advocacy before regulatory agencies to enhance competition in regulated industries such as airlines, telecommunications, and energy. AAI has been particularly critical of the use of regulation at the state and federal levels to restrict competition on behalf of incumbents. For example, AAI has criticized unjustified occupational licensing regimes, opposed dealer protection laws that limit the ability of innovative car manufacturers to distribute directly to consumers, and criticized certificate of need laws. On the other hand, regulation that restricts competition may be fully justified to correct market failures, or may involve legitimate tradeoffs that antitrust enforcers should respect. Moreover, regulation can also *enable* competition in ways that the antitrust laws cannot. We offer certain principles to guide the Division's advocacy on anticompetitive regulations.

I. Regulation Legitimately May Promote Other Values That Conflict with Competition

The Division should exercise "competition humility" in its advocacy related to anticompetitive regulations. Critics of the antitrust enterprise have attacked antitrust's focus on consumer welfare and maintained that antitrust law should take into account other important concerns, such as the welfare of workers, inequality, democracy, privacy, and community welfare, among other things. If antitrust enforcers are to resist such calls as beyond the ken of antitrust, they must avoid the perception that they reject such concerns altogether.

In a recent speech, Assistant Attorney General Delrahim said that antitrust's "narrow focus on competition and consumers is a feature, not a bug."[2] He continued:

[1] AAI's comments filed in connection with the first two sessions are available at http://www.antitrustinstitute.org/content/aai-participates-us-department-justice-public-roundtable-discussion-series-regulation.

[2] Makan Delrahim, Assistant Attorney General, Antitrust Division, Don't Stop Believin': Antitrust Enforcement in the Digital Era, as Prepared for Delivery at Booth School of Business, The University of Chicago (Apr. 19, 2018).

> The burden of curing our economic woes rests on the shoulders of policymakers and agencies with the institutional capacity and statutory mandate to tackle other complex issues. Shifting this responsibility to antitrust enforcers would require us to make trade-offs between competition and non-competition goals on a case-by-case basis. I view this as dangerous. It would threaten to disrupt the bipartisan economic consensus that has emerged by making antitrust a political tool that changes significantly depending on the party in power.[3]

Likewise, when other regulators *do* tackle social problems with regulations that have the effect of restricting competition, and those tradeoffs reflect a reasoned balancing of interests, antitrust enforcers should be circumspect in challenging those tradeoffs.[4] Indeed, to do otherwise would risk the same dangers Assistant Attorney General Delrahim was referencing.

For example, some advocate for allowing gig economy workers to bargain collectively with platforms like Uber in order to improve working conditions.[5] Putting aside the issue of whether such bargaining would constitute an unreasonable restraint of trade among independent contractors, states plainly could enact laws authorizing such conduct under the *Parker* doctrine. One might question whether the benefit to workers is worth the potential cost to consumers and possibly in less dynamic platform competition, and whether platform competition for workers is sufficient to protect them. But antitrust enforcers would be wise to stay out of the debate over the wisdom of these tradeoffs. To be sure, advocacy that focuses on whether state or local regulation to protect gig economy workers satisfies the demanding requirements of the state action doctrine is well within the realm of consensus antitrust enforcement.[6] But advocacy on policy grounds against the use of non-antitrust tools to protect workers may only lend support to the populist critique of antitrust.

II. Regulation May Be Necessary for Promoting Competition

Regulation has been an essential enabler of competition in network industries like telecommunications, electricity, and natural gas that involve elements of natural monopoly or bottlenecks. Open access and unbundling requirements imposed on incumbent network operators have facilitated the development of competitive ancillary markets. It is widely accepted that, at least absent vertical divestiture, a global regulatory solution to the access problem is preferable to piecemeal antitrust remedies that target particular instances of anticompetitive discrimination.

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[3] *Id.*

[4] The Division has recognized the legitimacy of other values in its competition advocacy. For example, it has explained: "In some industries, such as agriculture and banking, there are Congressionally-approved, legitimate, noncompetition policy goals at stake. The Antitrust Division has an important role to play in working with other Federal agencies to promote those goals in ways that are consistent, to the extent possible, with competition principles." Antitrust Division Manual, Fifth Edition, Chapter 5, Competition Advocacy.

[5] *See, e.g.,* Marina Lao, *Workers in the "Gig" Economy: The Case for Extending the Antitrust Labor Exemption*, 51 U.C. Davis L. Rev. 1543 (2018).

[6] *See, e.g.*, Brief for the United States and the Federal Trade Commission as Amici Curiae in Support of Appellant and in Favor of Reversal, *Chamber of Commerce of the United States of America v. City of Seattle*, No. 17-35640 (3d Cir. filed Nov. 3, 2017) ("Seattle Ordinance Amicus Brief").

Similar considerations supported the FCC's net neutrality requirements, which ensured competition in ancillary content markets in ways that antitrust enforcement is unlikely to be able to achieve.[7]

III. Deregulation Requires Vigorous Antitrust Enforcement

Eliminating rate and entry regulation in markets capable of supporting competition—such as airlines and trucking—and limiting such regulation to the extent necessary in markets with natural monopoly elements—such as telecommunications, electricity, and natural gas—has produced significant gains for consumers. But one of the lessons of deregulation is that deregulation without vigorous antitrust enforcement fritters away the gains to consumers. Substituting anticompetitive private action for anticompetitive regulation is no bargain. A prime example is the airline industry, where the great promise of deregulation has been undermined to a significant degree by lax merger enforcement.[8] Wholesale electricity markets subject to market-based rates are another example of deregulated markets that require close attention from antitrust enforcers, particularly to police the use of transmission constraints to foreclose competition.[9] In short, in advocating further deregulation of markets, antitrust enforcers must be prepared to step up enforcement and (continue to) advocate for limiting antitrust immunities.[10]

IV. DOJ's Competition Advocacy Should Give Priority to Shaping Antitrust Law and Advocating Before Federal Agencies

The Division is to be applauded for its initiative to step up its amicus filings to "help shape the development and application of antitrust law in the earliest stages of private litigation."[11] It has filed four such briefs since February, whereas the Division apparently last filed an amicus brief in a district court in 2003. The Division's amicus program implicates the issue of anticompetitive regulations insofar as its advocacy involves the application of the state action doctrine[12] or other exemptions or immunities. While shaping the law on exemptions and immunities is a good use of the Division's resources, we would suggest caution in investing scarce resources to invalidate anticompetitive state government constraints on other grounds, such as

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[7] *See* American Antitrust Institute, Repeal of Network Neutrality Eliminates Important Antitrust-Regulation Partnership, Deprives Competition and Consumers of Needed Safeguards (Dec. 22, 2017), http://www.antitrustinstitute.org/sites/default/files/AAI_Net Neutrality Repeal Comm_F.pdf.

[8] *See, e.g.,* Diana L. Moss, Revisiting Antitrust Immunity for International Airline Alliances (Mar. 2018), http://www.antitrustinstitute.org/sites/default/files/AAI_Revisiting Antitrust Immunity_4.6.18.pdf.

[9] *See* American Antitrust Institute, Antitrust Tools for Challenging Capacity Withholding in Wholesale Electricity Markets (July 22, 2014), http://www.antitrustinstitute.org/sites/default/files/AAI on Capacity Withholding_final.pdf.

[10] Notably, the Division advocated against immunity in both *Trinko* and *Credit Suisse*. In continuing its bipartisan advocacy in this area, the Division should look for an opportunity to seek to abolish the filed rate doctrine, or at least preclude its application to market-based rates.

[11] https://www.justice.gov/atr/division-operations/division-update-spring-2018/antitrust-division-expands-its-appellate-and-amicus-program.

[12] Statement of Interest on Behalf of the United States of America, *TIKD Services LLC v. The Florida Bar*, No. 1:17-cv-24103 (filed March 12, 2018); Seattle Ordinance Amicus Brief, *supr*a note 6.

the Dormant Commerce Clause or perhaps Substantive Due Process.[13] Wading into these controversial doctrines, which are not themselves within the competition expertise of the Division, may weaken public support for its core mission.

The Division has particularly valuable expertise to offer federal regulators in industries like electricity, natural gas, telecommunications, and airlines. We note, however, that during the Obama administration, the number of Division comments with federal regulatory agencies fell.[14] And the Division has apparently stopped filing submissions on antitrust immunities sought by members of airline alliances.[15] We would urge the Division to increase its competition advocacy before federal agencies.

[13] The Division has recently supported a complaint alleging that a state law granting an incumbent utility a right of first refusal with respect to a transmission project violates the Dormant Commerce Clause. *See* Statement of Interest on Behalf of the United States of America, *LSP Transmission Holdings, LLC v. Nancy Lange*, No. 17-cv-04490 (D. Minn. filed April 13, 2018). AAI agrees that the state law is poor policy, but the Division has no institutional interest in expounding on the contours of the Dormant Commerce Clause.

[14] According to the workload statistics, the number of comments dropped from 57 between FY 2001-08 to 23 between FY 2009-16.

[15] *See* Moss, *supra* note 8.

Department of Justice Roundtable on Anticompetitive Regulation
May 31, 2018
Written Statement of the Association of Corporate Counsel

The Association of Corporate Counsel (ACC) is pleased to participate in this roundtable series on regulation and antitrust law. ACC is a global bar association for in-house counsel with more than 40,000 members who work for more than 10,000 organizations in 85 countries. Our members work for businesses of all sizes, across all industries. As in-house counsel, our members are often charged with maintaining corporate compliance with antitrust rules, and providing proactive advice on business transactions and acquisitions in order to avoid antitrust violations.

Many of our members' companies are affected by anticompetitive regulations in the United States – both positively and negatively. We will be sharing some of these experiences at the May 31st roundtable, but with our written submission we wish to focus on the effects of anticompetitive regulations in the legal industry.

ACC has a vested interest in the regulation of the legal profession. In-house counsel are in the unique position of being both providers of legal services and clients of legal services providers. They are affected by legal industry regulations both as regulated professionals and as consumers of legal services. As access to affordable legal services has declined, the call for regulatory reform within the legal industry has grown. Limits on who can provide legal services and how entities that provide legal services can be funded have limited competition in the legal industry and contributed to the high cost of legal services and lower rates of innovation in the legal industry. While commentators rightly focus on how these restrictions affect the individual consumer of legal services, the same restrictions affect the $100 billion corporate legal services market in which our members provide and buy legal services.

Our members' experience as corporate legal providers and consumers has led us to the conclusion that there are two primary regulations within the legal industry that stifle competition and increase the costs of providing legal services. These two regulations are the prohibition on the unauthorized practice of law (UPL) and the prohibition on non-lawyer participation and investment in law firms. Although both of these prohibitions are meant to protect the public from harm, their continued application has not adjusted to the realities of the modern world or the critical need for affordable legal services for individual consumers. A restriction on competition should be justified by a valid need such as protecting the public interest and also be narrowly tailored to minimize its impact. It is questionable how much these restrictions protect the public interest, and as our comments below illustrate, neither is narrowly tailored.

Unauthorized practice of law rules are applied too broadly without clear evidence of harm to consumers

Clearly, some UPL prohibitions must exist to prevent fraudsters from holding themselves out as fully licensed lawyers when they are not, and to ensure that individual consumers are protected when they are purchasing legal services. However, UPL prohibitions go far beyond what is necessary to protect the public interest. UPL restrictions have the potential to capture a wide range of activities, conducted both by lawyers and non-lawyers. These rules encourage protectionism that excludes non-lawyers from the market for legal services and deters competition among lawyers from different states. For example, it can be the unauthorized practice of law for a lawyer licensed and located in Maryland to draft last wills and testaments for residents of Virginia. This restriction of the free flow of legal services across state lines raises the costs of legal services, restricts clients' choice of lawyers, and makes it more difficult to establish innovative approaches to legal services, such as virtual law firms.[1] In justifying these restrictions on who can provide legal services and where, state bars and supreme courts often rely on vague claims of harm that will befall the public if such restrictions are lifted. However, most complaints alleging unauthorized practice of law are made by lawyers or the bar association itself, not by consumers, suggesting that the primary motivation for these rules may not be consumer protection.

In the context of a sophisticated organizational client like the ones for which ACC members work, the UPL prohibitions do not serve a public interest. It does not much matter to these businesses if a lawyer who is licensed in Tennessee provides advice about complying with employment laws in Texas, because businesses that employ in-house counsel usually have multi-state or multi-national operations and expect their lawyers to competently advise them on the laws in multiple jurisdictions. Likewise, if a sophisticated business consumer wants to utilize the services of non-lawyers to perform what could be considered legal work under state law, there is no harm to the public interest if the business made a judgment and assumed the potential risk of receiving inferior legal services. There is no reason that states could not carve out "sophisticated consumer" exceptions to the UPL rules, so that lawyers and non-lawyers could provide legal services to sophisticated business consumers without fear of a UPL violation. States could start by carving out these sophisticated business consumers[2] and then evaluate what other aspects of UPL restrictions might be eliminated or modified to allow greater access to legal services for individual consumers.

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[1] Most states allow virtual law firms (law firms without a physical office space), but because of unauthorized practice of law restrictions, such firms can only offer services to clients who are residents of the state(s) in which the firm's lawyers are authorized to practice or who have matters in the state(s) in which the firm's lawyers are authorized to practice.

[2] ACC would define a sophisticated business consumer as an entity that employs an in-house lawyer. This presence of the in-house lawyer can ensure that the entity understands the nature of the legal services it is purchasing and can evaluate any risks inherent in utilizing a lawyer licensed in any particular jurisdiction or a non-lawyer to provide the services at issue.

Restrictions on non-lawyer participation and investment in law firms prevent U.S. firms from competing on equal terms in the market for corporate legal services

All U.S. states limit the ability of lawyers to partner with non-lawyers in offering legal services or financing the activities of a law firm.[3] These restrictions on non-lawyer participation and investment in law firms have the anticompetitive effect of putting law firms at a disadvantage against other types of professional service providers and non-U.S. law firms[4] because they limit U.S. firms' ability to make large investments that support innovation and service delivery within the firm. The debt financing that most law firms currently rely on has conditions and constraints that are not present in equity investments. The limited availability of long-term investment options for U.S. law firms is seen as a primary reason that law firms have been slow to invest in technology to enable more efficient delivery of legal services.

The arguments against loosening the restrictions on non-lawyer participation and investment center around maintaining lawyers' independence and minimizing potential conflicts of interest between the lawyers' or outside investors' economic interests and the client's best interest. But similar to the UPL prohibitions, the restrictions on non-lawyer investment make little sense in the context of a sophisticated business consumer of legal services. A sophisticated consumer of legal services is equipped to make a determination whether the potential for conflicts of interest is an acceptable one. Indeed, corporate legal departments are already doing so when they choose alternative legal service providers over law firms. Alternative legal service providers provide e-discovery, contract management, due diligence and other legal services to corporate legal department and the law firms that serve them. These providers generally leverage technology to lower costs, as well as using a mix of lawyer and non-lawyers to provide the services. These alternative providers generally are corporations with private, non-lawyer investors. They are able to provide these services without operating as a law firm because the services are supervised by corporate in-house lawyers or outside counsel, thus allaying fears that the service providers are actually practicing law under state laws. Bespoke legal services will likely always be dominated by law firms, but law firms are increasingly losing out on more "commoditized" legal services to these alternative providers that offer better value.

Sophisticated business consumers would benefit if law firms were allowed the same private investment options as the alternative legal service providers, because it would increase competition in the corporate legal services market. Even more so than sophisticated business consumers, individual consumers of legal services stand to benefit greatly from rules that allow for outside investment in law firms. There is a vast underserved market for individual consumer legal services that would benefit from the cost-savings of economies of scale. But the current limits on non-lawyer investment in law firms prevent the investment that would be needed to transform a law firm providing direct-to-consumer legal services to a large-scale operation, similar to the way H&R

[3] Washington state and the District of Columbia both allow a limited ability to partner with non-lawyers.

[4] Several countries allow various forms of non-lawyer participation and investment in law firms.

Block has applied economies of scale to tax preparation. While there are greater public interest concerns in the individual consumer legal market than in the corporate legal market, experiences in the United Kingdom, Australia, and other countries have demonstrated ways to implement regulations that provide at least as much protection against potential conflicts of interest as exist under our current legal regulatory system.

Increasing competition and competitiveness in the legal industry will be good for all consumers of legal services

As noted earlier, ACC looks at the state of regulation in the legal industry with the perspective of both a member of the profession and a consumer of legal services. As consumers with a wide range of service provider options (to include alternative legal services providers, accounting and consulting firms), we highly value the legal services offered by law firms, but we are concerned that regulations in the traditional sectors of the legal industry have not kept pace with the demands of modern businesses. As members of the profession, we want to see the legal industry remain strong and a force for what is ethical and compliant in the business world. The regulations that we have identified above are ripe for reform, especially as applied to the sophisticated business consumers in the corporate legal services market. Reform will help lower costs and support innovation in the legal industry.

Taking a broader view, starting the process of reform with services provided in the corporate legal market can give the industry an opportunity to experiment with new rules for the profession in a way that presents virtually no downside for individual consumers. For example, state bars can design a regime that provides for lawyer mobility by eliminating UPL violations for licensed attorneys, and start by applying this regime for sophisticated business consumers within the corporate legal services market before later applying it to the individual legal services market. Getting regulators comfortable with new rules and modes of regulation in the corporate legal services market can open the door to further reforms that more directly benefit the market for individual legal services.

In closing, we applaud the Department of Justice for its active practice of commenting on the anticompetitive implications of regulations within the legal industry. ACC would be happy to offer further in-house perspectives on this topic. We hope someday soon, the regulators of the legal industry will begin to consider how to welcome competition within the industry to better serve all consumers of legal services.

The Consumer Costs of Anticompetitive Regulations

Ryan Bourne, R Evan Scharf Chair in the Public Understanding of Economics at the Cato Institute

Thinking About Antitrust and Regulation

The very existence of antitrust law is predicated on the idea that certain business behaviors and practices can arise in markets which are detrimental to the functioning of effective competition – lowering consumer welfare.

Libertarian scholars, and my colleagues at the Cato Institute, have long debated the extent to which these concerns are justified. We tend to fall down on the side of these fears being overblown.

Though business actions towards consumers can no doubt be harmful in the short-term, market processes attenuate these behaviors in the longer-term, through the ordinary operation of entrepreneurship tied to consumer demands and the profit motive. The proof is in the pudding: rarely has a monopoly survived across generations absent government privileges. Even in imagined cases of cartels which restrict production to keep prices elevated, there are incentives to cheat to pick up market share.

Theoretically, of course, provided antitrust is purely focused on consumer welfare, is instantaneous and does not interfere with the competitive process, one can envisage scenarios where it has beneficial consumer welfare effects. But there tends to inevitably be broader tradeoffs from an active antitrust regime, including potentially adverse incentives against innovation stemming from the risk of cases being brought against successful companies, uncertainty about the law's application, the inability of policymakers to foresee the nature of future competition, and the potential for the regime itself to be captured by vested business or political interests.

This is important for the purposes of this roundtable - for the case against activist antitrust is the flip-side of the case for reviewing anticompetitive regulations. When a firm or company offers a price discount, or invests in some technology, or merges with another company, they may make life more difficult for their existing rivals or potential new entrants. But, absent the power of the government, they cannot explicitly bar them from the marketplace. In contrast, government rules and regulations often undermine competition too. But backed by the power of the state and by law, these tend to be much more difficult for markets to circumvent and so much more economically damaging to consumer welfare in the long term.

Why do we regulate?

In order to assess whether regulations undermine competition and harm consumers it is first necessary to remember their purpose.

Most regulations are justified, in economic terms, as efforts to correct perceived market failures. In economics textbooks, market failures are said to occur when the level of market transactions are not efficient, lowering net social welfare.

This can theoretically occur for a variety of reasons, including: the existence of positive or negative externalities from the trade (meaning that free markets lead to under-consumption or over-consumption of the good in question), a firm being a natural monopoly, a good being simultaneously non-rivalrous and non-excludable (i.e. a true public good), or the existence of significant asymmetries of information between buyers and sellers.

Most proponents of regulation start from the premise that the market in question fulfils one of these criterion. They then propose a government regulation to purportedly correct for it, taking us to the socially optimal level of consumption or production.

If this were true and the government was all-knowing about the external effects of all transactions, this would be the end of the story. But there are economic reasons to think that the "market failure" paradigm has major problems. Markets fail to deliver public goods much less often than the invokers of regulation or government provision suggest. Entrepreneurship has a tendency to eliminate inefficiencies over time. The government can miscalculate the appropriate scale of taxes and regulations and fail itself. Regulatory agencies can be captured by vested interest groups. And almost all activities have external consequences, meaning that correcting for externalities could justify almost unlimited amounts of intervention.

In order to truly assess whether regulation is effective then, one needs to examine the individual market in question, assessing not only whether a market failure exists, but also whether the corrective regulation works as intended. What one observes in many cases is that regulated markets are not characterized by market failure. And even in those markets characterized by market failure, regulation does not enhance market efficiency. Instead, the regulation redistributes from some firms to others and from some consumers to others and reduces overall efficiency, while the administration and compliance costs associated with the regulation consume both public and private resources.

Anticompetitive regulation

There are two very broad theoretical ways that economic regulation can be anticompetitive.

Some regulations are explicitly designed to affect the structure of the industry, via control of entry (and, less commonly, pricing). Regulations might eliminate competition entirely (see distribution and sale of liquor in states such as Virginia, or monopolistic transit and rail routes). Others might affect entry through the existence of legal hoops a firm must jump through before being able to trade (the most obvious example being occupational licensing). Some regulations and laws could give certain companies and industries exemptions or favorable terms. What unites all of these forms of regulations is that by controlling the supply of producers or by fixing the prices they can charge, the government constrains competition directly or deters new entrants to the sector.

Other regulations might still affect the structure of an industry but indirectly. By raising the cost base for all market participants, a regulation designed to achieve a different objective might create an unintentional barrier to entry. Some regulations might have a "poll tax" like effect with the costs of the provisions only absorbable for large incumbents, who are able to finance large departments working to comply, a luxury not available to smaller firms and start-ups. This potential consequence of regulations is exacerbated if regulations are devised or shaped with incumbents in mind.

The wrong question

This roundtable asks us to consider the consumer costs of anticompetitive regulations. But from an economic perspective this is the wrong question to consider. All regulations impose costs, and

in competitive markets at least we would expect a very large proportion of these to borne by consumers. But regulations are introduced on the basis of providing net social benefits. What we should ultimately be concerned about here then is whether, overall, regulations impose net social losses, or generate costly inefficiency rather than correcting for the market failures as advertised.

That is not to say that other regulations will not impose costs on consumers. For the purposes of this paper, however, I focus on regulations where the arguments or evidence for market failure are weak, or where the regulation fails to achieve its objective, and so the regulation imposes costs on the consumer at the same time as hurting overall economic efficiency.

The rest of this paper highlights first examples of current regulations (mainly at the state level) which fulfil this criterion, before then reviewing some older, historical examples.

Regulation of childcare

Individual states regulate formal childcare facilities, particularly in relation to staffing (including the qualifications of caregivers and the number of children per staff member). These regulations are said to be justified because of market failures in the childcare sector. It is believed that some parents would not appreciate the importance of good-quality care for their child's development and that they underestimate the broader social benefits, and so will under-consume high-quality care relative to a social optimum. It is also said that there are problems of information asymmetry in the sector, with parents having incomplete awareness of the range of childcare options available. By regulating staffing levels and qualifications, the theory goes that states can give parents peace of mind, generating a "quality assurance" effect which can stimulate demand for formal care. When care is used, these input regulations are also believed to ensure that care is of high quality, realizing positive social benefits.

But these market failure arguments seem a leap of faith. After all, the market for child care is competitive across types of care and includes homecare, informal care, and care by the parent directly.[i] Regulatory policies affecting perceived quality in formal settings can therefore cause substitutions from one type of care to another, particularly if they affect the costs of provision and hence the price of care.[ii] Furthermore, plenty of European countries operate successful childcare sectors without minimum staff:child regulations.[iii] Parental demands for a safe environment would likely constrain overly dangerous staffing levels in markets, and in other countries providers voluntarily sign up to accreditation and childcare agencies, often with inspections, in order to signal their quality.

It's not at all clear either whether the formal government regulations help achieve the objectives in practice, even if there were considered to be social benefits to high-quality care in theory. Suppose a regulation increases the staff–child ratio or requires child-care workers to achieve higher qualification levels. The former could theoretically increase quality by increasing staff interactions with individual children, and the latter by increasing caregiver training. Yet raising the staff–child ratio may restrict the wages of caregivers by restricting the revenue potential of each carer, or else raise costs per child for the childcare facility if the number of children cared for is fixed. The lower wages per worker could, in turn, result in lower-quality caregivers being attracted to the industry overall. Higher costs for facilities of more expensive employees would lead to fewer profitable facilities and hence higher childcare prices, leading to substitution away from formal care to home daycare (which is genuinely perceived to be even lower quality, on average). Child-care providers may also respond to higher government certification requirements on caregivers by lowering their

standards for support workers or facilities. The overall effect of both regulations on quality is therefore ambiguous.

A burgeoning empirical literature attempts to shed light on these issues. One finding that appears robust across studies is that stringent staff-to-child ratios increase child-care prices substantially to consumers with little beneficial effect on observed quality. Far from the "quality assurance" effect winning out, the regulations prove anticompetitive, reducing the supply of available care and hence raising its price.

Diana Thomas and Devon Gorry, for example, use variation in prices and state regulation requirements to estimate that loosening the staff–child ratio by one child across all age groups (regulations tend to vary by child age) reduces center-based care prices by 9–20% generally, or 2–5% for 4-year-olds particularly.[iv] This echoes an older result from Randal Heeb and Rebecca Kilburn, who found increasing the stringency by reducing the number of children in the allowed staff–child ratio by two raised the price of child care by 12%.[v]

And further evidence suggests the poor suffer disproportionately from this, with the effect manifesting itself through fewer providers in the sector.

Thomas and Gorry show that a small but measurable number of mothers stop working altogether as a result of these regulations. One would imagine that these are likely to be relatively low-income people on the margins of the labor market.[vi]

A more comprehensive paper by Joseph Hotz and Mo Xiao supports the intuition that the effects are particularly regressive.[vii] Using a panel dataset across three census periods and with extensive individual child-care center data, state data on day home care, and a host of control variables, they find tightening the staff–child ratio by one child reduces the number of child-care centers in the average market by 9.2–10.8% without increasing employment levels at other centers. This reduction in supply occurs wholly in relatively low-income areas and leads to lots of substitution to home day care. Increased stringency in the regulation actually increases the number of child-care centers in high-income areas, probably because of the "quality assurance" effect, meaning the overall effect is highly regressive.

Other regulations have similarly large effects on price, although with more mixed consequences for quality. Thomas and Gorry find that requiring lead teachers to have a high school diploma can increase child-care prices by 25–46% percent. Hotz and Xiao find likewise that increasing the average required years of education of center directors by one year reduces the number of child-care centers in the average market by 3.2–3.8%. Again, this effect manifests itself overwhelmingly in low-income markets, with quality improvements (proxied for them by accreditation for the center) overwhelmingly occurring in high-income areas.

Cost to consumers Data from Child Care Aware of America, a nonprofit that works in child-care policy, indicate the average annual cost for full-time care of an infant at a child-care center in 2016 ranged from $5,178 in Mississippi to $23,089 in the District of Columbia.[viii] Even the conservative end of the Thomas and Gorry estimates suggest that relaxing the staff–child ratio by one child across the board in Mississippi and D.C. could reduce average child-care prices by $466 and $2,078 a year, respectively (and in reality, these effects are likely to be non-linear and larger still in areas with the most strenuous regulations). Relaxing them entirely given they fail to achieve

their objectives could result in very large savings to families indeed (with the added benefit of making the transition to work more accessible for those with low level of labor market attachment).

There is some evidence that other staffing regulations – such as a requirement for caregivers to have had teacher training in early childhood education - can have positive effects on child development, though this comes with the trade-off of more expensive and less accessible care.

Childcare staffing requirements are anticompetitive regulations which do not achieve their objective but come at a high price for consumers.

Car Dealership Laws

Every state has laws governing the economic relationships of car manufacturers and dealers. These regulations require dealers to be licensed. But they can also incorporate restrictions on when franchise relationships can be terminated, cancelled or transferred, encroachment laws restricting manufacturers from establishing new dealerships in a market area without proof of need, regulations on reimbursement for warranty repairs, rules against price discrimination between dealers and requirements that manufacturers buy back vehicles or other accessories when a dealership franchise is terminated.[ix]

The most prominent impact of these laws in many states is the restriction on direct sales by manufacturers. But the broad consequence of all of them is to insulate dealerships from competition and prevent manufacturers from optimizing their inventory and distribution to best match the demands and preferences of consumers.

Consider two examples of prevalent regulations: "good cause" and "encroachment" provisions.

The former says that automobile manufacturers can only terminate a dealership for a set of enumerated "good cause" reasons, which in most cases does not include a broader desire for efficiency. Manufacturers face penalties and charges if they react to changed demand patterns by terminating dealerships. Though plenty of states allow for termination for noncompliance of the franchise agreement, even then the manufacturer faces the burden of proof in showing that they have acted in good faith, that the reason for termination is reasonable, and in lots of cases that they have given notice and an opportunity for the franchisee to deal with the issue at hand.

Likewise, plenty of states have laws which protect existing franchisees from "encroachment" – meaning that manufacturers have to show a need for a new dealership if it falls within a relevant market area of an existing one. Protection of exclusive territories such as this can create effective monopoly power for dealers, raising profits, when manufacturers might prefer to increase quantity.

The economic justification for this regulation arose in the early 20th century when it was believed that asymmetric information between the franchisor (the manufacturer) and the franchisee (the dealer) was leading to manufacturers exploiting dealers. But it is widely acknowledged that these rules today raise dealership profits through their anticompetitive effects which raise consumer prices. These days, calls to maintain auto dealership laws tend to be predicated instead on the supposed "social benefits" of local dealerships, including their roles in the community, as sponsors of local events etc. Such a claim could be made about all types of local business, and does not provide any robust "market failure" justification for higher profits for dealerships at the expense of consumers and manufacturers.

Cost to consumers This inefficiency raises consumer prices, though the magnitudes of this effect are disputed. A paper exploring data from 1972 suggested that all of the regulations combined raised new car prices by around 9 percent.[x] A report for the Federal Trade Commission in 1986 found an average price increase of just over 6 percent across all car types.[xi] In 2001, the Consumer Federation of America summarized the existing literature, concluding that these laws raised new automobile prices by between 6 and 8 percent.[xii] This was subsequently critiqued by Brian Shaffer on behalf of the National Automobile Dealers Association, who concluded that the true impact assessed by previous studies raised prices by just 2.2 percent.[xiii] But other papers focusing on other countries have found similarly large effects to the original studies.[xiv]

Unfortunately, little new empirical evidence exists on this subject, and it is beyond the scope of this paper to seek to investigate or quantify it. The internet may have helped to reduce some of the burden on consumers. But given there is no market failure justification for this kind of regulation, the only possible effect is the restraint of competition and hence higher prices for consumers.

Occupational Licensure

Individual states regulate a large number of occupations through licensing schemes requiring education, training or passing of examinations, which act as an anticompetitive barrier to entry to people practicing a trade. This is a clear restriction on availability of supply (both within state and for movement of workers in an industry across state lines) and so would be expected to raise the price of the service, whatever the other costs and benefits.

Licensing is justified often on grounds of imperfect information, particularly when harm could result for low quality service.

This argument is usually most forcefully made in relation to medical professions, where it is argued that "quack" practitioners might do substantial harm to patients. Yet even here there are likely to be clear trade-offs to restricted entry requirements, not least higher prices and the deterrence of many talented people from going into the profession in the first place. Ideally, one must assess whether there is evidence that licensing requirements reduce quackery and weigh up these benefits against the effects of restricting supply.

It is more clear cut in other sectors, such as hair braiding, barbers, sign language interpreters etc, that the costs associated with low quality providers is low, and in plenty of instances licensure boards are dominated by existing providers with a vested interest against competitors. To the extent that there might be a trade-off, consumers should be able to judge a price-quality bundle, and increasingly intermediate institutions such as online rating sites provide information about the nature and expected quality of service. Markets may also deliver certification mechanisms for safety or quality-sensitive consumers.

The arguments that licensure corrects for "market failure" then is increasingly difficult to justify. Yet it is now believed that up to 25-30 percent of Americans work in an occupation requiring a license.[xv]

A plethora of research has sought to assess the impact of licensure on labor markets, and tends to find that licensure puts upward pressure on wages (relative to no licensure or certification). A recent paper by Maury Gittleman, Mark Klee, and Morris Kleiner, found that "having a license when it is not required has no influence on wage determination, but, when it is required, licensing raises wages by 7.5 percent," even after controlling for a host of occupational characteristics.[xvi]

Costs to consumers The extent to which this raises costs to consumers really depends on the extent to which consumers would demand similar certification measures to ensure quality in a more open market. In the absence of licensure constraints, prices of services are likely to be lower, unless the government can provide significant economies of scale in delivering licenses relative to private certificates. However, in many cases consumers are unlikely to demand certification instead, and so prices would be reduced.

Work examining individual markets has shown clear evidence of this. Kleiner et al have shown that a relaxation of occupational licensing laws to allow nurse practitioners the ability to perform more tasks without the supervision of medical doctors reduced prices of well-child exams by between 3 percent and 16 percent.[xvii] Older papers from the 1980s have likewise suggested that licensing for dental assistants and hygienists raised the price of a visit to the dentist by between 7 and 11 percent[xviii] , and optician licensing the price of eye care by 5 to 13 percent.[xix]

The Heritage Foundation's Salim Furth estimates that occupational licensing across the whole economy costs the average household $1,033 per year, based on an average 8.8 percent wage premium.[xx] This is based on a simple calculation undertaken by Kleiner at all, who estimated a $203 billion annual cost to consumers based on a 15 percent wage premium.[xxi] One has to be careful when making these calculations to bear two things in mind (and ensure you do not over-estimate the effect): first, if consumers demand private certification to replace licensure then the savings in certain sectors might not be large; second, given licensing restricts people from practicing certain occupations, this enables a larger labor supply in non-licensed sectors, putting downward pressure on labor costs and hence prices in other industries. Overall then occupational licensing is likely to be costly to consumers, though not perhaps as costly as some critics imply.

Sugar policy

Though it might be beyond the scope of today's roundtable, it is worth remembering that lots of the most anticompetitive regulations at a federal level relate to trade policy, and attempts to insulate domestic industry from the competition of foreign producers.

The federal government's approach to sugar policy perhaps exemplifies this best.[xxii] Substantial interventions are made on highly speculative "market failure" grounds that absent interventions farmers would suffer from wild price swings, or that a sustained domestic supply is needed for "national security" – a public good as such. Yet many markets deal effectively with price volatility, and substantial numbers of countries seem to manage just fine without a domestic sugar supply (and it is unlikely that removal of protection would result in an elimination of domestic supply anyway).

The US federal government effectively cartelizes the sugar market. As my Cato colleague Colin Grabow has explained, the US Department Agriculture (USDA) facilitates loans to sugar processors using raw sugarcane as collateral, effectively creating a floor for the domestic sugar price.[xxiii] To ensure these loans are then more likely to be repaid, it then restricts the supply of domestic sugar through allotment quantities, influences demand by making purchases and limits the amount of sugar that can be imported without tariffs or with low tariffs, all in order to drive the market price higher.

Costs to consumers Unsurprisingly, the combination of these moves raise domestic sugar prices substantially. Data from the USDA shows that in March 2018 the US sugar price was 24.73 cents

per pound, almost double the world price of 12.83 cents.[xxiv] This, of course, means consumers not only face higher retail prices for sugar, but also more expensive foods which contain sugar as an ingredient.

Economic analysis of the consumer cost of the program has tended to look at the aggregate impact. The economist Michael Wohlgenant has suggested that the burden amounts to $2.4 billion per year, an average of around $19 per household.[xxv] A 2017 paper by John Beghin and Amani Elobeid estimated the cost to consumers higher still, with a total burden of between $3.4 billion to $4 billion.[xxvi]

Non-price and entry regulation

So far, the examples given have been price and entry regulations, which are clearly anticompetitive in that they restrict entry or trade in a way harmful to consumers, based on very tenuous market failure arguments. The more difficult regulations to assess tend to be environmental and health and safety regulations, where there may be well be externalities not "priced in", but where the specific nature of the regulations or mis-pricing of this externality has anticompetitive effects which go beyond what is necessary to correct for it.

The most obvious example of this worldwide relates to CO2 emissions and global warming. Lots of governments seek to price the social cost of carbon through minimum carbon prices or carbon taxes. But rather than just estimating and correcting for the social cost of carbon directly, allowing markets to adjust to the changed price signals, they then also mandate how much electricity, for example, must be generated from renewable resources or other means. This amounts to a "green industrial strategy." Indeed, governments have subsidized renewable energy resources and nuclear power in ways which distort the ordinary competitive process, and raise prices to consumers beyond what is necessary to account for externalities associated with carbon.

My Cato colleague and editor of Cato's Regulation magazine Peter Van Doren has made similar arguments pertaining to air pollution regulation. Economic analysis of Clean Air policy suggests that previous command-and-control regimes enacted by Congress, and their pattern of enforcement, is consistent with an attempt by politicians in already developed areas to retard the growth of industrial competitors in the South and the West and give excess profits (economic rents) to incumbent firms rather than clean up the environment at least cost. The provisions that prevent deterioration of environmental quality in pristine areas, the patterns of enforcement activity, and the grandfathering provisions for preexisting facilities were all consistent with restrictions on competition rather than environmental quality improvement. Other research has shown that the costs of building inefficiently sized plants in suboptimal locations were significant.[xxvii]

A similar story emerges with health and safety regulation, some of which might be justified where risks from health hazards are not known to workers or where labor markets are not competitive. Yet in many areas the mere existence of a health risk is thought justification enough for a regulatory intervention, even though labor markets tend to deal with risk via "compensating differentials" in pay setting.

Economic analysis has suggested that health and safety regulation often reflects the tastes of higher income individuals, who tend to have a stronger preference for the mitigation of risks which occur with relatively low probabilities.[xxviii] A study by Dustin Chambers and Courtney Collins used regression analysis to analyze the relationship between levels of federal regulation in certain

industries and prices.[xxix] Lower-income groups tend to spend a larger proportion of their incomes on goods and services from heavily regulated sectors, and they find a positive and statistically significant relationship between the level of regulation and prices.

Looking at the impact on consumers of other non-price and entry regulations though really requires analysis on a regulation-by-regulation basis, examining again what "market failure" is supposedly being solved for and how much compliance costs with the regulation or the process of regulatory development itself entrenches incumbents and deters entry.

Historic examples of successful deregulation

There are some clear examples through history of where the move away from government regulation, or at least its relaxation, has led to improved outcomes for consumers:

- **Banking**: the legacy of historic US banking regulation led to a fragmented banking system whose costs were excessive. The repeal of restrictions on branch banking in the 1980s and 1990s increased bank efficiency greatly and benefited consumers.[xxx] Loan losses and operating costs fell sharply, which translated into lower interest rates for borrowers. Better performing banks quickly grew through branching. State branching restrictions had acted as a ceiling on the size of well-managed banks and S&Ls, preventing their expansion and protecting less efficient, more risky competitors. Of course, this sector had a host of other problems which manifested themselves in the 2008/09 crisis.
- **Airlines:** forty years ago, the Civil Aeronautics Board (CAB) regulated the airlines industry, prohibiting new carriers, controlling routes and fixing rates. Academic work in the 1960s and 70s increasingly showed that the sector was inherently competitive and that regulation was simply raising prices for consumers. The CAB gradually relaxed ticket sale regulations, and approved carrier requests for more pricing freedom and control of routes. Subsequently, Congress passed the Airline Deregulation Act in 1978, removing federal control over routes and fares in the early 1980s (though subsidies to maintain some routes was implemented). This all led to a big increase in the number of carriers, and it has been estimated that between 1977 and 1996 real airfares fell by 40 percent. The Federal Trade Commission estimated that deregulation itself reduced fares by 25 percent, though there were some non-monetary costs to consumers in terms of more congestion in airports and on flights.[xxxi]
- **Trucking:** in the same way as the CAB, the Interstate Commerce Commission regulated trucking, controlling rates, and imposing tight restrictions on routes and firm entry. This began to be overturned in the mid to late 1970s. In 1975, the Commission began to focus more on competitive behavior and later approving applications for new authority. By 1979, the ICC expanded areas free of federal control, and started taking rates into consideration when approving new operating rights. In 1980 the Motor Carrier Act greatly liberalized licensing requirements, putting the onus on opponents of new authority to prove why it would be harmful, rather on the entrant themselves. In the mid-1990s, further deregulation occurred, with the ICC abolished and the industry becoming fully competitive. It is widely acknowledged that these changes led to lower rates for truckers, and had the positive spin off for other businesses of enabling them to operate flexibly with "just-in-time" deliveries.

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ConsumersUnion®
POLICY & ACTION FROM CONSUMER REPORTS

STATEMENT OF GEORGE SLOVER
SENIOR POLICY COUNSEL
CONSUMERS UNION

ANTITRUST DIVISION ROUNDTABLE DISCUSSION

ON

"ANTICOMPETITIVE REGULATIONS"

May 31, 2018

Thank you for inviting Consumers Union, the advocacy division of Consumer Reports,[1] to this important discussion on the appropriate role of regulation in an economy grounded, first and foremost, in free-market forces.

Today's topic is sort of the mirror image of the topic we discussed in the first roundtable – how to decide when it's appropriate for the antitrust laws to be displaced because of some other policy objective. And I will be saying again today what I said then – that competition and regulation each works best when they work hand-in-hand.

From our founding over 80 years ago, we have been strong supporters of the antitrust laws. We deeply appreciate the importance of sound and effective antitrust enforcement in protecting and promoting healthy competition in the marketplace, and the benefits that competition brings all of us as consumers, springing from the leverage of choice.

But our organization does not embrace unlimited business freedom. Our focus is on ensuring that consumers have a marketplace that they can trust to be safe, fair, and just. Competition is one aspect of promoting that, because – combined with enough transparency so that consumers are aware of their choices – it helps align business incentives with the interests of consumers.

But experience has demonstrated time and time again that we cannot rely on free market forces to ensure that the incentives of businesses, acting on the opportunities that present themselves for profit-making, are aligned with consumer interests, always and completely.

Accordingly, our advocacy on behalf of consumers goes far beyond supporting a competitive marketplace as protected by the antitrust laws. Competition policy and regulatory policy work most effectively when they each appreciate the role of the other – when they work hand in hand.

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[1] Consumers Union is the advocacy division of Consumer Reports, an expert, independent, non-profit organization whose mission is to work for a fair, just, and safe marketplace for all consumers and to empower consumers to protect themselves. Consumers Union works for pro-consumer policies in the areas of antitrust and competition policy, food and product safety, health care, financial services, telecommunications and technology, privacy and data security, transportation, and other consumer issues, in Washington, D.C., in the states, and in the marketplace. Consumer Reports is the world's largest independent product-testing organization, using its dozens of labs, auto test center, and survey research department to rate thousands of products and services annually. Founded in 1936, Consumer Reports has over 7 million subscribers to its magazine, website, and other publications.

A free market governed only by competitive market forces is not going to ensure that products are safe. It is not going to ensure that consumers are not cheated. It is not going to ensure that consumer privacy is not violated and exploited. It is not going to ensure that consumers have access to a full variety of viewpoints on important issues of the day.

It is not going to ensure that consumers are not left vulnerable because a business is in such a rush to get its products and services to market, or in such a rush to complete one project and get on to the next one, that it cuts corners in a careless and risky manner.

Experience has demonstrated that we need regulation to guard against these and other risks and hazards.

We need a Food and Drug Administration. We need a Consumer Product Safety Commission. We need a Federal Aviation Administration. We need a Federal Communications Commission. We need an Environmental Protection Agency. We need a National Highway Traffic Safety Administration. We need a Federal Trade Commission. We need a Securities and Exchange Commission. We need a Consumer Financial Protection Bureau. We need a Criminal Division in the Justice Department, not just an Antitrust Division. To name a few prominent examples at the federal level.

And here's a small list of a few protections those agencies have been responsible for bringing to consumers over the past few decades:

- The ban on lead paint, and on its use in children's products and furniture.
- Safety standards for cribs, including a ban on hazardous drop-side cribs.
- Food safety standards for meat and poultry.
- Vehicle fuel economy standards – and seat belts.

- The “Do Not Call” list.

- Required prior consent for cable companies to collect and share a consumer’s personal information.

- Fair Credit Reporting Act requirements that credit bureaus permit people to access and challenge the information on file, and that limit the purposes for which these personal records can be accessed and used.

And that's just at the federal level. At the state and local level, you have building codes, for example.

Granted, any one of these consumer protections might eventually have been offered by some businesses, over the course of time. But the fact is, they weren’t. And too many people were being harmed.

Furthermore, even if we assume that the free market would eventually have induced *some* businesses to offer protections like these, as a selling point, it would never have induced *all* businesses to do so. And do we want to leave it up to a toy maker to decide the pros and cons of using lead-based paint in children’s toys?

So competition is no substitute for regulation. Granted, competition might potentially help *reinforce* incentives to comply with a regulation, by enhancing a brand’s reputation, on the margins. Competition might thereby help promote greater compliance, and might help reduce enforcement costs. But regulation provides the foundation.

In any regulatory endeavor, there’s going to be a search for that appropriate spot, where the rules provide adequate protections for the public, without unduly burdening the businesses who must adjust their practices to comply. Excessive burdens do impose unnecessary costs, and divert productive resources. Inadequate protections lead to avoidable harm, sometimes devastating harm, and often to unjust enrichment for those responsible for causing the harm.

In searching for that appropriate spot, every federal regulatory endeavor is undertaken pursuant to Congressional authorization, and is subject to public notice and comment, and to a deliberative process in the agency. The agency can be overturned if a court finds that a resulting rule is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. There's a similar authorization, process, and review at the state and local level. Often, and perhaps understandably, it is the businesses being regulated who are able to devote disproportionate resources to getting their point of view across, both to the legislature and to the agency, as well as to the courts. Nonprofit consumer organizations like us also do what we can, with the resources we have.

One consideration in searching for finding that appropriate spot can be whether the approach being proposed in the regulatory endeavor is going to create undue impediments to competition. But it is important that this consideration be properly understood and contained.

In antitrust circles, we understand the objective of a "competitive marketplace" in terms of healthy rivalry among businesses each seeking to offer products and services. In the loose parlance of business circles, however, "competitiveness" is often understood to mean something different, something like "strength," or "ability to make profits."

The former conception is well within the experience and expertise of the Antitrust Division and the Federal Trade Commission. In fact, the agencies have a unique combination of experience, expertise, and credibility to draw upon in assessing how a particular restriction or requirement might make more likely, or less, the viability of healthy business rivalry that would give consumers the benefits that flow from the leverage of having meaningful choice.

The antitrust agencies have over the years provided a valuable service to other federal agencies and to Congress, and to state agencies and legislatures, that were considering market regulation, in advising them on alternatives for achieving a regulatory objective without unduly restraining competition. Perhaps the most common situation has been some effort by a state to restrict entry into a business, trade, or profession.

A prominent example of this is the Division's joint recommendations, along with the Federal Trade Commission, supporting repeal – or opposing enactment – of certificate-of-need laws that erect hurdles to the creation of new medical facilities, or to their expansion. Originally intended to reduce health care costs by avoiding the creation of unneeded facilities, these laws have been shown instead, with experience, to enable established facilities to block entry from new competition, and thereby to increase health care costs, and sometimes inhibit innovation. These joint agency recommendations to rein in certificate-of-need barriers have been submitted to Georgia, Florida, North Carolina, Virginia, South Carolina and, most recently, Alaska.

Similarly, the FTC has advised state legislatures on a number of proposals to open up, or to restrict, professional services, such as its comments in March of this year on an Ohio State Senate proposal regarding what dental hygienists and dental therapists are permitted to do.

And on the federal level, the Antitrust Division has submitted formal comments to the FCC on spectrum auctions, to the FAA on managing airport capacity constraints, and to the SEC on conflict-of-interest protections in implementing Dodd-Frank, to cite a few examples.

In addition to these formal public comments, the Division also routinely advises other federal Executive Branch agencies on the competitive implications of proposed rulemakings informally via the interagency review process.

When a regulation involves directly raising or relaxing a barrier to market entry, an antitrust perspective can be particularly useful. While still recognizing, of course, that there can be countervailing policy interests – like safety – that may justify what might be viewed, through a strictly antitrust prism, as a restraint of trade. The Sherman Act prohibits only *unreasonable* restraints of trade. And Congress ultimately has the prerogative, as do the states under the state action doctrine, to decide that a particular restraint is reasonable. We might not want to leave it up to the antitrust laws and the free market to decide who can perform brain surgery.

When I was on the House Judiciary Committee staff, we spent a good deal of effort stopping other committees from tossing an antitrust exemption into a larger regulatory bill. Sometimes it seemed to be some kind of offsetting gift to soften the blow of a new regulatory requirement. Sometimes the apparent purpose was to help induce companies to join forces together in pursuit of some regulatory objective, by shielding their collaborations against antitrust uncertainty, real or imagined. But in all cases, the premise was generally the other committee's view that the antitrust laws could serve as a bargaining chip, and could be negotiated away.

Of course, Congress enacted the antitrust laws, and it can create antitrust exemptions. On the Judiciary Committee, we said there should be a high bar for creating one, that it should be done only where there is a demonstrable and compelling overriding public interest that is truly irreconcilable with antitrust. But importantly, we thought the right place in Congress for making that assessment was in the Judiciary Committee, which had the experience and expertise, and the appreciation for the importance of antitrust, to make it. And had the sensitivity to look for ways that a regulatory objective in the public interest could be pursued without interfering with the antitrust laws. We quite rightly didn't think other committees were as capable of making that assessment.

But saying antitrust should not be relegated to second class does not mean it belongs at the top of the pyramid. Even less should there be a laissez faire retreat from regulatory protections, based on faith that free-market competition under the antitrust laws will give us all the protections we need. Again. competition and regulation work best when they work hand in hand. And the further away we are from assessing effects on competitive rivalry, and its benefits to consumers through the leverage of choice, the less reason there is for the antitrust agencies to be involved in advising the rest of the government on how to regulate.

A generalized observation that regulatory compliance imposes costs that can be harder for smaller companies to absorb, and that can make it harder for new firms to enter the market, is not an antitrust insight, and does not need to come from the antitrust agencies.

Rest assured, that still leaves a wide range of regulations and regulatory proposals where the antitrust community, and the antitrust agencies in particular, have an important perspective to contribute.

Even in the core situations, when a regulation directly and overtly restricts market entry into an occupation, there generally is an underlying safety concern, or important quality-of-service concern, put forth as justification. The question is whether the particular licensing qualifications, or other restrictions on practicing the occupation, are necessary to address the concern, or if there is an alternative means of effectively addressing it that is less restrictive on competition.

Still, the mere fact that a regulation directly and overtly restricts competition, and that existing players benefit from that restriction, and even that they support the regulation because of that benefit, does not necessarily condemn the regulation, although those are certainly relevant factors to consider.

Finally, while all markets have their special characteristics that must be understood to make assessments about appropriate regulation, Telecommunications and media are probably in a class by themselves. There are numerous interactions among a variety of businesses in production and distribution, involving complex technology. And even where the regulatory interests overlap with antitrust's interest in competition, the FCC's public interest standard is broader, also taking other concerns into account. Like ensuring universal affordable service, and access to a full diversity of viewpoints.

And even as to the core issue of competition, consumers' interest in choice goes beyond just making sure rivals are not conspiring not to compete, and making sure dominant firms are not seeking to monopolize. Net neutrality is a prime example of the limits of the Sherman Act.

In short, the broader issues of the impact of regulation on business and on the economy are important, and worthy of discussion. We should just be careful not to try too hard to turn them into antitrust issues.

Thank you.

Department of Justice Antitrust Division Roundtable
National Diversity Coalition Submission
May 31, 2018

The Department of Justice's Antitrust Division seeks a flexible, dynamic consumer welfare standard that is well-equipped to face threats to competition.

Today, the consumer welfare standard is premised on the idea that consumers benefit from free market competition because it increases economic efficiency, often in the form of lower prices or increased output. Courts and agencies in the United States traditionally analyze consumer welfare based on whether restraints or mergers may raise prices or reduce output. The National Diversity Coalition agrees with this approach.

Unfortunately, too often traditional antitrust analysis listens to the voices of academics, Ivy League experts, and statisticians in lieu of consumers.

Ironically, this leaves consumers feeling voiceless in a process purporting to determine effects on consumer welfare. In fact, it can appear that the historical process for assessing consumer welfare goes to great lengths to avoid direct consumer engagement. Current jurisprudence likewise can favor centralized analysis, sanitized from direct consumer interaction and input, over the consumers' perspective of the marketplace.

Today, the National Diversity Coalition seek to speak for the simple proposition that the voice of consumers must be part of anti-trust enforcement and it is inalienable from an assessment of consumer welfare. It is necessary to incorporate evidence gathered directly from consumers into antitrust analysis to unlock the power of efficient markets.

We are emboldened by the Division's increased openness under this Assistant Attorney General to include the voice of consumers and their advocates in its work. For instance, we commend Assistant Attorney General Delrahim and his staff for including us in this important discussion. We also acknowledge that the Department of Justice has recently recognized the need to consider ways to increase the voice of the consumer in antitrust analysis. For instance, we support the division's recent call for "[a]cademics and enforcers should consider whether tools such as NPS [Net Promoter Scores] and similar benchmarks are useful for measuring quality as a byproduct of competition."

We support the adoption of quantitative inputs into the assessment of consumer welfare to assess things like a merger's impact on product quality. However, we also believe that the use of such statistical approaches must not be misunderstood as a substitute for direct consumer engagement. Currently, we are concerned that there exists a disconnect between academics and enforcers on the one hand and consumers on the other. Increasing direct engagement with consumers remains essential. Consumers play an immutable role in the efficient functioning of markets that can't be replaced by academics and centralized regulations.

Likewise, their voices must be prioritized when determining the consumer impact from certain mergers and restraints of trade.

The National Diversity Coalition and its partners believe that actual consumer input and opinions are the best evidence of the impact of corporate actions on consumer welfare. Increased consumer input will help the Department of Justice identify wrong-doing, assess remedial measures, prioritize enforcement, and enhance economic liberty and the functioning of efficient markets.

To assess consumer welfare absent the consumer voice itself poses a threat to the reliability of findings and the ability of enforcers to fully protect consumers and innovation.

To that end, we offer the following recommendations for the Antitrust Division's consideration.

1. The Antitrust Division should ensure the consumers voice is properly part of the three phases of its antitrust Oversight: Assessment, Enforcement, Monitoring.

    a. Assessment. We believe the Antitrust Division should establish a Consumer Advisory Board to formalize the participation of at-risk consumers in the assessment of antitrust matters. It would strengthen the connection between consumers and the Antitrust Division and enable the Antitrust Division to surface troubling behavior directly from those effected. The Federal Communications Commission and Department of Treasury, amongst others, have successfully development community advisory boards to ensure their leadership is aware of key issues affecting the welfare of at-risk consumers and communities – including those most vulnerable such as consumers living paycheck to paycheck. We urge the Antitrust Division to establish a Consumer Advisory Board to increase its connectivity to consumer welfare and to demonstrate an openness to the consumer's voice in assessing the impact of corporate actions.

    b. Enforcement. We believe formal public guidance is necessary relating to the use of community comments, feedback and evidence during the enforcement process and in resolving appropriate remediation steps. Clear, public guidance is needed to ensure that corporations remain responsive to consumers and their welfare throughout an enforcement action. Today, many corporations with whom we meet perceive that the consumers have no role in antitrust enforcement matters once the Division has initiated proceedings, and in fact reduce communications with consumer advocates during the pendency of such proceedings.

    c. Monitoring. Formal monitoring of a transaction's actual impact on consumer welfare, post-transaction, is also critical. Consumers opinions must be monitored, pricing and output evaluated, and consumer feedback gathered

following a merger. This ensures that the Company's commitments are being fulfilled and that there are no unexpected impacts on consumer welfare. Consumer surveys and benchmarks can help ensure that there do not materialize unintended impacts on trade. The lack of systemic, public on-going monitoring and consumer feedback post-transaction often rewards corporations who do not follow through on their stated plans as submitted during an antitrust review.

2. The National Diversity Coalition believes that a company's governance structure also plays a key role in the ability of the Department and others to build confidence that a merger or trade policy will not ultimately harm consumers.
    a. The National Diversity Coalition has experienced several instances of companies who do not follow through on their commitments relating to post-transaction behavior or take actions that directly contradict commitments made during merger application processes.
    b. A Company's corporate citizenship, including Board diversity, as well as key policies and procedures, and a Company's history of community support should each play a role in determining whether the Company can be trusted to monitor and mitigate consumer impact post-transaction.

We are encouraged by the outreach efforts made by the Antitrust Division and its recent support for greater ways to measure consumer welfare based on the actual voice of consumers. We believe that including the voice of consumers through the antitrust process is a necessary, if underappreciated, part of the Antitrust process. We urge the Antitrust Division to proactively engage with consumers and their advocates and to only use expert reports and statistics as a complement (but not a substitute) for direct consumer input.

Sincerely,

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OPEN MARKETS
LIBERTY • DEMOCRACY • PROSPERITY

May 30, 2018

Public Comments Submitted by the Open Markets Institute for the Antitrust Division's Roundtable on "Consumer Costs of Anticompetitive Regulations"

The Open Markets Institute welcomes the opportunity to participate in the Justice Department's roundtable discussion on "the consumer costs of anticompetitive regulations." We look forward to continuing to engage with the Antitrust Division on antitrust and competition issues.

Markets are shaped through law and regulation. Although public regulations are often depicted as encumbering or interfering with competition, it is a mistake to classify them this way. On the contrary, public regulations are often fundamental to creating constructive competition within open markets. Other public regulations—following legitimate mandates from federal, state, or local authorities—promote non-competition values, such as public health and safety, worker protections, diversity, and local control.

In select instances, it may be appropriate for the Antitrust Division to identify those public regulations that serve private interests at the expense of both competition and the public interest. But our view is that the Antitrust Division should focus its efforts and resources on antitrust enforcement, and that devoting resources to critiquing the work of public regulators should generally *not* be a component of the Division's work.

We believe this for three reasons. First, the US political economy is currently seeing historically high levels of merger activity alongside signs of persistent and prevalent market power.[1] This means that the Antitrust Division's tools and resources are critically needed to block anticompetitive mergers and to investigate, remedy, and deter anticompetitive conduct.[2] The

[1] Companies have spent over two trillion dollars on mergers in 2018 so far, a "record pace for merger activity, topping the deal volume from the first few months of 2007" and set to "easily pass the all-time annual record of $4.7 trillion in deals set in 2015." Paul R. La Monica, *Companies have spent a stunning $2 trillion on mergers so far this year*, CNN (May 24, 2018), http://money.cnn.com/2018/05/24/investing/merger-boom/index.html; *Too Much of a Good Thing*, ECONOMIST (Mar. 26, 2016), http://www.economist.com/news/briefing/21695385-profits-are-too-high-america-needs-giant-dose-competition-too- much-good-thing; COUNCIL OF ECON. ADVISERS, BENEFITS OF COMPETITION AND INDICATORS OF MARKET POWER 4 (2016), https://obamawhitehouse.archives.gov/sites/default/files/page/files/20160414_cea_competition_issue_brief.pdf.

[2] At his confirmation hearing, Federal Trade Commission Chairman Joe Simons said, "The place most likely to have antitrust problems are places that have market power. Those are the places you want to look the most." We agree with this approach and believe the prevalence of market power across our political economy should prompt serious investigations by the Justice Department as well as by the Federal Trade Commission. See *Hearing for the President's Nominees to Serve as Federal Trade Commissioners, Senate Comm. on Commerce, Science, and Transportation,* 115th Cong. (2018); *see also* Hamza Shaban, *Nominee for FTC chairman signals scrutiny for tech*

Division's focus should be on identifying exercises of private power that violate the law rather than exercises of public power whose policy judgments the Antitrust Division may question.

Second, the Antitrust Division's institutional mandate is to enforce the antitrust laws. As far as we can tell, none of the antitrust statutes require or even invite the Division to examine the effects of "anticompetitive" public regulations, an exercise that assesses regulation through the lens of a single goal (competition) while ignoring the other values that lawmakers may have sought to promote. Indeed, playing competition advocate risks putting the Antitrust Division in the position of making policy judgments more suited for a legislature than a law enforcer—a hazard that Assistant Attorney General Delrahim has cautioned against in other contexts.[3] The Division's commitment to regulatory humility should make it equally humble in matters that fall outside its purview and expertise.

Third, concern about the costs of public regulation may also serve to distract both the Antitrust Division and the public from the costs of private regulation. Dominant actors with market power are often able to set the terms within a specific marketplace, thereby dictating outcomes for other businesses. Such unilateral exercise of private power is also very much a form of regulation. As Robert Hale wrote, "There is government whenever one person or group can tell others what they must do and when those others have to obey or suffer a penalty."[4] Especially in digital technology markets, certain dominant firms now exert regulatory control over the terms on which others can sell goods and services. The private regulations established by these "functional sovereigns" and the costs they impose on different sets of customers invite close attention from the Antitrust Division, as they suggest both maintenance and potential abuse of market power.[5]

Below we offer our views on (i) the relationship between markets and regulations, (ii) examples of public regulations that promote competition, (iii) examples of private regulations that undermine competition, and (iv) how this should inform the Antitrust Division's priorities.

I. Reframing Regulations

Given the topic and the framing of this workshop, it is worth first discussing the relationship between markets and regulation. Markets are created and structured through law. There is no such thing as a market "free" from government intervention; in fact, government is a precondition for a functioning market. Markets cannot function without property rights, which government defines and enforces, and markets rely on state authority to settle disputes through contract law and other tools.

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giants, WASH. POST (Feb. 14, 2018), https://www.washingtonpost.com/news/the-switch/wp/2018/02/14/nominee-for-ftc-chairman-signals-scrutiny-for-tech-giants/?utm_term=.a0e513d2e0b1.

[3] Makan Delrahim, Assistant Att'y Gen., Antitrust Div., Dep't of Justice, Assistant Attorney General Makan Delrahim Delivers Keynote Address at American Bar Association's Antitrust Fall Forum (Nov. 16, 2017) https://www.justice.gov/opa/speech/assistant-attorney-general-makan-delrahim-delivers-keynote-address-american-bar.

[4] ROBERT HALE, FREEDOM THROUGH LAW: PUBLIC CONTROL OF PRIVATE GOVERNING POWER (1952).

[5] Frank Pasquale, *From Territorial to Functional Sovereignty: The Case of Amazon*, CNBC (Dec. 8, 2017), https://www.cnbc.com/2017/12/08/amazon-shows-corporations-replacing-government-functions-commentary.html.

For this reason, the Antitrust Division's framing of this topic—looking at regulations that "supplant free market processes"—is misguided. It misses the fact that markets are not freestanding organic entities. Government does not stand outside of and separate from markets—it is intrinsic to and constitutive of them. "Laissez-faire was planned."[6] In structuring markets, legislators and other policymakers seek to promote a range of economic, political, and social objectives, including short-term price competition, but also consumer protection, public health, fair wages, safe working conditions, and the dispersal of private power. Consumer protection and public health laws and regulations—just like contract and property law—are forms of state action that shape markets.

Similarly, it's important to recognize that regulations can play a critical role in promoting competition. The Antitrust Division invites us to examine "the costs of supplanting competition with regulation," implying that competition and regulation are inexorably at odds, or that regulations necessarily undermine competition. But, as we describe below, regulations can play a critical role in promoting competition. History shows that regulations can help structure open marketplaces, enabling firms to compete on a level playing field. For this reason, it is especially important that the Antitrust Division employ both regulatory humility and deference to legislators and regulators. Not only do many regulations legitimately reflect democratic decision-making and non-competition values that fall outside of the Division's role and expertise, but they can also successfully fulfill competition mandates.

II. How Public Regulations Can Promote Competitive Market Structures

There are at least four types of regulations that can promote competition. These include: (i) separation rules, (ii) common carriage rules, (iii) rules reducing switching costs, and (iv) price transparency regimes. Described as "competition catalysts," these regulations have traditionally been applied in network industries, or sectors where a small number of private actors have captured control over an essential input or critical infrastructure.[7] Below we briefly review how each can structure competition.

(i) Separation rules place structural limits on business activity in order to ensure that firms don't exploit their control over critical networks. By serving as limits on certain forms of integration, these rules ease barriers to entry in related or adjacent markets. Examples of separation regimes that successfully promoted competition include the "fin-syn" rules, the "Maximum Separation" rules, and the *Carterfone* rule. All were issued by the Federal Communications Commission and are viewed as having successfully kept existing incumbents from dominating adjacent markets.[8]

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[6] KARL POLANYI, THE GREAT TRANSFORMATION: THE POLITICAL AND ECONOMIC ORIGINS OF OUR TIME (1944).
[7] Tim Wu, *Antitrust via Rulemaking: Competition Catalysts*, COLO. TECH. L. J. (forthcoming).
[8] Marc L. Herskovitz, *The Repeal of the Financial Interest and Syndication Rules: The Demise of Program Diversity and Television Network Competition?*, 5 CARDOZO ARTS & ENT'MENT 177, 183 (1997); Jonathan Weinberg, *The Internet and "Telecommunications Services," Universal Service Mechanisms, Access Charges, and Other Flotsam of the Regulatory System*, 16 YALE J. ON REG. 211, 222 (1999); Robert Cannon, *The Legacy of the Federal Communication Commission's Computer Inquiries*, FED. COMM. L. J., Vol. 55, Iss. 2, Art. 2 (2003); Tim Wu, *Wireless Carterfone*, 1 INT'L J. OF COMM. 389, 395–97 (2007). For an overview of how structural separations can enhance competition, *see* Lina M. Khan, *The Separation of Platforms and Commerce*, 119 COLUM. L. REV.

(ii) Common carriage rules require the carrier to treat all customers equally and transparently—both at the consumer and at the producer level. Absent common carriage, a dominant transportation or network facility can discriminate among customers, picking winners and losers. This means that the success or failure of a particular good depends on the whims of the carrier, rather on the merits of the product. This also opens the door to de facto extortion by the carriers, who can demand ever higher payments for carriage. Common carriage prevents such distortion and such extortion. Net neutrality rules are the most recent example of common carriage. The rules prohibited Internet carriers from discriminating between senders of content and from accepting payment for faster transmission. After being implemented, the policy protected TV and music providers, bloggers, nonprofit organizations like Wikipedia, and other entrepreneurs from being throttled or blocked by providers like AT&T and Verizon—thereby promoting an open market for content and information.[9]

(iii) Rules reducing switching costs promote competition by eliminating a barrier to entry. Switching costs typically arise when customers have long-term, dependent relationships with a firm and when firms make it difficult to abandon their services. Pro-competitive regulations isolate the source of the switching costs and use regulation to reduce them. The "number portability" rules adopted by the FCC for the mobile phone market, for example, required that a consumer be permitted to keep their number when changing service providers. Regulations requiring that a dominant firm make its product interoperable with services offered by competitors play a similar role, promoting competition through reducing switching costs and entry barriers.

(iv) Price transparency rules seek to prevent companies from distorting the competitive process through engaging in deceptive pricing. As the National Economic Council has described, deceptive pricing may "inhibit the competitive process" by hurting "the ability of a price-cutting competitor to take business away from a more expensive rival." Price transparency regulations—such as "all-in" pricing that require firms to display all and any fees that constitute the final price—help promote competition on the merits.

A final example of pro-competitive regulation that reflects these principles but does not fall neatly into any single one of these categories are the USDA's Grain Inspection, Packers and Stockyards Administration (GIPSA) rules. First proposed in 2010 following joint national workshops held by the Antitrust Division and USDA, the rules sought to redress the monopsony power that packers and processors enjoy over farmers and ranchers. As the Antitrust Division's record of the workshops documents, certain agricultural markets—particularly in poultry—are characterized by extreme disparity of bargaining power between processors and farmers.[10] This is because packers

(forthcoming).

[9] Tim Wu, *The 'Fix' for Net Neutrality That Consumers Don't Need*, N.Y. TIMES (Apr. 28, 2017) https://www.nytimes.com/2017/04/28/opinion/the-fix-for-net-neutrality-that-consumers-dont-need.html.

[10] Antitrust Div., Dep't of Justice, Competition and Agriculture: Voices from the Workshops on Agriculture and Antitrust Enforcement in our 21st Century Economy and Thoughts on the Way Forward (May 2012), https://www.justice.gov/sites/default/files/atr/legacy/2012/05/16/283291.pdf. *See also*, CHRISTOPHER LEONARD, THE MEAT RACKET (2014); Lina Khan, *Obama's Game of Chicken*, WASH. MONTHLY (Nov/Dec 2012).

and processors were permitted to roll up agriculture markets through mergers and acquisitions. The lack of competition today enables processors to use their leverage over farmers to extract better terms, saddle them with risk, and engage in deceptive, unfair, and potentially anti-competitive practices.[11]

By clarifying the scope of the Packers and Stockyards Act, the GIPSA rules would have given teeth to a statute that prohibits processors and packers from abusing their monopsony power against farmers. Although a modified version of the rules were due to go into effect last year, a few days before its scheduled implementation, GIPSA announced it was withdrawing them.[12] The USDA's decision to withdraw the rule has allowed the existing conduct to continue. Given the Antitrust Division's extensive efforts documenting the effects of concentration in agriculture markets, its competition advocacy work should have impelled it to publicly support the GIPSA rules.

III. How Dominant Firms Impose Private Regulations

In highly concentrated markets, dominant players with market power can impose private regulations. Private regulations are decisions by private actors that unilaterally set the terms of commerce and steer outcomes within a marketplace. When a single company or a small group of dominant companies make decisions that effectively set standards for the rest of the industry, those outcomes take on the character of governance.[13] The power to establish private regulations is troubling because, unlike a government, private actors are not accountable to the public.

Indeed, many modern markets are not competitive but are governed by private regulatory power. Instead of targeting public regulations, the Antitrust Division should focus on private regulations, which can (i) signify market power and (ii) distort market outcomes.

Below are two examples of private regulations:

(i) Four airlines govern which cities in America receive affordable and regular air service and which are cut off from the grid. Due to a series of mergers approved by the Justice Department, what were nine major carriers in 2005 have whittled down to four. Following these mergers, major airlines have dramatically slashed flights at major hubs, "de-hubbing" airports in Cincinnati, Memphis, Pittsburgh, and St. Louis. Each of these cities saw flights cut by over fifty percent.[14] The sharp reductions have led businesses to relocate; Chiquita Banana, for example, moved its headquarters from Cincinnati to Charlotte, citing the poor air service in Cincinnati. Given the lack of

[11] *Id*.
[12] Deena Shanker, *Trump Chooses Big Meat Over Little Farmers*, BLOOMBERG (Oct. 25, 2017).
[13] For examples of instances whereby firms with market power have issued private regulations, *see* Zephyr Teachout & Lina Khan, *Market Structure and Political Law: A Taxonomy of Power*, 9 DUKE J. CONST L. & PUB. POL'Y 37, 53-55 (2014). *See also* Sandeep Vaheesan, *What Iron Pipefittings Can Teach Us About Public and Private Power in the Market*, 91 INDIANA L. J. SUPP. 15 (2015).
[14] Phil Longman & Lina Khan, *Terminal Sickness*, WASH. MONTHLY (Mar/Apr 2012); Alan Blinder, *The Trouble With the Memphis Airport: No Crowds*, N.Y. TIMES (May 23, 2018) https://www.nytimes.com/2018/05/23/us/memphis-airport.html.

competition, policies set by airline executives can now shape the economic geography of the entire country, helping determine the economic fate of a given city or region. Perversely, airlines enjoy this private regulatory power largely because the Antitrust Division failed to vigorously enforce the antitrust laws. Alfred Kahn, a primary architect of airline deregulation, acknowledged that deregulation had failed to meet its promise, in part due to government's failure to fully enforce antitrust.[15]

(ii) Two companies—Google and Facebook—serve as private regulators over the news and publishing industries. Close to 50 percent of Americans rely on Facebook to access news, and the two companies together capture 83% of all digital revenue growth. News publishers depend on Google and Facebook for traffic; tweaks to their algorithms can lead traffic to plummet. For this reason, editorial decisions are now informed by what Facebook and Google's algorithms privilege. When Facebook decided to prioritize video content, for example, editors "pivoted to video," laying off dozens of journalists.[16] According to news reports, Mark Zuckerberg is directly involved in determining business outcomes for publishers, determining, for example, the number of articles that readers can read for free.[17] "Facebook and Google are our primary regulators," said David Chavern, president of the News Media Alliance, a trade group representing over 2,000 newspapers.[18]

IV. Antitrust Division's Priorities

America's political economy is witnessing both historic levels of market power and record-breaking merger waves. This means that the Antitrust Division's resources are critically needed to police anticompetitive mergers and to investigate and challenge companies engaging in exclusionary, predatory, and other abusive conduct. Insofar as the DOJ engages in competition advocacy, its efforts should be focused on *promoting* pro-competitive regulations—especially given that the Trump administration as a whole is pursuing a deregulatory agenda that in many instances may reduce competition. Targeting market power will also help the Division identify anticompetitive forms of *private* regulation—which is at the core of the DOJ's statutory mandate to enforce the antitrust laws.

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[15] Alfred E. Kahn, *Deregulation: Looking Backward and Looking Forward*, 8 YALE J. REG. 325, 348 (1990) ("[T]he government clearly has neglected responsibilities of which it was never the intention of deregulation to relieve it. These include…vigorous enforcement of the antitrust laws.").

[16] Daniel Walters, *Facebook's new algorithm threatens to destroy media companies that long chased Facebook clicks*, MONTEREY CENTERPIECE NOW (Feb. 15, 2018), http://www.montereycountyweekly.com/news/cover/facebook-s-new-algorithm-threatens-to-destroy-media-companies-that/article_2010756a-11e5-11e8-99b7-5bf7e5612006.html.

[17] Nellie Bowles, *Is Facebook's Campbell Brown a Force to Be Reckoned With? Or Is She Fake News*?, N.Y. TIMES (Apr. 21, 2018), https://www.nytimes.com/2018/04/21/technology/facebook-campbell-brown-news.html.

[18] Nitasha Tiku, *Publishers Could Get a New Weapon Against Facebook and Google*, WIRED (Mar. 7, 2018), https://www.wired.com/story/bill-would-let-publishers-gang-up-versus-facebook-and-google.

DEPARTMENT OF JUSTICE ROUNDTABLE ON ANTICOMPETITIVE REGULATIONS

May 31st, 2018

Submission of John Bergmayer, Senior Counsel, Public Knowledge

Public Knowledge believes that regulation can promote competition and protect the public interest, but that changes in technology and business models require that regulations periodically be re-thought. This testimony will focus on a few of these, from the media and wireless space.

First, though, two broad observations are in order. Regulatory agencies are generally well-suited to update their rules to match changing market conditions. However, often their hands are tied by overly-specific statutes that do not merely give agencies outcomes to pursue, but specifically instruct them how to pursue them. In some of the examples discussed here, the agency (here, the FCC) likely has the authority to reform the rules on its own, but even so in most cases there are legal arguments to be made on each side about the agency's authority. Some critics of what is seen as an excessively large administrative state believe that agency discretion is the problem, and would have Congress grant agencies much narrower delegations of authority (and would judicially roll back the Chevron doctrine, which holds that agencies should be granted deference when Congress has delegated them the job of clarifying ambiguous statutory terms). But ironically in many cases it is not agencies but Congress that are responsible for excessive "regulatory underbrush," and in this environment, too, agency actions are easier to challenge in the courts, tying up agencies and making reform still harder.

Second, Public Knowledge believes that regulations of various kinds are necessary for a well-ordered marketplace to function, and that the fundamental question is not whether to regulate, but how. Particularly in areas where the government itself defines the scope of a business and creates the relevant rights and causes of action the idea that there is a tradeoff between "regulation" and "deregulation" in a broad sense is incoherent. But that does not mean that all regulations as currently implement benefit consumers or the public interest, as they should. That said even when there are regulations in place that may not fulfill these broad goals Public Knowledge would also caution against premature or hasty regulation. In some cases incumbents who have benefited from the status quo would be able to take advantage of deregulation to lock in their current advantages. Therefore in some instances even when certain rules should eventually be rolled back, other measures may be more wise to take in the meantime.

Programming Exclusivity Provisions

A few years ago, led largely by now-Chairman Pai, the FCC on a bipartisan basis eliminated the sports blackout rule. This rule gave cable and broadcast companies a way to use the FCC to enforce their private contracts—turning a matter of private rights between different parties in the marketplace (to be enforced, if necessary, through the courts) into a regulatory issue requiring the involvement of an independent executive agency. These rules served no legitimate public purpose and the predictions of doom from the broadcast industry that attended their elimination have all proved false.

It is time for the FCC to finish the job and eliminate similar protections, such as rules against distant signal importation and syndicated exclusivity. Then-Chairman Tom Wheeler proposed the elimination of such rules in 2015 but, according to industry reports, pulled back the proposal after significant Congressional pressure.[1] However, a blog post by the former chief of the FCC's Media Bureau, Bill Lake, persuasively explains why the rules are unnecessary today.[2]

First, it should be noted that to the extent that local broadcasters have bargained for exclusivity rights with program suppliers or networks they should of course continue to have those rights, using the same means that other businesses have to enforce their rights. There is no need for special rules or processes in this instance. Similarly cable systems or broadcasters who transmit programming they have no rights to may be found liable, for example, for infringing copyright law, or for retransmitting a broadcast station without its consent. The elimination of specific exclusivity rules does not mean an end to exclusivity—just an end to the government's thumb on the scale in favor of exclusivity.

Having specific rules about specific business arrangements has contributed to the rigidity of the video marketplace. Regulations that guarantee exclusivity enforcement mean that broadcasters do not have to bargain as hard for it. During a time of broadcast consolidation and broadcast deregulation it simply makes no sense for FCC rules to step in and give broadcasters legal tools and leverage unavailable to other media companies. Eliminating them might produce more alternatives for viewers and, to the extent that pay-TV providers would gain the ability to obtain lower-cost programming from new sources, lower bills.

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[1] Doug Halonen, Wheeler Backs off on Exclusivity Rules, TVNewsCheck (Oct. 29, 2015), http://www.tvnewscheck.com/article/89609/wheeler-backs-off-on-exclusivity-rules.

[2] Bill Lake, The Time Has Come to End Outdated Broadcasting Exclusivity Rules, FCC (Sep. 22, 2015), https://www.fcc.gov/news-events/blog/2015/09/22/time-has-come-end-outdated-broadcasting-exclusivity-rules.

Needless Technology-Specific Distinctions

The FCC should update its rules by abandoning, wherever the statute allows, technology-specific rules that artificially favor some kinds of video services over others. At some point when the video marketplace is fully competitive; the FCC (and Congress) can consider relaxing or eliminating some of these rules entirely. But in the meantime, while Public Knowledge supports keeping them in place, they must be interpreted in a way that allows for new entry.

Specifically, the FCC should find that online services that offer multiple channels of linear video are "multichannel video programming distributors" under the law. This regulatory clarification would benefit consumers by increasing competition, by permitting purely online services to negotiate for and retransmit broadcast programming under the existing legal framework, as well as benefit from statutory protections that prevent incumbents from denying programming to new entrants. These "program access" rules are a valuable way to limit vertical leveraging in the media marketplace, and properly interpreted they can help ensure that competitive video providers can carry "must-have" programming. Similar rules ("program carriage") prevent MVPDs from discriminating against third-party programming on the basis of its ownership or affiliation.

At the same time, the FCC could clarify that some MVPD- or cable-specific rules (e.g. those having to do with signal leakage or competitive devices) would apply only to facilities-based MVPDs. Distinguishing between various providers in ways that reflect their actual differences is good policy; granting regulatory advantages to one class of providers over another based on technological and regulatory path-dependence does not.

Retransmission Consent Rules Should Ultimately Benefit the Public

The FCC should also update its retransmission consent rules to better reflect today's marketplace. It is a travesty that consumers are paying more and more simply to access "free" TV, as a result of a tilted negotiating process that holds viewers hostage, while failing to promote the purported goal of broadcast localism. Thus, to best protect consumers and localism, the FCC should find that certain retransmission consent negotiating tactics are *per se* bad faith and thus unlawful, such as, but not limited to:

- Restricting online video and consumer device usage

- Ceding control over negotiations to third parties

- Timing blackouts to coincide with marquee events

• Demanding per user fees for non-subscribers

The FCC should also be remedy the disparate bargaining power that large broadcast chains have, particularly when they negotiate for stations across different areas, and affiliated with different networks. Finally, the FCC should also establish a process for challenging bundling and tiering demands, adopt baseball-style arbitration rules, and require interim carriage, when necessary.

Media Ownership Rules Should Promote Diversity, Competition, and Localism

The FCC's media ownership rules are a complex area, but their original purpose is very simple. First, the rules were designed to promote competition in media markets. In this way they went beyond antitrust's mandate of preventing harms to competition. Second, they were designed to promote public interest goals it was felt the market by itself would not provide, such as localism. Broadcast companies receive a valuable benefit by being permitted to use the public airwaves--airwaves which now could be put to many other purposes, such as mobile broadband, inter-vehicle communication, and public safety. To the extent that the broadcast regulatory model is maintained it is fair to demand of broadcasters that they fulfil a broader public interest mandate in return.

However the current rules are failing at this purpose. Currently, different broadcast stations that operate essentially as a single enterprise through "joint sales agreements" count as different companies for the purpose of ownership rules. To the extent that the FCC expressly allows collusion between competitors in a local marketplace, this may be immune to antitrust review as well. Local stations no longer have to have their main studio in the community they purportedly serve. Multiple stations in a single market may share a common owner and large chains of broadcasters such as Sinclair are transforming what were once local broadcast stations into something more like a national broadcast network or a national cable news outlet.

It is time for a broad re-thinking of broadcast policy that is informed by the function broadcasters are intended to perform, not just by what some broadcast companies think would benefit their bottom line. If the purpose of broadcast is to ensure that viewers have access to free TV, then the FCC's rules should be updated accordingly. If the purpose of broadcast is to ensure that local communities have access to programming tailored to their specific needs, then broadcast rules should reflect that, as well. As it stands, however, the FCC's broadcast rules appear to be tilted toward giving individual broadcasters the maximum discretion to do as they will, with little thought given to the social and economic costs this creates.

FCC Rules That Prohibit À La Carte Offerings Should Be Eliminated

The Commission's basic tier buy-through rules require that cable operators include broadcast stations in all of the programming packages they offer. They go further than the statute requires and needlessly prevent MVPDs from offering à la carte service. There is no reason why viewers who wish to subscribe to cable service should be required (as opposed to having the option) of paying for over-the-air programming they can get for free with an antenna. While these rules are far from the only barrier preventing more consumer choice, the Commission can at least help move the industry closer to more subscriber-friendly plans.

The Commission's regulation implementing the buy-through requirement states that "Every subscriber of a cable system must subscribe to the basic tier in order to subscribe to any other tier of video programming or to purchase any other video programming." 47 CFR § 76.920.

However, the buy-through requirements in the statute itself apply only to cable systems for which there is no effective competition: the basic tier itself is defined as the "basic tier subject to rate regulation," and the prohibition on buy-through of other tiers is found in subsection (b) of 47 U.S.C. § 543, which pursuant to 47 U.S.C. §§ 543(a)(2) and (a)(2)(A) may only be used to regulate the rates of cable systems not subject to effective competition. Yet the Commission's implementation in 47 CFR § 76.920 has no such limitation. (A related provision, 47 CFR § 76.921, does.)

The Commission's reasoning in applying the buy-through prohibition to all video subscribers, not just subscribers of systems that do not face effective competition, was based on reading the basic tier regulation provisions in the context of must-carry rules. The Commission reasoned, agreeing with the National Association of Broadcasters, that since all cable systems must "provide" their subscribers with must-carry stations, 47 U.S.C. § 534, and because must-carry stations are part of the basic tier, that all cable customers must subscribe to the basic tier. Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992 Rate Regulation, Report and Order and Further Notice Of Proposed Rulemaking, 8 FCC Rcd 5631, ¶¶ 164-66 (1993).

However, this analysis was flawed. While it is true that cable systems in markets not subject to effective competition may not offer a version of the basic tier that consists only of must-carry stations, but are required to offer a basic tier that meets the "minimum contents" described in the statute, there is no such statutory requirement as to systems for which there is effective competition. Thus, even accepting the (debatable) interpretation that for a cable system to "provide" a must-carry station, all its customers must actually subscribe to it, there is no

reason why customers in markets that are subject to effective competition should be required to pay for stations that elect retransmission consent, instead of simply using an antenna.

It is absurd that Commission regulations, unsupported by a sound reading of the statute, currently prohibit à la carte with respect to broadcast stations. For these reasons, the Commission should modernize it rules to require that consumers purchase, at most, a tier containing must-carry stations, not all broadcast stations.

Spectrum Policies Should Better Promote Competition

Various policies the FCC has adopted over the years have inhibited the development of wireless competition and have harmed smaller providers.

- The FCC's preference to opt for large geographic license sizes for spectrum frequencies is essentially a form of industrial policy that only benefits the four large nationwide wireless providers and is an impediment to new market entrants, innovative alternative uses of the spectrum, and competitive providers that focus on local markets, rather than the national market. Large providers could nest together small licenses to establish the nationwide footprint they want, but the FCC's policy of creating geographically large spectrum licenses makes the licenses cost prohibitive to everyone other than already entrenched national carriers. This harms competition and innovation.

- FCC's spectrum policy treats licenses as presumptively renewable so long as the licensee has complied with build-out conditions. Long initial license terms (usually 10 years) and a presumption of unlimited renewability of those licenses artificially drives up the cost of the initial license. As a result, licenses become too cost prohibitive for new market entrants to acquire, leaving little new competition in the market. Licenses in densely populated markets become too expensive for everyone except the largest incumbents to acquire, which means that smaller competitors and new entrants are largely precluded from ever offering a viable alternative to mobile customers - locking the marking into at most 4 firm competition, with further attempts at consolidation at the doorstep.

- The FCC has a preference for existing business models and already deployed technologies that undermine innovation and competition. The Ligado/GPS controversy is a good example. The receivers on GPS devices are cheap, and don't adequately filter out transmissions on neighboring bands. As a result, proposed uses of neighboring spectrum bands are discouraged. This spectrum lies fallow and new use cases or new competitive business models can't get off the ground.

- The FCC has typically opted to maximize licensee control of spectrum, even when the licensee has not commenced any operations in the band, to the detriment of public access to the band and innovative unlicensed uses. Instead of adopting "use or share" requirements for licensed frequencies that would allow for unlicensed use of bands where the licensee has not yet deployed, those frequencies can lie fallow for years after they are licensed. In general, unlicensed use of spectrum has proven to be one of the most efficient ways to deploy new technologies and services, yet decades of success have failed to dislodge the presumption in favor of exclusive licensed spectrum access—in large part because certain industries benefit from keeping spectrum closed off to the public.

Finally, the FCC's methods for calculating the value of spectrum holdings do not properly weigh licenses by the spectrum's technical characteristics. As a result it is difficult to get a clear picture of the advantages that various carriers have with respect to spectrum holdings or to craft rules that prevent single carriers from hoarding spectrum, not to use it, but simply to keep potential competitors from having it.

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The specific examples cited in this submission are far from the only instances where regulations either stand in the way of competition or should be updated to promote it. However they may serve as illustrative examples from the media space that can inform policymakers in other contexts.

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Roundtable on Anticompetitive Regulations

Antitrust Division, U.S. Department of Justice

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Thank you to Assistant Attorney General Makan Delrahim and to the staff of the Antitrust Division for providing me the opportunity to offer my thoughts on the potential anticompetitive effects of regulation. In my comments, I will address how regulation (1) can serve as an entry barrier, (2) can facilitate collusion, (3) can dampen incentives to conserve costs and to innovate, (4) can immunize conduct form antitrust scrutiny without substituting meaningful regulatory oversight, and (5) can influence the application of antitrust even when it does not strictly speaking apply.

I. Regulation as an Entry Barrier

Courts and commentators have long recognized that regulation can create barriers to entry.[1] For example, occupational licensing and the requirement that providers obtain a certificate of public necessity and convenience have long had the effect of preventing new firms from entering the marketplace.

Even regulation that does not restrict entry directly can have the effect of deterring the arrival of new competitors. As Richard Posner recognized, regulation can have the effect of serving as an alternative form of taxation.[2] Industry-wide regulation can benefit incumbents despite the additional costs of compliance if new entrants and fringe players find it harder to bear the

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[1] *See, e.g.*, United States v. Citizens & S. Nat'l Bank, 422 U.S. 86, 118 n.30 (1975); United States v. Marine Bancorporation, 418 U.S. 602, 629 (1974); Gary S. Becker, *A Theory of Competition Among Pressure Groups for Political Influence*, 98 Q.J. ECON. 371 (1983); Herbert Hovenkamp, *Antitrust Policy After Chicago*, 84 MICH. L. REV. 213, 227, 276-77, 279 (1985); Sam Peltzman, *Toward a More General Theory of Regulation*, 19 J.L. & ECON. 211 (1976); George J. Stigler, *The Theory of Economic Regulation*, 2 BELL J. ECON. & MGMT. SCI. 3 (1971); Oliver E. Williamson, *Delimiting Antitrust*, 76 GEO. L.J. 271, 293 (1987).

[2] Richard Posner, *Taxation by Regulation*, 2 BELL J. ECON. & MGMT. SCI. 22 (1971).

regulatory burden.[3] A workshop convened by the Federal Trade Commission in 1984 identified numbers specific examples where firms have actively sought regulation in order to create entry barriers.[4]

II. Regulation as a Means for Facilitating Collusion

Price regulation has long been recognized to facilitate collusion.[5] For example, cartels are much easier to form and enforce when products are homogeneous. When products are uniform, any coordination designed to reduce competition need only focus on a single dimension: price.[6] When products are heterogeneous, however, any price agreement must take into account all of the ways that products can vary. This makes agreements both harder to reach and to police.[7] Indeed, if products are so customized that each is individualized, cartel cheating may be almost impossible to detect or prevent.[8] Another practice that tends to undermine oligopoly discipline is unsystematic price discrimination.[9] Indeed, secret price discrimination is one of the best ways for cartel members to cheat.[10] Cartels also function best when demand is more or less constant, which in turn helps ensure that prices remain stable.[11] The filed rate doctrine makes such unsystematic discounting illegal.

Price regulation has the effect of facilitating collusion along each of these dimensions. In short, standardizing both products and prices makes cartel agreements easier to reach and any defection from the cartel cheating easier to identify.[12] Moreover, by preventing competitors from deviating pricing either up or down, price regulation can use the government to serve as an effective cartel enforcer. At the same time, entry restrictions and the ratemaking process can help stabilize demand.

Price regulation also has the effect of making all pricing information visible and easily available to all other industry participants. In addition, it requires every provider to announce to all of its

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[3] Herbert Hovenkamp, *Antitrust Policy After Chicago*, 84 MICH. L. REV. 213, 276–77 (1985); Steven C. Salop & David T. Scheffman, *Raising Rivals' Costs*, 73 AM. ECON. REV. 267, 268-69 (1983).

[4] For a survey of this literature, see Robert E. McCormick, *The Strategic Use of Regulation: A Review of the Literature*, *in* THE POLITICAL ECONOMY OF REGULATION: PRIVATE INTERESTS IN THE REGULATORY PROCESS 13, 18–25 (Robert A. Rogovsky & Bruce Yandle eds., 1984) (Federal Trade Commission Law and Economics Conference).

[5] *See, e.g.*, Andrew F. Daughety & Robert Forsythe, *The Effects of Industry-Wide Price Regulation on Industrial Organization*, 3 J.L. ECON. & ORG. 397, 428–29 (1987).

[6] F.M. SCHERER & DAVID ROSS, INDUSTRIAL MARKET STRUCTURE AND ECONOMIC PERFORMANCE 279 (3d ed. 1990).

[7] DENNIS W. CARLTON & JEFFREY M. PERLOFF, MODERN INDUSTRIAL ORGANIZATION 135 (3d ed. 2000); SCHERER & ROSS, *supra* note 6, at 279.

[8] SCHERER & ROSS, *supra* note 6, at 279–80.

[9] HERBERT HOVENKAMP, FEDERAL ANTITRUST POLICY: THE LAW OF COMPETITION AND ITS PRACTICE § 14.5b, at 578 (3d ed. 1994); SCHERER & ROSS, *supra* note 6, at 500; W. KIP VISCUSI, JOSEPH E. HARRINGTON, JR. & JOHN M. VERNON, ECONOMICS OF REGULATION AND ANTITRUST 349–50 (4th ed. 2005).

[10] HOVENKAMP, *supra* note 9, § 4.1a2, at 150–51.

[11] CARLTON & PERLOFF, *supra* note 7, at 137.

[12] HOVENKAMP, *supra* note 9, § 4.1a3, at 151–52.

competitors any planned changes in prices or product offerings long in advance. The loss of lead time dampens the incentive to make price cuts.[13]

Pooling of pricing information has long been recognized as a facilitating practice that makes it easier to form and maintain a cartel.[14] Such information is particularly helpful to cartels if that information pertains to changes in product or changes to price.[15]

Finally, cartels need some means to enforce the cartel by preventing price cutting. Cartels often find them difficult to enforce, as any mechanism must not reveal to the government they are colluding. Price regulation provides for an open and legal way to enforce prices. By requiring that prices conform exactly to the published rate, price regulation prohibits any deviations from the established price.

In addition, price regulation gives any member of the public the right to challenge any proposed change to a tariff.[16] Firms have routinely used this authority to oppose price reductions proposed by their competitors.[17] As such, tariffing creates the same opportunity for interference as competitor suits in antitrust law, where a less efficient competitor can try to prevent its rival from competing on the merits.

The imposition of price regulation thus facilitates collusion in a wide variety of ways. The danger of expediting the formation and maintenance of a cartel provides another important reason to resist price regulation.

III. The Impact of Regulation on the Incentives to Conserve Costs and Innovate

A widely cited problem with price regulation is that the regulated firm has no incentive to economize on costs. The cost-plus nature guarantees the firm a return on its expenditures, which dampens their incentive to economize as well as their incentive to invest in cost-reducing improvements.[18] Firms subject to price regulation may also avoid deploying new technologies

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[13] Scott M. Schoenwald, *Regulating Competition in the Interexchange Telecommunications Market: The Dominant/Nondominant Carrier Approach and the Evolution of Forbearance*, 49 FED. COMM. L.J. 367, 415–16 (1997).

[14] HOVENKAMP, *supra* note 9, § 5.3, at 215–17.

[15]. CARLTON & PERLOFF, *supra* note 7, at 138; HOVENKAMP, *supra* note 9, § 4.1, at 147.

[16] Schoenwald, *supra* note 13, at 411–12.

[17] John Haring & Evan Kwerel, *Competition Policy in the Post-Equal Access Market* 10 (FCC Office of Plans & Pol'y, Working Paper, 1987), *available at* http://www.fcc.gov/Bureaus/OPP/working_papers/oppwp22.pdf.

[18] Policy and Rules Concerning Rates for Dominant Carriers, Second Report and Order, 5 FCC Rcd. 6786, 6789 ¶ 22 (1990), *petition for review dismissed sub nom.* Nat'l Rural Telecom Ass'n v. FCC, 988 F.2d 174, 177 (D.C. Cir. 1993); Policy and Rules Concerning Rates for Dominant Carriers, Report and Order and Second Further Notice of Proposed Rulemaking, 4 FCC Rcd. 2873, 2889–90 ¶¶ 29–30; JEFFREY CHURCH & ROGER WARE, INDUSTRIAL ORGANIZATION: A STRATEGIC APPROACH § 26.2.2, at 847, § 26.2.3, at 852 (2000); ROBERT W. CRANDALL & LEONARD WAVERMAN, TALK IS CHEAP: THE PROMISE OF REGULATORY REFORM IN NORTH AMERICAN TELECOMMUNICATIONS 100 (1995); NAT'L TELECOMMS. & INFO. ADMIN., U.S. DEP'T OF COMMERCE, NTIA REGULATORY ALTERNATIVES REPORT 27–29 (1987), *available at* http://www.its.bldrdoc.gov/publications/87-222.aspx; 2 ALFRED E. KAHN, THE ECONOMICS OF REGULATION: PRINCIPLES AND INSTITUTIONS 48 (1971); DANIEL F. SPULBER & CHRISTOPHER S. YOO, NETWORKS IN TELECOMMUNICATIONS: ECONOMICS AND LAW 129 (2009); Haring & Kwerel, *supra* note 17, at 1489.

that would render its investments in its rate base obsolete before they have the chance to recover those costs.[19]

Conversely, regulated firms may overspend on quality to avoid interruptions that would weaken political support or undertake costs that would make management processes and labor relations easier.[20] Regulators attempt to curb inappropriate expenditures by only allowing carriers to recover investments that were "prudent," usually determined by whether the asset for which recovery is sought is "used and useful."[21] Realistically, this authority enables regulators to catch only the most egregious of excesses.[22] And in any event, it can never evaluate investments that were never made but should have been.

Moreover, ex post evaluation always runs the risk of hindsight bias, denying recovery of investments and expenditures that were prudent at the time they were undertaken but ended up not panning out.[23] The problem is that once investments are sunk, regulated firms are vulnerable to regulatory opportunism should regulators arbitrarily strand costs by finding them to be imprudent.[24] The risk of such expropriation can cause firms to underinvest systematically in their networks.[25]

A closer review of the literature reveals a number of subtleties. Consider the role of regulatory lag. The natural instinct is to regard it as a shortcoming because delays in updating rates can cause them to deviate from reasonable cost. During the period between rate hearings, however, prices no longer depend on costs.[26] As a result, the regulated firm can keep any cost savings it is able to achieve, providing some limited incentive to economize.[27] Of course, this incentive varies with the length of time remaining until the next rate hearing.[28] As the rate hearing approaches, the incentive to keep costs down weakens.[29]

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[19] NAT'L TELECOMMS. & INFO. ADMIN., *supra* note 18, at 19–20, 27, 29; CHURCH & WARE, *supra* note 18, § 26.2.3, at 848–49.

[20] CHURCH & WARE, *supra* note 18, § 26.2.3, at 848–49, 852, 2 KAHN, *supra* note 18, at 50, 53; NAT'L TELECOMMS. & INFO. ADMIN., *supra* note 18, at 27. For a review of the empirical literature, see Paul L. Joskow & Nancy L. Rose, *The Effects of Economic Regulation*, *in* 2 HANDBOOK OF INDUSTRIAL ORGANIZATION 1450, 1484–86 (Richard Schmalensee & Robert D. Willig eds., 1989).

[21] *See, e.g.*, JAMES C. BONBRIGHT, ALBERT L. DANIELSEN & DAVID R. KAMERSCHEN, PRINCIPLES OF PUBLIC UTILITY RATES 257–58 (2d ed. 1988); SPULBER & YOO, *supra* note 18, at 129.

[22]. CHURCH & WARE, *supra* note 18, § 26.2.2, at 851–52; 2 KAHN, *supra* note 18, at 47; NAT'L TELECOMMS. & INFO. ADMIN., *supra* note 18, at 27–28.

[23] Daniel F. Spulber & Christopher S. Yoo, *Toward a Unified Theory of Access to Local Telephone Networks*, 61 FED. COMM. L.J. 43, 84 (2008).

[24] Christopher S. Yoo, *Vertical Integration and Media Regulation in the New Economy*, 19 YALE J. ON REG. 171, 294–95 (2002).

[25] Thomas P. Lyon, *Regulation with 20-20 Hindsight: "Heads I Win, Tails You Lose"?*, 22 RAND J. ECON. 581, 581–82 (1991) (citing John Panzar).

[26] 2 KAHN, *supra* note 18, at 48 (discussing regulatory lag).

[27] CARLTON & PERLOFF, *supra* note 7, at 669; 2 KAHN, *supra* note 18, at 48; VISCUSI, HARRINGTON & VERNON, *supra* note 9, at 432–33; *see* Paul L. Joskow, *Inflation and Environmental Concern: Structural Change in the Process of Public Utility Price Regulation*, 17 J.L. & ECON. 291, 294 (1974).

[28] STEPHEN G. BREYER, REGULATION AND ITS REFORM 48 (1982).

[29] *Id.*

In addition, the guarantee of a rate of return may create a moral-hazard problem that gives regulated firms excess incentives to undertake risky projects.[30] If so, reviewing expenditures for prudence may actually bring investment closer to optimal levels.[31] Indeed, pre-committing a "used and useful" regime may benefit regulated entities by preventing regulatory authorities from increasing the costs they declare to be imprudent.[32]

In addition, debates over price regulation have been dominated by concerns that the ratemaking formula may be creating systematic biases in firm behavior.[33] The most famous such bias is the Averch-Johnson effect, which suggests that firms will favor capital-intensive solutions over solutions that emphasize operating costs, such as labor.[34] This is because the ratemaking formula allows regulated firms to earn a rate of return on its capital expenses, whereas operating expenses are reimbursed dollar-for-dollar without any additional markup.[35] So long as the regulated rate of return exceeds the firm's actual cost of capital, it should find it profitable to do so.[36]

Stated slightly more formally, an unregulated firm would increase its use of both labor and capital until the marginal cost of each factor equals the marginal value that it generates.[37] The constraint mentioned above that the regulated rate of return exceeds the actual cost of capital exaggerates the profit signal for capital, which means that the firm will increase its use of capital beyond the socially optimal point, at which point production no longer employs the socially optimal mix.[38]

While conceptually appealing, the Averch-Johnson effect is subject to a number of caveats.[39] As an initial matter, the effect may compensate for the fact that uncertainty dictates that some capital investments may not pan out.[40] In addition, the effect does not occur if management seeks to maximize revenue instead of profits.[41]

Moreover, a necessary condition for the effect to occur is that the regulated rate of return exceeds the firm's cost of capital, otherwise all capital investments will be unprofitable, and the firm will exit the market.[42] Consequently, the effect will not occur if inflation temporarily causes the

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30 H. Stuart Burness, W. David Montgomery & James P. Quirk, *Capital Contracting and the Regulated Firm*, 70 AM. ECON. REV. 342, 349–50 (1980).
31 Lyon, *supra* note 25, at 582, 584, 586–88, 591.
32 Richard J. Gilbert & David M. Newbery, *The Dynamic Efficiency of Regulatory Constitutions*, 25 RAND J. ECON. 538, 538–39, 547–48, 551 (1994) (internal quotation marks omitted).
33 SPULBER & YOO, *supra* note 18, at 129.
34 Harvey Averch & Leland L. Johnson, *Behavior of the Firm Under Regulatory Constraint*, 52 AM. ECON. REV. 1052, 1068 (1962).
35 *Id*. at 1053–54.
36 *Id.*
37 *Id.* at 1055–56.
38 *Id.* at 1053, 1057.
39 NAT'L TELECOMMS. & INFO. ADMIN., *supra* note 18, at 5–26.
40 2 KAHN, *supra* note 18, at 56–57.
41 Elizabeth E. Bailey & John C. Malone, *Resource Allocation and the Regulated Firm*, 1 BELL J. ECON. & MGMT. SCI. 129, 137–38 (1970).
42 Averch & Johnson, *supra* note 34, at 1054–55.

firm's cost of capital to rise above the regulated rate of return after the rate is set.[43] In addition, any tendency toward overcapitalization may be offset if raising larger amounts of capital causes capital costs to rise.[44]

Other factors may create downward pressure on capital costs. The extent to which regulators provide higher rates of return when rates are stable or declining may give firms the incentive to reduce costs.[45] Moreover, during the lag when prices are fixed, firms can increase profits by cutting costs.[46] In addition, regulatory authorities may disallow certain capital expenditures as imprudent.[47]

Another exception follows from Averch and Johnson's second finding, which is typically overlooked in the literature. If the firm can use the same inputs to make a second product, it can also earn a rate of return that exceeds its cost of capital by entering that market as well.[48] Indeed, it has the incentive to do so even if it runs a loss, so long as the difference between the regulated rate of return and the actual cost of capital exceeds the margin of the loss.[49] To the extent that regulation is imperfect and regulated firms are still able to exercise monopoly power, the tendency to expand output and price below marginal cost may actually be beneficial.[50]

Given this multitude of considerations, it comes as no surprise that empirical tests of the Averch-Johnson effect are all over the map.[51] Some studies confirm a tendency toward overcapitalization.[52] Others find undercapitalization[53] or are inconclusive.[54]

Despite these caveats, the general consensus is that the Averch-Johnson effect does affect firm behavior, even if disagreement still exists as to its direction and magnitude.[55] Whatever the

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43 Leland L. Johnson, *Behavior of the Firm Under Regulatory Constraint: A Reassessment*, 63 AM. ECON. REV. 90, 90, 95 (1973); *see also* Paul L. Joskow & Richard Schmalensee, *Incentive Regulation for Electric Utilities*, 4 YALE J. ON REG. 1, 7 & n.29 (1986) ("Due to regulatory lag, the actual rates of return . . . may be above or below the commission-determined fair rate of return at any instant.").

44 2 KAHN, *supra* note 18, at 57–58.

45 *Id.* at 57.

46 Joskow & Schmalensee, *supra* note 43, at 7–8.

47 VISCUSI, HARRINGTON & VERNON, *supra* note 9, at 462; Joskow & Schmalensee, *supra* note 43, at 8.

48 Averch & Johnson, *supra* note 34, at 1058–59.

49 *Id.* at 1059.

50 2 KAHN, *supra* note 18, at 106–07.

51 CARLTON & PERLOFF, *supra* note 7, at 676; NAT'L TELECOMMS. & INFO. ADMIN., *supra* note 18, at 26; Joskow & Rose, *supra* note 20, at 1477–79.

52 CARLTON & PERLOFF, *supra* note 7, at 676; Leon Courville, *Regulation and Efficiency in the Electric Utility Industry*, 5 BELL J. ECON. & MGMT. SCI. 53, 72 (1974); Jean Mirucki, *A Study of the Averch-Johnson Hypothesis in the Telecommunications Industry*, 12 ATLANTIC ECON. J. 121, 121 (1984); H.C. Petersen, *An Empirical Test of Regulatory Effects*, 6 BELL J. ECON. 111, 124 (1975); Robert M. Spann, *Rate of Return Regulation and Efficiency in Production: An Empirical Test of the Averch-Johnson Thesis*, 5 BELL J. ECON. & MGMT. SCI. 38, 50 (1974).

53 David P. Baron & Robert A. Taggart, Jr., *A Model of Regulation Under Uncertainty and a Test of Regulatory Bias*, 8 BELL J. ECON. 151, 164–65 (1977).

54 CARLTON & PERLOFF, *supra* note 7, at 676; Randy A. Nelson & Mark E. Wohar, *Regulation, Scale Economies, and Productivity in Steam-Electric Generation*, 24 INT'L ECON. REV. 57, 74–75 (1983); Charles W. Smithson, *The Degree of Regulation and the Monopoly Firm: Further Empirical Evidence*, 44 S. ECON. J. 568, 579 (1978).

precise impact of the effect, it does underscore that introducing regulation would distort decisions away from those that marketplace participants would make in the absence of regulation.

Firms subject to price regulation have also been criticized for their failure to innovate.[56] As an initial matter, regulated firms may be reluctant to deploy innovations when doing so would obsolete existing equipment that has not been fully amortized. Moreover, the fact that its return is capped means that it benefits little from innovations that improve profitability.[57]

Moreover, innovative activity typically carries greater risks than the firm's existing lines of business, with the risk levels also varying from innovation to innovation. If the rate-of-return formula applies a single, uniform rate of return, the regulated entity has little incentive to pursue ventures in which the risk exceeds the rate-of-return benchmark imposed by the authorities. Conversely, the possibility that an investment may be declared imprudent may deter regulated firms from pursuing innovations with higher risk.[58]

Other commentators find some incentive to innovate in some areas.[59] Some argue that price regulation induces firms to pursue innovations that increase the productivity of labor over capital.[60] Others find the theory to be ambiguous.[61] The empirical evidence is probably best characterized as thin and inconclusive.[62]

IV. The Potential for Partial Deregulation to Immunize Conduct from Antitrust Scrutiny

Regulation can also immunize conduct from antitrust scrutiny. State regulation can displace antirust liability,[63] subject to the requirement that the state regulator be actively supervising the immunized conduct.[64] Federal regulation can displace the antitrust laws well.[65] Unlike under state regulation, the federal regulator need not be actively supervising the conduct or subjecting it to meaningful review in order to justify immunizing the conduct, effectively leaving the conduct without either antitrust or regulatory oversight.[66]

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55 2 KAHN, *supra* note 18, at 50, 59; NAT'L TELECOMMS. & INFO. ADMIN., *supra* note 18, at 26.

56 Haring & Kwerel, *supra* note 17, at 9.

57 NAT'L TELECOMMS. & INFO. ADMIN., *supra* note 18, at 19.

58 Thomas P. Lyon, *Regulatory Hindsight Review and Innovation by Electric Utilities*, 7 J. REG. ECON. 233, 233–37 (1995).

59 NAT'L TELECOMMS. & INFO. ADMIN., *supra* note 18, at 18–19; V. Kerry Smith, *The Implications of Regulation for Induced Technical Change*, 5 BELL J. ECON. & MGMT. SCI. 623, 628 (1974).

60 Smith, *supra* note 59, at 628.

61 Wesley A. Magat, *Regulation and the Rate and Direction of Induced Technical Change*, 7 BELL J. ECON. 478, 478–79, 490 (1976); Koji Okuguchi, *The Implications of Regulation for Induced Technical Change: Comment*, 6 BELL J. ECON. 703, 703–05 (1975).

62 Joskow & Rose, *supra* note 20, at 1482–84.

63 Parker v. Brown, 317 U.S. 341 (1943).

64 FTC v. Ticor Title Ins. Co., 504 U.S. 621 (1992).

65 Credit Suisse v. Billing, 551 U.S. 264 (2007).

66 Herbert Hovenkamp, *Antitrust and the "Filed Rate" Doctrine: Deregulation and State Action* (2012), https://scholarship.law.upenn.edu/faculty_scholarship/1851/.

These problems are exacerbated when the regulated price is embodied in a filed rate. As an initial matter, agencies have ceased conducting ex ante review of tariffs and instead simply conduct ex post review in response to complaints. This review is typically not very searching. Under the filed rate doctrine, the tariff represents the entirety of the agreement, and providers are not allowed to vary from the price in either direction. Thus, a provider subject to price regulation that offers a discount to a customer can later hide behind the filed rate doctrine and refused to honor it notwithstanding its promise to do so.[67] Most importantly for the purposes of this workshop, all of this conduct is immunized from antitrust scrutiny.

V. The Shadow of Regulation

Lastly, regulation can affect the application of the antitrust laws, often in ways that exceed the proper legal authority of the federal government. For example, when Bell Atlantic and NYNEX merged in 1997 to form Verizon, approval of the merger was conditioned on the merged company's willingness to make all of its rates for interconnection, transport, termination, and access to unbundled network elements based on the forward-looking, economic cost to provide those items. Effectively, this required the merged company to forego participating in many aspects of the ongoing legal challenge to that rate methodology that would continue through the courts for the next decade.[68]

In addition, the merger conditions that Comcast accepted to obtain approval of its acquisition of NBC Universal continues to bind it to the terms of the FCC's 2010 Open Internet Order[69] even though the courts declared that most of the Order fell outside the agency's regulatory authority.[70]

Most interestingly, regulations can force conditions and deal changes to obtain merger approval even when they have been declared invalid. For example, the courts twice invalidated the Federal Communications Commission's (FCC's) attempt to limit the geographic area that any cable operator can serve to no more than 30% of the country an improper exercise of the agency's statutory authority.[71] Yet when Comcast proposed to acquire some of the assets of Time Warner Cable, it felt compelled to give assurances that it would divest assets so that it complied with this requirement even though the agency's prior attempts to impose that requirement had failed judicial review.[72]

Finally, the fact that conduct arises in a sphere often subject to regulation can create skewed perceptions of antitrust risk. Consider the case of the dueling offers by Disney and Comcast to

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[67] Jim Rossi, *Lowering the Filed Tariff Shield: Judicial Enforcement for a Deregulatory Era*, 56 VAND. L. REV. 1591 (2003).

[68] Applications of NYNEX Corp., Transferor, and Bell Atlantic Corp., Transferee, Memorandum Opinion and Order, 12 FCC Rcd. 19985 ¶ 185 (1997).

[69] Applications of Comcast Corp., General Electric Co. & NBC Universal, Inc., Memorandum Opinion and Order, 26 FCC Rcd. 4238, 4275 ¶ 94 (2011).

[70] Verizon v. FCC, 740 F.3d 623 (D.C. Cir. 2014).

[71] Time Warner Entm't Co. v. FCC, 240 F.3d 1126, 1133-36 (D.C. Cir. 2001); Comcast Corp. v. FCC, 579 F.3d 1, 10 (D.C. Cir. 2009).

[72] Commission Seeks Comment on Applications of Comcast Corporation, Time Warner Cable Inc., Charter Communications, Inc., and Spinco to Assign and Transfer Control of FCC Licenses and Other Authorizations, 29 FCC Rcd. 8272, 8273 n.6, 8274 n.12, 8278 & n.46 (2014).

acquire certain assets that 21st Century Fox plans to divest. Both proposed transactions seem likely to pass scrutiny by the antitrust regulators. That said, 21st Century Fox's proxy statement expresses the concern that the proposed acquisition by Comcast would present more significant antitrust risks than the proposed acquisition by Disney, pointing to past proposed transactions by Comcast and to the ongoing challenge to the proposed merger between AT&T and Time Warner. Interestingly, the proxy statement does not explore the possibility of antitrust risks associated with the proposed acquisition by Disney, notwithstanding the belief by many informed observers that combining Fox's assets with Disney's larger movie studio, more extensive cable programming assets, and more valuable and sports assets arguably raises more serious antitrust concerns than the proposed acquisition by Comcast.[73] The asymmetry in attention is probably best explained by the history of regulation. In recent years, movie studios have been subject to less extensive oversight than cable programmers and operators. The fact that the proxy statement notes that Comcast has previously faced regulatory scrutiny in a past transaction (which was horizontal in nature and thus raised very different concerns) reflects the perception that past regulation makes more intensive regulatory scrutiny more likely in the future.

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Thank you again for giving me the opportunity to share my views on anticompetitive regulation. I look forward to the discussion at the May 31 workshop.

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[73] New Street Research, Does Fox Business Report Suggest the Message to Comcast Fox Bid is Drop Dead!? (May 10, 2018).

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The U.S. Chamber of Commerce (the Chamber) welcomes the opportunity to provide comments to the Department of Justice (DOJ) on the anticompetitive effects of regulation as part of a roundtable series examining competition and deregulation. The Chamber believes it is important that competitive effects of regulation be considered and examined both on an ex-ante and ex-post basis. We offer these comments in support of that perspective.

1. The Role of Regulation

The Chamber is a strong believer in the power of the market to self-regulate for the benefit of consumers. For this reason, we prefer antitrust enforcement to regulation. Antitrust enforcement, rather than regulation, is the proper remedy for market failures. Antitrust intervention can and should be precise in addressing anti-competitive conduct in a manner that restores self-regulating market forces, avoiding the sweeping impact regulation has across all market participants and consumers.

While regulation is often needed to advance societal economic and non-economic goals, those goals are set by elected officials, not antitrust enforcers. Regulators are empowered by statute to regulate only in accordance with the legal frameworks designed to govern them. Regulation must be narrowly tailored to meet stated statutory objectives.

2. Good Regulatory Design

Much work has been done to develop good regulatory practices and embed those understandings into a well-developed body of U.S. administrative law. There are

established practices to ensure transparency, allow for stakeholder input, require reliance on quality data, incorporate a standard methodology for calculating and weighing costs and benefits, and guarantee consideration for distributive effects and compliance considerations, as well as many other forms of guidance addressing various aspects of rulemaking, all with the aim of creating a quality regulatory process that leads to high quality regulatory outcomes.

However, arguably less has been done to flesh out a competitive-effects framework for analysing either ex-ante or ex-post regulation. A heightened justification should be required for regulation that restrains competition. Free competition is so central to the nation's economy that restraints must be compellingly justified and no broader than necessary to serve the justification. For these reasons, it is important for rule makers to consider competitive impacts as part of the rulemaking process.

3. Adverse Effects of Anti-competitive Regulation

Anti-competitive regulation can tilt the competitive playing field in the direction of certain economic actors at the expense of others. It can ward off new market entrants or it can outright foreclose innovation and new market opportunities from emerging. In other instances, anti-competitive regulation can create perverse market incentives that have a chilling effect on pro-competitive conduct. All of these anti-competitive regulatory instances result in a loss to consumer welfare.

One important consideration in regulatory analysis is the impact the regulation has on large versus small businesses. Large businesses are better positioned to take on regulatory burdens and more easily can comply with a complex regulatory environment, whereas small businesses can ill-afford the compliance costs. Indeed, regulatory complexity can easily prevent new competitors from entering the market. By overly burdening small businesses and preventing new entrants, cumulative regulatory burdens can result in protection for incumbent market actors.

The goals and methods of economic regulation often are antithetical to antitrust. Instead of promoting free markets, regulation can inhibit competition. It may restrict entry, control price, skew investment (causing too much or too little), or limit innovation (delaying innovations by subjecting them to regulatory approval, barring marketing of innovations, or forcing innovations to be shared with rivals on regulated terms).

Even when regulation and antitrust have the same goals, regulation works by methods that are substantively contrary to antitrust—indeed, regulatory methods may tend to preserve monopolies. For example, the swiftest and surest way to end a monopoly is to let it charge a market price; high prices attract entry. Conversely, regulation that seeks to impose a "competitive" result (for example, restricting price to some measure of costs) may deter competitive entry. Similarly, forcing a dominant firm to share its productive facilities with rivals results in shared dominance while deterring the rivals' independent investments in competing facilities. Treating the symptoms of monopoly may keep it intact longer.

Even more concerning is when regulation inhibits firms from engaging in pro-competitive conduct, such as cutting prices, innovating, and investing. There is a popular view that allowing dominant firms to cut prices will harm competition by injuring rivals. That view is wrong. Dominant firms, most of all, should be encouraged to lower prices, invest, and innovate because by definition full market pressure to do so is missing, and the dominant firm has more customers who stand to benefit.

4. Importance of Competition Advocacy

Some of the largest public policy debates in recent American history have centred around questions of market competition. This was true of the debate around capital market regulation following the Great Recession as well as the debate over healthcare. In each, societal objectives and expectations where debated against the backdrop of economic considerations, the need to promote competition, and consumer choice and protection.

While debates such as these are largely unguided by antitrust enforcers, the regulatory decisions that follow statutory decisions can and should be influenced through competition advocacy at the federal, state, and local level. The Chamber strongly supports the Antitrust Division of the DOJ and the Federal Trade Commission (FTC) acting as an advocate for competition considerations in public policy debates. Lending the expertise of antitrust enforcers on market structure, barriers to entry, and consumer welfare to rulemaking by other executive departments and agencies may provide invaluable counsel. That counsel has been called upon at the federal and state level, but should be sought by regulators more frequently.

One potential recommendation would be to place on a permanent basis a rotation of DOJ and FTC economists at the Office of Information and Regulatory Affairs

(OIRA). These economists could lend their antitrust expertise to the regulatory review process to help OIRA better align rulemaking with pro-competitive outcomes and steer clear of anti-competitive impacts. This would also be important as OIRA continues to improve its capacity and capabilities to conduct retrospective review of regulation with various regulatory agencies. Similar arrangements could also be made with regulatory agencies that are independent of OIRA review authority.

Finally, competition advocacy should be backed up by enforcement when regulators seek to impose anticompetitive restraints that are not properly authorized by federal or state law.

5. Examples

The Chamber offers the following specific examples of situations where the views of DOJ could help shape regulation to have pro-competitive effects.

a. Seattle Independent Contractor Ordinance

A good recent example of domestic advocacy against anticompetitive regulatory activity is the amicus brief filed jointly by DOJ and the FTC against the City of Seattle's ordinance to permit independent contractors to collude over prices and output. The Chamber brought suit against the City, claiming that its ordinance was pre-empted by federal antitrust and labor law. The federal district court in Seattle initially granted a stay of the ordinance on antitrust grounds, but then reversed course and concluded that Seattle's ordinance was immune from federal antitrust law under the state action immunity doctrine.

On appeal to the Ninth Circuit, the DOJ and the FTC filed a powerful amicus brief in opposition to Seattle's ordinance, arguing that the district court misapplied settled principles of state action immunity. The Ninth Circuit recently issued a unanimous panel opinion agreeing with the DOJ and the FTC, and reversing the district court's judgment and remanding for further proceedings.

There are more than 43,000 municipalities in the United States, and in many there may be powerful political incentives for those jurisdictions to regulate in anti-competitive ways that are contrary to the federal antitrust laws. The antitrust enforcement agencies have historically guarded against anti-competitive conduct by municipalities masquerading as permissible state regulation. Amicus briefs, such as

the one filed in the Ninth Circuit, and other litigation efforts are appropriate tools to fulfil that historic mission.

b. Universal Postal Union Terminal Dues

The United States is a member of the Universal Postal Union (UPU), which facilitates international mail between government post offices around the world. The organization sets "terminal dues" that bind the price charged between postal systems to send mail and packages. Instead of the price being reflective of the cost to deliver mail and packages, prices are based on a scale correlated with the level of development a country is assigned. Therefore, packages shipped from "lesser" developed countries to "more" developed countries pay far less than mail headed in the other direction.

As a result, a huge volume of mail, much of which is e-commerce from China, enters the U.S. postal system at rates that vastly distort competition. Often, it costs U.S. e-commerce merchants more to ship an item within the United States than it does to ship that same item from China. Further, while the arrangement is arguably a violation of U.S. postal laws, the United States is not forced to accept these rates, but it chooses to do so.

The U.S. State Department represents the United States at the UPU, and every four years the pricing arrangement is negotiated. When this occurs the State Department looks to the U.S. Postal Regulatory Commission for guidance on the proposed UPU rates and the impact on competition in the market. While the Postal Regulatory Commission is increasingly sympathetic to the distortion, there should be a more robust inter-agency process that involves the competition authorities regarding terminal dues levels.

c. State Occupational Licensing

At the state level, there has been much discussion about the anti-competitive impact of occupational licensing. In July of 2015, the Council of Economic Advisors to President Obama found that such practices cost millions of jobs and more than one hundred billion dollars. These requirements often on the surface may seem well intended, as they attempt to serve as a regulatory check over whether an individual is qualified to perform a service. However, in some cases the licensing requirements are questionably extensive or unnecessary. In these instances, the intention to better inform or protect the consumer is outweighed by the harm to consumers that is a

result of a lack of competition. The Chamber applauds the recent work of the FTC to expose these types of anti-competitive regulations that stifle job creation and economic opportunity for individuals.

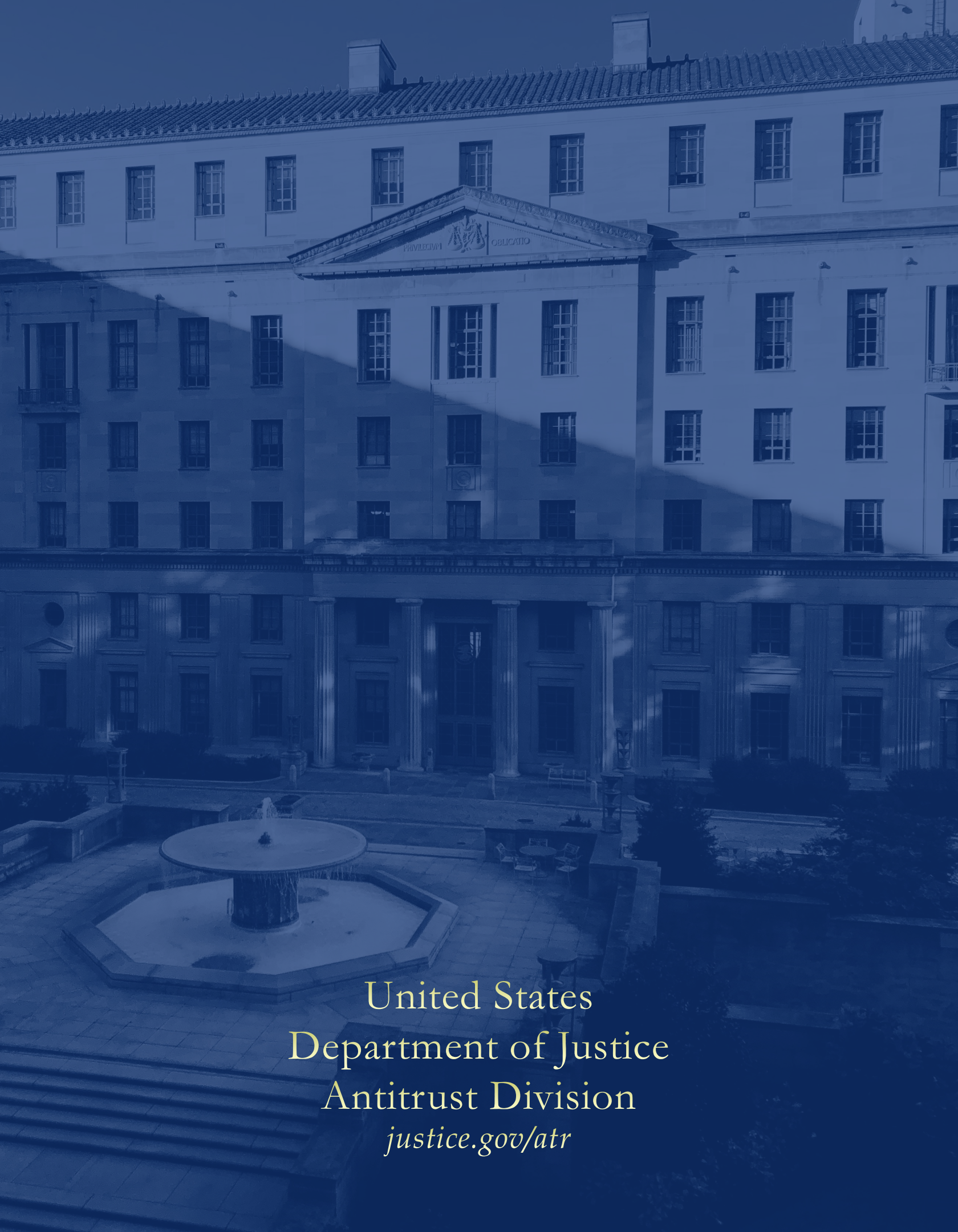
6. Conclusion

The Chamber thanks you for the opportunity to share our member's views on anti-competitive effects that can occur with regulation.

Sincerely,



Sean Heather
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U.S. Chamber of Commerce



United States
Department of Justice
Antitrust Division
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