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### Innovation Advantage

#### Disparagement dooms biosimilar innovation---antitrust is key.

Carrier 2020, Michael A. Carrier Rutgers Law School Distinguished Professor (Northwestern Law Review 2020 “DON’T DIE! HOW BIOSIMILAR DISPARAGEMENT VIOLATES ANTITRUST LAW” https://papers.ssrn.com/sol3/papers.cfm?abstract\_id=3595785)//ellie

In the small-molecule setting, disparagement is not a concern. Brands are not likely to falsely injure near-identical generics, which garner sales not from advertising campaigns but from state laws that allow—and in many cases require—pharmacists to substitute generic versions of brand-name prescriptions.39 In contrast, the education of stakeholders is critical to the marketing of biologics and biosimilars,40 which has tempted biologic firms to engage in disparagement. There are four related categories of statements and omissions that biologic firms have made against biosimilars, none of which is consistent with the statute. The first category is the most dramatic. A January 2019 Washington Post article quotes Philip Schneider, chairman of the Alliance for Safe Biologic Medicines’ international advisory board, as suggesting caution in a move to unbranded biologics “so we don’t end up with another thalidomide [which famously caused birth defects]” or “all the other things that happen when safety isn’t considered.”41 Offering another example in the fearmongering category, the article further quotes a patient advocate affiliated with the group, who stated that a switch from one drug to another “disrupts your continuity of care,” as “[y]ou could end up in an emergency room, or be[] hospitalized, or try[] other, less efficient treatments,” all of which “can exacerbate or flare your disease, bring[ing] it out of remission.”42 The second group of assertions claims that the biosimilar acts differently from the reference product. In an Amgen YouTube video quoted in Pfizer’s citizen petition raising awareness of this issue, the company states that the two products “can behave differently in the body.”43 Amgen also tweeted: “Biologics or biosimilars? It’s not just apples to apples. While #biosimilars may be highly similar to their #biologic reference products, there’s still a chance that patients may react differently.”44 Janssen Biotech provides a similar, albeit more subtle, example. In a patient brochure, the company states that a patient “may be asked to switch to a biosimilar that works in a similar way to REMICADE,” but that “you and your doctor did a lot of fine tuning to get where you are now,” so “if your REMICADE® treatment is still working for you, talk to your doctor about staying on it.”45 The third category is based on claims that the biosimilar is not identical to the reference product. The Amgen video mentioned above states that “no two biologic medicines are identical.”46 Similarly, Genentech’s website, again as discussed in the Pfizer citizen petition, states that “FDA requires a biosimilar to be highly similar, but not identical” to the reference product.47 The fourth group emphasizes that biosimilars do not satisfy the standard of interchangeability. In the brochure mentioned above, Janssen states that “[e]ven though infliximab biosimilars are very similar to REMICADE®, that doesn’t mean they are interchangeable with REMICADE®.” Janssen also warned (in bolded statements) that “no infliximab biosimilar has been proven to be interchangeable with REMICADE®” and that “[t]he infliximab biosimilars are not approved as interchangeable with REMICADE®.”48 Each of these four categories can constitute disparagement. The first— consisting of threatening comparisons to Thalidomide and warnings of trips to the emergency room—needs no explanation. But each of the other categories also runs afoul of the statute’s requirements. The second category—that the biosimilar acts differently—fails to mention that the FDA only approves a biosimilar when it is “highly similar” to and has “no clinically meaningful differences” from the biologic product.49 In other words, the biologic and biosimilar products are required to have the same safety and effectiveness profile.50 As the FDA explained in Draft Guidance issued in February 2020, “representations or suggestions that create an impression that a biosimilar is not highly similar to its reference product are likely to be false or misleading.”51 Evidence from Europe, which has witnessed robust biosimilar market entry, has confirmed that more than “700 million patient days of treatment” demonstrated that “clinical outcomes with biosimilars match the outcomes of the reference biologics.”52 This evidence also has revealed that “patient[s] switching from the reference biologic to the biosimilar . . . is not of concern” since more than 14,000 switches resulted in “[n]o change in clinical outcomes.”53 As discussed below,54 disparaging statements, even if not completely false, are, at a minimum, deceptive in conveying the misleading interpretation that biosimilars have “clinically meaningful differences” from their reference biologics.55 The third category—claiming that the biosimilar is not identical— focuses on an issue that is irrelevant; in fact, it is “normal and expected within the manufacturing process” for even batches of biologic products themselves to reveal “[s]light differences.”56 In the Draft Guidance mentioned above, the FDA “remind[ed] firms that a biosimilar product is not required to be identical to the reference product” but that it need only be “highly similar to the reference product notwithstanding minor differences in clinically inactive components and that there are no clinically meaningful differences . . . in terms of safety, purity, and potency.”57 Finally, for the fourth category, a biosimilar’s failure to attain interchangeability does not mean that it is less safe. For starters, this status only makes sense for biosimilars that will be dispensed at the pharmacy counter (where substitution takes place), but each of the 15 biosimilars that has entered the U.S. market is dispensed in a hospital or infusion center.58 More fundamentally, as Pfizer pointed out in its citizen petition, its biosimilar “demonstrated that a single switch does not result in different safety or efficacy.”59 As the statement from the global regulatory authorities explained, “[a] full clinical development program[] is not necessary when extensive laboratory testing has demonstrated that the biosimilar is highly similar to the originator.”60 And as Boehringer Ingelheim explained in supporting Pfizer’s petition, “an FDA interchangeability designation is irrelevant” for “the majority of biologics . . . administered to the patient by the physician who has written the prescription,” with “misinformation . . . generated” to “impl[y] that interchangeable biologics are ‘better biosimilars’ . . . rather than the same biosimilar on which additional data has been generated.”61 II. REGULATORY SETTING How should courts analyze the antitrust effects of biologic firms’ disparagement of biosimilars? This Part sets the stage for the antitrust analysis by discussing the importance of the regulatory regime, showing the regime’s ineffectiveness, and highlighting the significant barriers to entry facing biosimilars. By brief way of background, the antitrust framework that applies to a single firm acting unilaterally is monopolization. This offense requires a showing of monopoly power and exclusionary conduct.62 Monopoly power is “the power to control prices or exclude competition.”63 Biologic firms that disparage biosimilars are likely to satisfy this element because of their ability to charge and sustain supracompetitive prices in a market characterized by significant barriers to entry.64 In contrast to monopoly power, the caselaw on exclusionary conduct is less clear. Courts often distinguish between the “willful acquisition or maintenance of [monopoly] power” and “growth or development as a consequence of a superior product, business acumen, or historic accident.”65 Considering the regulatory regime can shed critical light on the issue of exclusionary conduct. A. Regulatory Regime As the Supreme Court explained in Verizon Communications v. Trinko, the starting point for antitrust analysis is the regulatory regime. The Court stated that antitrust analysis must take “careful account” of “the pervasive federal and state regulation characteristic of the industry” and “recognize and reflect the distinctive economic and legal setting of the regulated industry to which it applies.”66 The Court in Trinko considered not just the existence of a regulatory regime, but also its effectiveness. In Trinko, the regime was working: phone companies providing local service were required to “be on good behavior” and not to discriminate in providing access before entering the long-distance market.67 Firms that did not satisfy these conditions were subject to financial penalties, weekly reporting requirements, or the suspension or revocation of long-distance approval.68 In contrast, regulatory abuse has prevented the biologics regime from operating as intended. The combination of ineffective FDA regulation and high barriers to entry ensures a role for antitrust.69 B. Ineffective Regulation Biosimilar competition in the United States is far from robust. In Europe, 59 biosimilars have received approval.70 In the United States, 27 biosimilars have been approved (with more than half the approvals occurring since July 2018).71 In addition, U.S. biosimilars have offered savings of only 15% to 35% (typically on the lower end), far less than the more significant (often 70%) discounts in Europe.72 The weak U.S. biosimilar market is not the consequence of the FDA’s lack of effort. In its citizen petition, Pfizer pointed to “various initiatives” the agency had undertaken “aimed at encouraging and facilitating the development and approval of biosimilars.”73 Such activities included “the numerous biosimilar-related guidance documents FDA has issued, the Agency’s development and distribution of educational materials . . . , the Agency’s Biosimilar User Fee Act performance goals, and the . . . Biosimilars Action Plan.”74 Despite these efforts, FDA officials have expressed frustration with the lack of biosimilar competition. In 2018, Former Commissioner Scott Gottlieb “worried” that the market for biosimilars “still isn’t established” and that “[t]he ability for these products to penetrate clinical practice, and gain acceptance, is still not firm.”75 In addition, Gottlieb lamented that biosimilar competition is “anemic” and that “the real savings” from biosimilars have been “just a fraction of even the most conservative initial estimates.”76 In fact, the agency found that “if Americans had the opportunity to purchase successfully marketed, FDA-approved biosimilar prescription drugs, they could have saved more than $4.5 billion in 2017.”77 Such savings, however, will not come to fruition if biologic companies “unfairly delay or derail the entry of biosimilar competitors” through conduct (discussed in the next Part) such as patent thickets and anticompetitive contracts.78 Gottlieb expressed further concern “that the biosimilar manufacturers may pull out” if biologics “are able to lock up markets even in cases where there’s a fully interchangeable competitor.”79 Even more on point, Gottlieb “worried” that “there are either deliberate or unintentional efforts by branded companies to create confusion” about biosimilars’ safety and effectiveness.80 These messages “can potentially undermine consumer confidence in biosimilars in ways that are untrue” and “negatively impact a patient’s judgment about an otherwise safe and effective product.”81 The FDA and FTC reiterated these concerns in a joint statement in February 2020 in which they explained that they “support competitive markets for biologics” and “have serious concerns about false or misleading statements and their negative impacts on public health and competition.”82

#### False advertisement wrecks biosimilars---maintaining competition with antitrust is key.

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An example illustrates our framework. The pharmaceutical industry is marked by high barriers to entry. It is expensive to enter the market, and there are significant hurdles such as receiving approval from the FDA. These barriers are even higher in the biologics setting. Compared to the “small molecule” drugs that have made up the pharmaceutical market for the past several decades, biologic products are more complex and less predictable. As a result, unlike the near-identical relationship between brand and generic drugs, the connection between biologics and “follow-on biosimilars” is not as direct.171 The relevant statute, the Biologics Price Competition and Innovation Act (“BPCIA”),172 requires a biosimilar to be “highly similar to” the biologic and have “no clinically meaningful differences” in relation to “safety, purity, and potency.”173 But the uncertainty surrounding the products has resulted in biologic manufacturers stating or implying that biosimilars are unsafe, sometimes by omitting relevant information about their functional equivalence with the reference biologics.174 In a setting in which even the most minute differences between products could be enough to dissuade patients from trying new medications, the assertions at least implied dissimilarities that could have significant safety effects. For example, Genentech noted on its “Examine Biosimilars” website that “FDA requires a biosimilar to be highly similar, but not identical to the [reference product].”175 More explicitly, Amgen tweeted: “Biologics or biosimilars? It’s not just apples to apples. While #biosimilars may be highly similar to their #biologic reference products, there’s still a chance that patients may react differently.”176 Given the context of life-saving medications, it’s easy to imply dire consequences. For example, Amgen created a YouTube video asserting that a switch “carries risks, given that no two biologic medicines are identical,” which suggests that they “can behave differently in the body.”177 Amgen also cautioned that “[s]witching drugs is not a good idea if your medicine is working for you” and that “an inadvertent substitution . . . is not appropriate care.”178 Finally, some biologic manufacturers have warned that patients could face “additional risks” by taking biosimilars or even “could end up in the emergency room.”179 These claims raise several concerns. Most significant, the statements at issue imply that biosimilars create serious risks, failing to disclose that the FDA approves a biosimilar only when “there are no clinically meaningful differences [from] the biologic product.”180 To the contrary, biologic and biosimilar products are required to have the same safety and effectiveness profile.181 Evidence from Europe, which has witnessed robust biosimilar entry, has confirmed that “over 700 million patient days of treatment” demonstrated “that clinical outcomes with biosimilars match the outcomes of the reference biologics.”182 This evidence also has revealed that “patient switching from the reference biologic to the biosimilar . . . is not of concern” since the more than 14,000 switches from biologic to biosimilar resulted in “[n]o change in clinical outcomes.”183 Given significant development costs, regulatory barriers, thickets of dozens of (or even more than 100) patents,184 and exclusive contractual arrangements,185 biologic manufacturers are likely to have monopoly power.186 Taking the absence of clinically meaningful differences in FDAapproved biosimilars as a given, plaintiffs challenging false statements are likely to satisfy our presumption if they can show that, under false advertising law, the statements (or omissions) are false and material, and therefore are likely to deceive consumers and cause harm. False advertising principles establish that biologic manufacturers will not be liable unless their statements are false or mislead substantial numbers of relevant consumers. But, if falsity or misleadingness are established, they are not likely to be able to rebut the presumption of anticompetitive conduct given the significance of health risk claims to consumers. Even for attempted monopolists, as long as a plaintiff establishes falsity or misleadingness, the factors would seem to favor liability. Given the lack of biosimilar entry to date, in many cases biosimilars will be seeking to enter the market. The statements, which focus directly on risk, pose significant barriers to entry, as doctors and consumers are not likely to take a chance on drugs that have even the possibility of safety concerns. It is hard to think of examples that would more concretely affect consumers than warnings that drug products are potentially unsafe. In fact, the FTC recently issued warning letters to a number of plaintiff-side law firms for advertising that linked FDAapproved drugs with serious side effects, potentially frightening patients away from useful medications.187 In addition, a biologic manufacturer’s disparagement of a biosimilar rival may be part of a broader range of anticompetitive conduct. For example, disparagement could entrench barriers to entry that convince insurance companies to favor biologics through potentially anticompetitive exclusive dealing, bundling, and rebates.188 In short, false advertising law provides useful tools for determining if substantial numbers of relevant consumers are being misled to their detriment. And our framework would likely find that a biologic manufacturer’s proven false advertising that raises safety concerns against a biosimilar constitutes monopolization.

#### Antitrust and biosimilar competition is make or break for the future of pharma

Marmaro, 21 – Morgan, Editor-in-Chief, Colum. J.L. & Soc. Probs., 2020-2021. J.D. Candidate 2021, Columbia Law School. Molecule Size Doesn't Matter: The Case for Harmonizing Antitrust Treatment of Pay-for-Delay Agreements, 54 Colum. J.L. & Soc. Probs. 169, Winter, p. Nexis – Iowa

In contrast, the FDA only recently developed the regulations allowing it to determine that a biosimilar is "interchangeable" with a biologic. 30 As of September 2020, the FDA has yet to designate a single biosimilar or biologic drug in the U.S as "interchangeable." 31 Indeed, the FDA has been relatively slow to even approve biologic and biosimilar drugs for sale in the U.S., making biosimilar introduction relatively slow in the U.S compared to Europe. 32 While there are seventy-one biosimilar drugs approved in Europe as of January 2020, only twenty-six biosimilars had been approved in the U.S. 33 But even when the FDA actually approves a biosimilar as an "interchangeable" drug, most states do not have laws that permit or mandate the substitution of the "interchangeable" drug with the biologic. 34 The pharmaceutical industry successfully lobbied for laws requiring naming conventions for biosimilar drugs that make it difficult for pharmacists to identify similar biologic drugs. 35 [\*177] States, for their part, have generally not updated their laws to provide more substitution of biosimilars or those drugs with interchangeability designations. However, with the end of the "golden age" for small-molecule brand drugs in sight and $200 billion in brand sales subject to generic competition by 2025, companies increasingly see biologics and biosimilars as the future of the pharmaceutical market. 36 As explained infra, biologic drugs' large price tag derives, in part, from a lack of meaningful competition in the U.S. and few pricing constraints. 37 Some $67 billion of the biologic market is vulnerable to biosimilar competition as major patents are set to expire in 2020; 38 the use of patents and pay-for-delay agreements by biologics companies remains a potent threat to any real competition. A class action, In re Humira (Adalimumab) Antitrust Litigation, 46alleges that AbbVie's multiple agreements are actually market allocating agreements and settlements qualifying as reverse payments. As of this writing, the In re Humira litigation is undergoing appeal after a district court ruled in favor of AbbVie, noting that while the behaviors seem unsavory, they were legal "exploited [\*179] advantages" derived from the current regulatory system. 47The court went further astray, finding that the agreements were not anticompetitive, and in contradiction with Actavis's rejection of the scope of the patent doctrine, did so by relying upon the alleged strength of AbbVie's Humira patents. 48But neither the parties nor the Court in In re Humira questioned the basic application of Actavis to the agreements in this case. Though the In re Humira district court dismissed the case in favor of defendants, 49this Note argues that the In re Humira district court was correct to engage in an Actavis analysis but did so incorrectly. A constrictive reading of Actavis to not include biologics, despite similar economic incentives to game the system and collusively divide the markets, would undoubtedly result in the proliferation of collusive biologic settlement agreements that will increase the already staggering biologic prices. There is clear congressional intent that supports treating biologic and small molecule collusive agreements under the same standards. 50 Further, using the ongoing In re Humira litigation as a framing device, an opportunity for courts to explicitly determine whether and how to apply the Actavis framework to biologic drug settlements, this Note will demonstrate how the reasoning and analysis of Actavis applies to qualifying settlements in the biologic sphere and is consistent with precedent, congressional intent, and public policy. While differences between biologics and small molecule pharmaceutical production warrant different FDA manufacturing [\*180] procedures, 51recent and ongoing legislative proposals addressing pay-for-delay agreements apply the same legal standards to adjudication of agreements for biologic and small molecule drug manufacturers. 52Some commentators, however, have advocated a narrow interpretation of Actavis to apply only to small molecule drugs 53because the Court only discusses the relevant regulatory framework for small molecule drugs in that case. 54They argue that the Actavis result was founded and based on the language and intent of the Hatch-Waxman Act. 55Just as the courts then spent years litigating whether Actavis only implicated cash-only "payments," 56savvy pharmaceutical attorneys are likely to argue that Actavis should apply only to drugs covered by the Hatch-Waxman Act. Part II will first discuss various forms of antitrust abuses that arise in the pharmaceutical space and are often utilized as part of or together with reverse payment agreements. It goes on to explain the legal and regulatory backgrounds of small and large molecule drugs, focusing on how the biologic regulatory regime differs. Part III then discusses the consequences of lax antitrust scrutiny on pharmaceuticals, and finishes with the allegations, arguments, and findings currently on appeal in In re Humira. Lastly, Part IV proposes a two-fold solution to the problems posed by Actavis's lack of legal clarity. First, there must be regulation or precedent that clearly indicates that for antitrust purposes, biologic settlement agreements should be subject to the same antitrust scrutiny as [\*181] those concerning small molecule drugs. In re Humira provides the perfect opportunity; and as the Part IV analysis will show, applying Actavis to biologics is in the spirit of the law, aligns with public policy, and follows precedent -- despite the In re Humira district court ruling in favor of the defendants. Second, this Note suggests a need for a corresponding legislative solution. This Note's purpose is to demonstrate that the way a drug is manufactured, approved, or allowed to compete does not alter the application of antitrust law seeking to rid the market of collusive agreements between rivals.

#### Pharma innovation solves disease, bioterror, and ABR.

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As key actors in the healthcare innovation landscape, pharmaceutical and life sciences companies have been called on to develop medicines, vaccines and diagnostics for pressing public health challenges. The COVID-19 crisis is one such challenge, but there are many others. For example, MERS, SARS, Ebola, Zika and avian and swine flu are also infectious diseases that represent public health threats. Infectious agents such as anthrax, smallpox and tularemia could present threats in a bioterrorism context. The general threat to public health that is posed by antimicrobial resistance is also well-recognised as an area in need of pharmaceutical innovation. Innovating in response to these challenges does not always align well with pharmaceutical industry commercial models, shareholder expectations and competition within the industry. However, the expertise, networks and infrastructure that industry has within its reach, as well as public expectations and the moral imperative, make pharmaceutical companies and the wider life sciences sector an indispensable partner in the search for solutions that save lives. This perspective argues for the need to establish more sustainable and scalable ways of incentivising pharmaceutical innovation in response to infectious disease threats to public health. It considers both past and current examples of efforts to mobilise pharmaceutical innovation in high commercial risk areas, including in the context of current efforts to respond to the COVID-19 pandemic. In global pandemic crises like COVID-19, the urgency and scale of the crisis – as well as the spotlight placed on pharmaceutical companies – mean that contributing to the search for effective medicines, vaccines or diagnostics is essential for socially responsible companies in the sector. It is therefore unsurprising that we are seeing industry-wide efforts unfold at unprecedented scale and pace. Whereas there is always scope for more activity, industry is currently contributing in a variety of ways. Examples include pharmaceutical companies donating existing compounds to assess their utility in the fight against COVID19; screening existing compound libraries in-house or with partners to see if they can be repurposed; accelerating trials for potentially effective medicine or vaccine candidates; and in some cases rapidly accelerating in-house research and development to discover new treatments or vaccine agents and develop diagnostics tests. Pharmaceutical companies are collaborating with each other in some of these efforts and participating in global R&D partnerships (such as the Innovative Medicines Initiative effort to accelerate the development of potential therapies for COVID-19) and supporting national efforts to expand diagnosis and testing capacity and ensure affordable and ready access to potential solutions. The primary purpose of such innovation is to benefit patients and wider population health. Although there are also reputational benefits from involvement that can be realised across the industry, there are likely to be relatively few companies that are ‘commercial’ winners. Those who might gain substantial revenues will be under pressure not to be seen as profiting from the pandemic. In the United Kingdom for example, GSK has stated that it does not expect to profit from its COVID-19 related activities and that any gains will be invested in supporting research and long-term pandemic preparedness, as well as in developing products that would be affordable in the world’s poorest countries. Similarly, in the United States AbbVie has waived intellectual property rights for an existing combination product that is being tested for therapeutic potential against COVID-19, which would support affordability and allow for a supply of generics. Johnson & Johnson has stated that its potential vaccine – which is expected to begin trials – will be available on a not-for-profit basis during the pandemic. Pharma is mobilising substantial efforts to rise to the COVID-19 challenge at hand. However, we need to consider how pharmaceutical innovation for responding to emerging infectious diseases can best be enabled beyond the current crisis. Many public health threats (including those associated with other infectious diseases, bioterrorism agents and antimicrobial resistance) are urgently in need of pharmaceutical innovation, even if their impacts are not as visible to society as COVID-19 is in the immediate term. The pharmaceutical industry has responded to previous public health emergencies associated with infectious disease in recent times – for example those associated with Ebola and Zika outbreaks. However, it has done so to a lesser scale than for COVID-19 and with contributions from fewer companies. Similarly, levels of activity in response to the threat of antimicrobial resistance are still low. There are important policy questions as to whether – and how – industry could engage with such public health threats to an even greater extent under improved innovation conditions.

#### Disease causes extinction---the risk is categorically underestimated.

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A pandemic (from Greek πᾶν, pan, “all”, and δῆμος demos, “people”) is an epidemic of infectious disease that has spread through human populations across a large region; for instance several continents, or even worldwide. Here only worldwide events are included. A widespread endemic disease that is stable in terms of how many people become sick from it is not a pandemic. 260 84 Global Challenges – Twelve risks that threaten human civilisation – The case for a new category of risks 3.1 Current risks 3.1.4.1 Expected impact disaggregation 3.1.4.2 Probability Influenza subtypes266 Infectious diseases have been one of the greatest causes of mortality in history. Unlike many other global challenges pandemics have happened recently, as we can see where reasonably good data exist. Plotting historic epidemic fatalities on a log scale reveals that these tend to follow a power law with a small exponent: many plagues have been found to follow a power law with exponent 0.26.261 These kinds of power laws are heavy-tailed262 to a significant degree.263 In consequence most of the fatalities are accounted for by the top few events.264 If this law holds for future pandemics as well,265 then the majority of people who will die from epidemics will likely die from the single largest pandemic. Most epidemic fatalities follow a power law, with some extreme events – such as the Black Death and Spanish Flu – being even more deadly.267 There are other grounds for suspecting that such a highimpact epidemic will have a greater probability than usually assumed. All the features of an extremely devastating disease already exist in nature: essentially incurable (Ebola268), nearly always fatal (rabies269), extremely infectious (common cold270), and long incubation periods (HIV271). If a pathogen were to emerge that somehow combined these features (and influenza has demonstrated antigenic shift, the ability to combine features from different viruses272), its death toll would be extreme. Many relevant features of the world have changed considerably, making past comparisons problematic. The modern world has better sanitation and medical research, as well as national and supra-national institutions dedicated to combating diseases. Private insurers are also interested in modelling pandemic risks.273 Set against this is the fact that modern transport and dense human population allow infections to spread much more rapidly274, and there is the potential for urban slums to serve as breeding grounds for disease.275 Unlike events such as nuclear wars, pandemics would not damage the world’s infrastructure, and initial survivors would likely be resistant to the infection. And there would probably be survivors, if only in isolated locations. Hence the risk of a civilisation collapse would come from the ripple effect of the fatalities and the policy responses. These would include political and agricultural disruption as well as economic dislocation and damage to the world’s trade network (including the food trade). Extinction risk is only possible if the aftermath of the epidemic fragments and diminishes human society to the extent that recovery becomes impossible277 before humanity succumbs to other risks (such as climate change or further pandemics). Five important factors in estimating the probabilities and impacts of the challenge: 1. What the true probability distribution for pandemics is, especially at the tail. 2. The capacity of modern international health systems to deal with an extreme pandemic. 3. How fast medical research can proceed in an emergency. 4. How mobility of goods and people, as well as population density, will affect pandemic transmission. 5. Whether humans can develop novel and effective anti-pandemic solutions.

#### Affirmative prohibition is critical to innovation---creates a presumption of antitrust liability.

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One concern courts have raised with making false advertising the basis for an antitrust violation is that much of this behavior does not affect the market as a whole. Courts are right that even if one company engages in this conduct, and even if an individual rival is harmed as a result, that does not mean that competition in the market as a whole is affected. But there is a simple solution to this concern: focus on the defendant’s market power. Of all the actors employing false advertising, monopolists are the most likely to affect the market, with those attempting to monopolize making up the second-most-likely category. Targeting these two categories of actors recognizes that Section 2 of the Sherman Act provides the appropriate—and in fact only—framework for antitrust liability for unilateral conduct such as false advertising. Focusing attention on only monopolists and attempted monopolists dramatically narrows the universe of false advertising/antitrust claims. Such an emphasis also is consistent with the approach taken in the Areeda/Hovenkamp treatise, which recognizes that antitrust may be appropriate when “the practice makes a durable contribution to the defendant’s market power.”131 The treatise crafts a de minimis presumption because of the relative unlikelihood that any given false claim would “lead[] to or perpetuat[e] durable market power.”132 But the treatise also recognizes that “misrepresentations and organized deception by a dominant firm may have Section 2 implications when used against a nascent firm just as it is entering the market.”133 Once we understand that the treatise’s concerns about overapplication of false advertising law are addressed by requiring monopoly (or, as discussed below, attempted monopoly) status, the treatise would lend support to liability when the defendant’s monopoly power makes false advertising especially likely to affect the market as a whole and harm competition. Our focus on monopolists and attempted monopolists also is consistent with antitrust injury doctrine. As the Supreme Court famously explained in Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., plaintiffs must prove “injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants’ acts unlawful.”134 In other words, plaintiffs must challenge a harm that affects the market as a whole. Limiting our scrutiny to monopolists and attempted monopolists helps effectuate Brunswick’s objectives. We suggest a presumption that false advertising by monopolists constitutes monopolization. Crucially, the most fundamental critique against applying antitrust to false advertising—that “false advertising” does not require marketwide effects—are addressed by the defendant’s control over the market. To satisfy the first of the two elements of a monopolization case, a plaintiff must show that the defendant has monopoly power. As discussed above,135 a plaintiff can do so indirectly by showing a market share of at least 75 percent (and more likely 90 percent) along with barriers to entry that could entrench that market position. A plaintiff also can prove market power directly, such as by showing the defendant’s power to impose price increases or output reductions. Second, the plaintiff must show that the defendant engaged in false advertising. As a matter of underlying substantive law, liability for false advertising already requires findings that the defendant’s conduct was literally false or misleading, was material, actually deceived or was likely to deceive consumers, and caused or was likely to cause harm to the plaintiff.136 These elements are logically and practically linked to each other; they constitute the wrong of false advertising, just as an agreement to set prices constitutes the wrong of price fixing. In particular, deception is generally presumed from literal falsity, or is demonstrated by showing misleadingness—if consumers receive a false message from a facially ambiguous or even literally true claim, they have been deceived. Likewise, once both deception and materiality have been shown, courts generally find a likelihood of harm, as consumers have been misled about facts that are likely to affect their decisions. The false advertising foundation provides a unique advantage for antitrust law, one not available in other settings. The reason is simple. False advertising’s underlying requirements focus on the bad conduct, show its relevance, and demonstrate the harm. These elements offer on a silver platter what antitrust needs to prove monopolization. In addition, materially false advertising by a monopolist threatens multiple concerns: It makes it more difficult to compete on the merits, can easily be repurposed to harm any competitor, and is hard to credibly rebut without souring consumers on factual claims more generally. Because of these harms and the satisfaction of false advertising’s elements, a monopolist’s materially false advertising should be presumed to affect the market as a whole. A presumption that a monopolist using false advertising has engaged in illegal monopolization also is appropriate given the near certainty of anticompetitive effects. Unlike other lawbreaking by a monopolist such as tax fraud, false advertising by definition harms at least one competitor, in what is a relatively small field. That is, by definition a monopolist controls most of the market, so there will be fewer competitors to harm. False advertising may even directly harm all the other competitors if the false claim is one of general superiority, or, as in the AT&T example, is directed at keeping existing customers from switching products. And by poisoning the informational environment, false advertising inherently threatens the key mechanism by which rivals can compete: by explaining to consumers what they can offer in a way that might persuade them. False advertising is also a technique that can easily be extended to the next competitor, further justifying a presumption that its use by a monopolist caused harm to competition. Another way to frame the presumption of harm to competition centers on how we know that harm to actual entities has crossed into the legal category of “harm to competition.” When an entity that meets the standards for monopoly power engages in materially false advertising that causes damage, we know that it is a monopolist and that it harmed identified victims (such as consumers or competitors) in a way likely to push the market as a whole toward an untrusting and untrustworthy market for lemons. When a monopolist introduces a valuable innovation to the market, in contrast, that can harm competitors, but it also produces social benefit, meaning that the harm should be tolerated. So too when a monopolist truthfully and nonmisleadingly advertises a superior product. But when the ready-made template of false advertising law makes clear that a monopolist harms consumers’ ability to trust information in the market and causes consumers to pay prices or buy products they otherwise wouldn’t have chosen, at the very least the burden should be on the monopolist to show that it did no structural damage to the market.

#### American innovation solves global threat readiness---extinction from cyber, bio, chemical, and refugee-induced war.

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Indeed, the United States’ leadership in science and technology has been a historical cornerstone of its capacity for “hard power” force application and projection and economic and societal “soft power.” It buttresses the country’s economic might, enables the modern standards of living of our citizenry, and expands our global cultural and normative reach.[ii] Equally so, the power of science and technology has been decisive in the context of national security. As President Truman noted in 1945, while urging Congress to create a Department of National Defense, “no aspect of military preparedness is more important than scientific research.” [iii] Through discoveries, technological innovation, and the capacity to develop ideas into deployable weapons, systems, and concepts, the United States has arrived at its modern-day military advantage and superiority.[iv]

To that end, science and technology may be considered key elements of the United States’ comprehensive national power – fundamentals of the country’s strength vis-à-vis competitors. Yet science and technology alone cannot ensure any country’s continued security, prosperity, or hegemony; far from operating in a vacuum, science and technology are constantly evolving to address changing domestic and international circumstances and threats. To reap advantage from science and technology, especially in their national security application, a country must continually innovate to tackle contemporary developments and anticipate future ones. This poses a considerable challenge, the solution to which extends beyond advanced engineering and research.

To explore these notions, this essay, particularly interested in the application of science and technology toward national security ends, examines the United States’ recent employment of security-related technologies. From this, it explores the attributes of science and technology power and the similarities and differences between science and technology power and other forms of national power such as the economic and diplomatic. Looking at the relative importance of science and technology in the United States today and likely significance in the coming future, it lays out a series of policy recommendations that may guide policymakers as they make decisions that impact the direction of the country’s scientific and technological course.

Employment of – and Challenges Facing – National Security-Related Technology

Recognizing the vital role that technology played in winning World War Two, along with the emerging threat of Soviet technological competitiveness, the United States established in the war’s wake an extensive infrastructure to support national security science and technology efforts. This provided foundation and catalyst for the development of military capabilities and tools needed to meet the challenges of the Cold War and the modern day: the nuclear triad, intelligence-gathering and cyber infrastructure, space-based radar and communications systems, advanced precision-guided munitions, and integrated command and control, along with myriad other assets.[v]

These technologies have seen extensive use in contemporary military conflicts. The wars in the Balkans and the Gulf saw the ever-increasing use of position, navigation, and timing assets such as GPS to provide precise and reliable information to the warfighter and direct precision-guided weaponry.[vi] Targeted airstrikes and weapons such as the long-range cruise missile have allowed for far more rapid, responsive, and accurate strikes than those of the past while substantially reducing collateral damage. Combat drones and unmanned aerial vehicles, innovations emblematic of the “War on Terror,” enable the warfighter to engage adversaries and conduct reconnaissance while safely remaining away from the front lines of the battlefield. Stealth aircraft, using a range of advanced technologies that reduce reflections and emissions, have helped pilots conduct sorties while evading detection.[vii]

Technology abets the United States’ security beyond warfighting. Advanced cyber capabilities – encryption, for example – seek to defend the networks which control the country’s power, transit, and water infrastructure from malicious hacks and crippling denial of service.[viii] Technologies capable of detecting harmful biological and chemical agents guard the country against potentially devastating attack by non-state actors.[ix] Increasingly sophisticated monitoring and surveillance technology enables the government to globally track and work to counter criminal activity, terrorist organizations, and other developments which threaten the country’s safety.[x]

Crucially, though, the United States’ contemporary application of national security systems has also demonstrated the inherent challenges of innovation and the limitations of technology. Despite advanced military hardware, principally designed to fight large-scale conventional wars against Cold War-era foes, the United States military had to “catch up” and react to unconventional tactics, such as roadside bombs and sniper attacks, employed against it in the Iraq and Afghanistan wars. Though decidedly outnumbered and outgunned, enemy combatants effectively countered the United States’ asymmetric technological advantage through guerilla warfare, propaganda, and exploiting collateral damage that advanced weapons systems created – doctrines which the United States’ technology did not anticipate and was unprepared or unsuited to counter.[xi] Likewise, despite the sophistication of the United States’ homeland security technologies, the government has struggled to prevent incidents of domestic terrorism such as mass shootings, often characterized by the use of simple, off-the-shelf equipment.[xii]

Meanwhile, in reaction to the United States’ present-day technological superiority, competitive foreign powers such as Russia and China are heavily investing in hardware and capabilities in the cyber and military realms specifically designed to counter the United States’ technological strengths and exploit its demonstrated vulnerabilities. The technological capabilities underlying the United States’ comparative military advantage are now proliferating to an increasing number of state and non-state actors, including potential adversaries, leveling the military “playing field.”[xiii]

The Attributes of National Security Science and Technology Power

From this, several key attributes and characteristics of science and technology as a form of national power can be identified. Foremost is the capacity for technology and science to be a significant, occasionally decisive, enhancer of a country’s military strength against enemies. Countries which develop innovative military technologies which effectively counter an adversary’s offenses or defensives, or against which an adversary has no means to protect itself, find themselves disproportionately advantaged on the battlefield. Indeed, technologies which upend dominant “status quo” warfighting paradigms – such as, historically, the introduction of the chariot, the tank, or nuclear weapons – are poised to significantly disrupt and reorder the geopolitical and military balance of power.[xiv]

To that end, science and technology power, particularly in the national security sphere, is developed and sustained through the adaption to, and more so through the anticipation of, revolutionary changes in military affairs, doctrine, and hardware. As Lieutenant Colonel Scott Stephenson noted in the influential “The Revolution in Military Affairs,” “those slow to adapt to military revolutions… are likely to suffer painful results. When the pace of change accelerates, the militaries that anticipate and adapt are likely to gain a massive advantage over potential enemies who are less agile.”[xv] That agility is, in large part, borne from innovations in science and the development of new technologies which lead to unanticipated, and therefore difficult to counter, doctrines.

A defining characteristic of science and technology power, then, is the continual quest for states to match, counter, and out-compete the technology of their adversaries. This continuing interplay between technology and national power, characterized by the sustained technological evolution and described often as an “offset,” has been a key focus for national security-related research and development throughout the Cold War and into the present. The United States’ deployment of nuclear weapons, for example, offset the numerical advantage held by the Soviet Union’s land forces in the early Cold War. Soviet parity in nuclear weapons catalyzed the development of guided weapon and integrated command and control as a counter, focusing on accuracy of targeted weapons systems independent of range.[xvi] The United States’ capacity to offset Soviet technology through innovative developments – and the Soviet bankruptcy borne from military expenditure that came as a corollary – was an important factor in maintaining a generally peaceful stable of power along with the country’s ultimate triumph in the Cold War. In the present-day, China and Russia’s focus on countering the systems and technologies which currently provide the United States’ military asymmetry is emblematic of this “offset” approach to science and technology power.

Paradoxically, however, national security-related technology in the present day has become as great an equalizer as it has historically been a separator of actors’ strengths. Technological superiority in the present may provide the United States’ unrivaled military strength, especially against foes (historically, state actors with large conventional forces) for which its national security technologies anticipated countering. Yet as the example of the Iraq and Afghani insurgencies amply demonstrated, technological superiority coupled with innovation focused on addressing hypothetical future battlefields may not be adequate to oppose or defeat all actors or all forms of warfare, regardless of the level of their sophistication.

Indeed, advanced technologies may be entirely vulnerable to actors utilizing doctrines with simple technologies that nonetheless exploit their weaknesses, as was the case with sophisticated – and expensive – American vehicles being destroyed by crude, homemade IEDs. Technology itself also creates weaknesses; the United States’ progressing economic and social reliance upon interconnected networks, for example, makes the country more vulnerable to potentially crippling attack. Despite advanced American cybersecurity technologies and techniques, non-state actors have still proven themselves capable of infiltrating, attacking, and even denying use of American cyber capabilities; considering recent trends, this vulnerable seems likely to continue, if not worsen.[xvii]

It may be that an attribute of science and technology power, borne more from the focus and perceptions of the technologists, theorists, and military leadership that employ it than from science and technology itself, is that it obscures other factors which equally dictate important developments in military, international, and geopolitical affairs. Political upheaval, social change, and economic development can change warfare dramatically, for example – and have nothing to do with “offset” strategies or war-room predictions of possible enemies’ future high-tech military hardware. As a product of the military-industrial complex that emerged in the Cold War United States to sustain continued technological development, Americans tend to be acutely – perhaps overly – sensitive to technological innovation among competitors and potential rivals. Fears during the Cold War and contemporary discussions of the “Third Offset” paint pictures of emerging, potential, and fanciful enemy weapon systems – which military planning and technology development was and is oriented toward countering.[xviii] This fixation on solutions entailing engineering and technological complexity blinds the national security technology apparatus to external trends that could definitively impact the future course of war – such as the collapse of the Soviet Union leaving the United States with a high-tech military and warfighting doctrine unsuited for the military pressures and asymmetric nature of counterinsurgency; the rise of radical terrorism with ideological underpinnings that condone unconventional guerilla tactics such as suicide bombings, which had great effect against high-tech targets; or the continuing crisis where lone-wolf gunmen using off-the-shelf rifles can commit massacres despite the government’s highly complex and pervasive surveillance and monitoring technology.

Similarities and Differences to Other Forms of National Power

With these attributes in mind, a comparison can be drawn between science and technology power and other forms of power which constitute a country’s comprehensive strength, such as the economic and diplomatic. Regarding the economic, science and technology power is similar in that the development of science and technology is driven by the same forces as economic growth. Like new economic products, services, and methods of operation, science and technology power relies upon the ingenuity of human actors predicting and anticipating future trends, possibilities, and human behavior. Innovation, iteration, and competitiveness are fundamental catalysts for the continued evolution and growth of both. The rapid proliferation and subsequent use of innovative technologies across the world quickly equalizes both the national security advantage and the economic advantage they provided their inventor.

Economic power, like national security technology, is a key element of a country’s warfighting capability – industrial might, strength in quality production, and capable infrastructure are crucial facets of a country’s ability to mobilize and project force. A fundamental difference between economic power and science and technology power, however, is competition. While economies naturally compete, there is incentive for states to specialize in the economic product or service most suited for it – their comparative advantage. Competing economies are not actively incentivized to counter the economic specialization of their rivals. With science and technology power for national security use, however, states decidedly hope to actively and explicitly counter the relative advantage of their adversaries.

Like diplomatic power, science and technology has a “soft power” element; other states and their societies may be influenced or compelled to action by the might, prestige, or cultural and technological hegemony of a country in possession of highly advanced and capable technologies.[xix] Diplomatic power occasionally experiences the same issue of science and technology policy in being blinded to unpredicted or external trends in the social, cultural, and economic spheres. The power of diplomacy, for example, did not anticipate and struggled to deal with the cultural, social, and political circumstances that led to a breakdown of order in post-invasion Iraq; just as national security technology was unprepared for the guerilla warfare of the Iraqi insurgency. Diplomatic power and science and technology power differ, though, in the fields of innovation and evolution. Whereas the military regime is constantly evolving and occasionally being upended by revolutions in security technology and associated doctrine, the Westphalian diplomatic order has remained largely similar through centuries – even as it has grown gradually more complex and interconnected. States do not tend seek to outcompete each other in the diplomatic sphere through revolutionary new approaches to diplomacy; negotiations, sanctions, deals, bi- and multilateral agreements, and the like have remained consistent “doctrines” employed by states in their dealings with international friends and foes.

Science and Technology Power’s Present and Future Importance

To return to Vannevar Bush’s assertion over half a century ago, science and technology is crucially important for a states’ economic growth and prosperity, the wellbeing of its citizens, and national security. This remains absolutely the case today. Despite the challenges facing innovation in the face of unanticipated adversaries and the proliferation of advanced, equalizing technologies among adversarial states and non-state actors, science and technology provides the United States’ unrivaled levels of security and military hegemony.

With the appearance of significant global challenges – refugee crises, environmental degradation, the possible emergence of a bi- or multi-polar world characterized by states with rough or equal technological parity, to name a few – the future importance of science and technology power cutting across all aspects of national security will undoubtedly redouble. Science and technology and its application as an element of the United States’ national power will need to be directed to address these challenges. While the exact characteristics that will define domestic and foreign national security technologies of the future – not to mention the economic and social – remain uncertain, the United States cannot afford to permit its current technological advantage to slip. Indeed, as revision states such as China continue to develop their technologies to directly counter the United States’ capabilities, it will likely become an imperative for the country to more actively engage in and support the development of innovative new security technologies and doctrines – lest, as history would suggest, the international order again be upended.

#### Alternative regulations fail and suppress competition.

Carrier and Tushnet 21, Michael A. Carrier Rutgers Law School Distinguished Professor, Rebecca Tushnet Harvard Law School Professor of Law (Iowa Law Review 2021 “An Antitrust Framework for False Advertising” https://papers.ssrn.com/sol3/papers.cfm?abstract\_id=3593914)//ellie

False advertising liability alone cannot address the marketwide harms caused by deceptive behavior. This Section first addresses antitrust’s comparative advantage for marketwide harms. It then offers examples of antitrust properly targeting conduct that violates other, non-antitrust laws, demonstrating that antitrust’s treatment of false advertising is an outlier. It concludes by showing that false advertising’s remedies cannot fully protect competition on their own. 1. Antitrust’s Comparative Advantage An antitrust-based framework for false advertising claims is necessary because of the unique role that the discipline can play. When companies engaging in false advertising have monopoly power, they possess the ability to harm not only an individual competitor but also the market as a whole. The consequences can be significant, especially for nascent competitors not able to enter the market, as the deception of consumers deprives them of the opportunity to obtain lower prices, more options, or enhanced quality. One way to understand the harms of false advertising to the market as a whole is revealed by George Akerlof’s classic explanation of the market for lemons.99 As Akerlof explains, in the absence of some way to guarantee the truth of claims about products, such as a used car’s quality, consumers reasonably respond by discounting all such claims. This distrust means that producers with actually superior products cannot charge the amount consumers would pay if they believed the superiority claim, which pushes superior (but more expensive to produce) products out of the market. If truthful advertisers are not able to guarantee their claims, producers unable to compete on their product characteristics suffer. And consumers are harmed by an unattractive (and perhaps even harmful, in the case of false health or safety claims) mix of products. Meanwhile, many false advertising techniques can be readily repurposed for new uses, meaning that a false advertiser can go from success to success in the absence of false advertising liability.100 Regulation that suppresses false claims—especially where such claims are most likely to have an effect—thus does more than protect individual consumers from fraud. It allows truthful producers to compete on a level playing field. In other words, addressing false advertising protects competition, not just competitors. The Supreme Court relied on Akerlof’s insights when it endorsed the pro-competitive effects of restrictions on false advertising. In California Dental Ass’n v. FTC, the Court addressed a dental association’s attempts to restrict “false or misleading” advertising that imposed significant limits on advertising “low prices” or other general price claims.101 The Court rejected the idea that such limits were inherently anticompetitive. Especially where information is hard to evaluate, even broad restrictions with the aim of preventing false advertising can be procompetitive.102 When false advertising threatens harms to the market as a whole, antitrust liability offers advantages over false advertising law. For starters, antitrust offers a more powerful toolkit deterring this conduct. Although false advertising law allows recovery of damages (albeit not as a penalty) and disgorgement of the profits from false advertising, courts impose high barriers to disgorgement, including requiring a showing of willfulness. In addition, courts have required plaintiffs to show a robust connection to the harm suffered to receive damages or disgorgement of profits. As a result, courts have denied awards in precisely the cases of concern: where there are a small number of potential competitors and where some of the monopolist’s gains from false advertising likely came at the expense of the overall market rather than a single plaintiff, making it difficult to allocate false advertising-based damage awards.103 There are two key ways in which antitrust offers more powerful protection against monopolists’ false advertising than federal false advertising law: remedies and eligible plaintiffs. First, antitrust offers the more powerful remedies of treble damages and automatic (as opposed to the Lanham Act’s exceptional104) attorneys’ fees that promise to provide robust deterrence against companies considering this behavior. Antitrust also offers injunctive relief preventing the continuation of the conduct. While a Lanham Act false advertising injunction generally is limited to the specific false claims that have been proven, an antitrust injunction could more generally target false advertising and marketwide harm to competition.105 Antitrust offers a more expansive territorial jurisdiction.106

### Plan

#### The United States federal government should substantially increase prohibitions on false advertising by applying a presumption that monopolists engaging in false advertising violate antitrust law and are subject to Penalty Offense Authority enforcement by the Federal Trade Commission.

### FTC Advantage

#### **FTC failure to prohibit false advertising is an existential threat to the agency. Asserting market-wide penalty offense authority (POA) restores FTC credibility, boosts deterrence of fraud, and reduces litigation**

Lee, 21 – Bethany, J.D. Candidate, University of Pennsylvania Law School. “Reviving the Power of the FTC,” The Regulatory Review, May 17, <https://www.theregreview.org/2021/03/17/lee-reviving-power-of-ftc/> -- Iowa

The Federal Trade Commission (FTC) may face an existential threat to its ability to hold corporate lawbreakers accountable. A pending U.S. Supreme Court case threatens the FTC’s ability to seek monetary relief from wrongdoers, while mounting public concerns about the adequacy of the FTC’s enforcement have led to a crisis of confidence in the agency.

The solution to this urgent crisis involves restoring a key FTC authority, according to a new paper by FTC Commissioner Rohit Chopra and his attorney advisor Samuel Levine.

After tracing the history of the FTC’s enforcement tools and explaining their current inadequacy, Chopra and Levine argue that reviving the FTC’s Penalty Offense Authority will improve the FTC’s effectiveness and regain public confidence by increasing deterrence and ensuring fairness for honest firms.

Established by the FTC Act, the FTC has a mission to “protect consumers and competition by preventing anticompetitive, deceptive, and unfair business practices.” Chopra and Levine, however, highlight the FTC’s concerning track record in fulfilling this mission.

In the 1980s, the FTC’s leadership viewed markets as self-correcting, and the agency shifted its focus from market-wide abuses to “small-scale criminal fraud.” Seeking to avoid the derisive label of a “national nanny,” the FTC began to disarm the administrative state by halving the agency’s staff, reversing rulemakings, and adopting policies restricting the agency’s own authority.

The FTC’s ideology of the 1980s had lasting consequences, according to Chopra and Levine. In the 1990s, the agency failed to challenge tobacco advertising directed at children. In the 2000s, the FTC took minimal enforcement action to prevent the mortgage meltdown, remaining largely idle as subprime lenders sold loans structured to fail. Congress responded by stripping the FTC of major authorities over the financial sector, such as rulemaking on mortgages and debt collection.

Chopra and Levine argue that the agency’s inaction over several decades has resulted in “massive harm for consumers, small businesses, and the economy.” They call for a shift toward “systematic efforts to combat widespread harms.”

A key step, say Chopra and Levine, involves resurrecting the agency’s Penalty Offense Authority. Codified in Section 5 of the FTC Act, this provision allows the FTC to correct and deter harmful practices.

Currently, the FTC largely relies on Section 13(b) of the FTC Act, which allows the agency to seek preliminary and permanent relief in federal court. But the use of Section 13(b) has been challenged in multiple cases, including in a pending U.S. Supreme Court case challenging the FTC’s authority to seek equitable monetary relief.

Even if courts uphold the use of Section 13(b), argue Chopra and Levine, this enforcement tool remains inadequate in correcting and deterring widespread harms. To seek monetary relief under Section 13(b), the FTC must approximate harms or unjust gains—a potentially difficult and costly calculation. As a result, the FTC often resorts to no-money settlements that do not adequately deter wrongdoing. In addition, corporate wrongdoers tend to be undeterred by equitable relief sought under Section 13(b) since the worst consequence merely involves returning their earnings.

Instead of overreliance on Section 13(b), Chopra and Levine advocate greater use of the Penalty Offense Authority under Section 5 of the FTC Act. Under this authority, the FTC can seek civil penalties if the agency issued a final cease-and-desist order determining that a practice is unfair or deceptive and if a party subsequently engaged in that practice, knowing that the practice was unfair or deceptive.

Chopra and Levine note that the Penalty Offense Authority provides “strong due process protections for defendants.” For example, parties cannot be held liable unless shown to have actual knowledge of the FTC’s determination. Defendants can also challenge the FTC’s prior determination that the conduct was unlawful.

Previously, the FTC deployed its Penalty Offense Authority to target whole industries, in a manner that one FTC commissioner described as “extremely effective and efficient.” Nevertheless, the agency’s use of this tool rapidly declined in the 1980s, and it was used only once in the last decade.

Calling for renewed use of the Penalty Offense Authority, Chopra and Levine outline three key benefits of such a resurrection. First, compared to equitable relief, civil penalties would more effectively punish and deter wrongdoers. Second, the use of the Penalty Offense Authority would reduce litigation risk for the FTC. Current overreliance on Section 13(b) creates uncertainty as court cases challenge the program, and seeking monetary relief under Section 13(b) requires risky and expensive attempts to quantify harm. Finally, the Penalty Offense Authority provides market-wide impact. By providing notice to firms across an industry, the FTC can correct market-wide practices—increasing compliance and reducing the need to bring similar enforcement actions repeatedly.

Chopra and Levine specifically advocate the use of the Penalty Offense Authority in areas where a harmful practice has been condemned by an FTC order but not forbidden by an agency rule. They identify five areas where the FTC could deploy the Penalty Offense Authority based on existing orders: for-profit college fraud, false earnings claims targeted at workers, online disinformation, deceptive data harvesting, and illegal targeted marketing.

Ultimately, Chopra and Levine call on the FTC to shed its “self-inflicted paralysis” by drawing on a broader set of tools to protect the public.

#### The FTC abandoned Section 5 POA in favor of Section 13(b), a landmark shift which drove the FTC to becoming irrelevant. The recent death of 13(b) means the FTC is now at its weakest point, and only a broad resurrection of POA revives it

Chopra and Levine, 21 – Rohit Chopra was a Federal Trade Commissioner and is now head of the Consumer Financial Protection Bureau (CFPB). Samuel A.A. Levine is Acting Director of the Bureau of Consumer Protection. *The Case for Resurrecting the FTC Act’s Penalty Offense Authority*, Social Science Research Network (SSRN), Feb 16 last revised, originally published 11/3/20, [https://papers.ssrn.com/sol3/papers.cfm?abstract\_id=3721256](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3721256&download=yes) – Iowa

Deploying the Penalty Offense Authority should be part of a broader strategy to resurrect the FTC as a vigorous check against corporate malfeasance. This article has detailed how the authority can be used to notice whole industries of unlawful practices, and to seek remedies that not only reverse the effects of wrongdoing but also deter others from crossing the line. We have identified five areas where the Commission has already condemned practices that can be designated as penalty offenses. Going forward, as the Commission condemns new forms of misconduct, we believe it should include in its orders clear findings that can be served on other market participants.

In addition to increasing the agency’s ability to deter and correct wrongdoing, resurrecting the Penalty Offense **A**uthority would mitigate the ongoing gamesmanship around Section 13(b), showing the marketplace that the FTC has more than one trick up its sleeve, regardless of how the Supreme Court rules.

The Commission’s overwhelming reliance on Section 13(b) is of recent vintage. In the 1970s, following widespread dissatisfaction with “scandalously weak” no-money orders,174 Congress armed the Commission with strong tools to meaningfully deter widespread lawbreaking. These tools include rulemaking powers backed by civil penalties, the ability to seek damages under Section 19, and the Penalty Offense Authority described here. However, these powers were largely abandoned after James C. Miller III took over the FTC in 1981, as the Commission shifted its focus to halting scams using Section 13(b).

The takeover and subsequent gutting of the Federal Trade Commission by Chairman Miller is an underappreciated milestone in our nation’s economic history.175 By shifting attention and resources away from scrutinizing emerging business practices that pose harm to households and honest businesses, Miller and his lieutenants architected a new paradigm for corporate oversight. The FTC abandoned its former role and began to duplicate the role of criminal law enforcers who tackle fraud rings, but without the authority to seek any criminal sanctions. The Commission’s new emphasis on shutting down “illegitimate” businesses created the guise of an active agency, when, in reality, it became increasingly irrelevant to commercial regulation across many sectors of the economy.

Since the Miller era, the Commission had essentially ceded its role as the government’s analytical engine of emerging commercial practices. The result has too often been an agency that is disconnected from pressing market problems. In recent decades, the Commission has failed to tackle some of the worst abuses facing consumers, ranging from subprime mortgage lending to predatory for-profit colleges. By 2010, as Congress stripped key authorities from the Commission, industries actively lobbied to remain under FTC jurisdiction, 176 an effort currently being replicated by tech titans in the privacy arena.177 This does not reflect well on the agency’s credibility as a watchdog.

For the architects of this ideological project to weaken the FTC, the current judicial threats to Section 13(b) could prove to be the most striking blow yet. They have long argued that Section 13(b) should be used only in cases involving “true fraudsters,”178 and they have offered a detailed blueprint to those wishing further limit the Commission’s remedial authority.179 Should they succeed, this would represent the culmination of their decades-long project to defang this once-storied agency, conceived of by Louis Brandeis to be a strong check on corporate power.

But if the FTC is rendered toothless, this is by choice. The agency can shed its self-inflicted paralysis by using the dormant powers granted by Congress. Regardless of how the Supreme Court rules, the Commission must close the chapter on its overreliance on Section 13(b), and deploy a broader set of tools to meet its mission. By deploying these tools, the Commission can reemerge as a vigorous watchdog, detecting and deterring systemic harm instead of playing whack-a-mole against small scams. Adopting this approach is essential to regaining the public’s confidence and realizing Brandeis’s vision of an agency that protects the public from abuse and misuse of corporate power.

#### The demise of 13(b) gutted FTC fraud enforcement – Section 19 fails, and Section 5 is the only avenue for fraud crackdowns

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It is hard to imagine a favorable outcome for the FTC after this oral argument. The Court will probably limit 13(b) relief to injunctions, requiring the Commission to resort to cumbersome administrative proceedings to get any monetary relief. That would dramatically undermine the Commission’s work over several decades to build a robust fraud program.40 It would leave Section 5 and 19 as the only avenues for monetary relief under the FTC’s general consumer protection authority. Under Section 5, the Commission may impose monetary civil penalties under some limited circumstances.41 Under Section 19, the Commission may obtain monetary consumer redress or disgorgement but only after obtaining a final cease-and-desist order through administrative litigation and only after demonstrating that “a reasonable man would have known under the circumstances [that the conduct] was dishonest or fraudulent.”42 Moreover, Section 19 includes a statute of limitations whereas Section 13(b) does not.43 Thus, the FTC has strongly favored Section 13(b) actions. At oral argument, the FTC conceded that going directly to court is “more attractive in certain instances” and that the Commission brings “far more [consumer protection] cases” in court than through its own administrative proceedings.

#### The current FTC approach is incoherent – only a presumption against monopolists engaging in false advertising violates antitrust solves

Tushnet and Carrier, 21 – Rebecca Tushnet is a Professor at Harvard Law School and former NDT Finalist. Michael Carrier is a Professor at Rutgers Law School. *An Antitrust Framework for False Advertising*, May, 106 Iowa L. Rev. 1841, p. Nexis – Iowa

Federal law presumes that false advertising harms competition. Federal law also presumes that false advertising is harmless or even helpful to competition. Contradiction is not unknown to the law, of course. This contradiction, though, is acute. For not only are both regimes at issue designed to protect competition, but they are both enforced by the same agency: the Federal Trade Commission, which targets "unfair competition" through antitrust and consumer protection enforcement.

Courts' treatment of false advertising in antitrust cases makes no sense. While courts have reasonably evidenced concern that not all false advertising violates antitrust law, the remedy is not to abandon the false advertising/antitrust interface. Instead, the solution is to focus on the actors most likely to harm the market: monopolists and attempted monopolists.

This Essay proposes an antitrust framework for false advertising claims. It introduces a presumption that monopolists engaging in false advertising violate antitrust law and a rebuttal if the false advertising is ineffective. The framework also applies to attempted monopolization by incorporating factors such as falsity, materiality, and harm inherent in false advertising law, along with competition-centered issues like targeting new market entrants.

Antitrust has dismissed false advertising that entrenches monopoly power for too long. This Essay seeks to resolve the contradiction in the law by showing how false advertising threatens the proper functioning of markets. Such an approach promises benefits for false advertising law, antitrust law, and consumers.

#### Fraud crackdowns stop major terror attacks

Michael Tierney 18, George & Mary Hylton Professor of International Relations; Director Global Research Institute (GRI), “#TerroristFinancing: An Examination of Terrorism Financing via the Internet,” International Journal of Cyber Warfare and Terrorism, vol. 8, no. 1, 01/2018, pp. 1–11

2. TERRORIST FINANCING AND THE INTERNET

As mentioned, terrorists’ use of the internet has become a major concern for security officials across the world in recent years. Like many other users, terrorists have found that the internet is an invaluable tool to share information quickly, in order to disseminate ideas and link up with likeminded individuals (Jacobson, 2010; Okolie-Osemene & Okoh, 2015). In this manner, terrorists use the internet for a variety of purposes, including recruitment, propaganda, and financing. As scholars have also noted, the internet is an attractive option for extremists due to the security and anonymity it provides (Jacobson, 2010). Yet while there have been a growing number of studies completed on the ways in which terrorist organizations use the internet to recruit and indoctrinate others, there has been relatively little focus on the methods by which terrorists finance themselves through online activities. Some researchers have attempted to fill gaps in this area by broadly studying internet aspects of terrorism financing. However, research on this particular aspect of terrorism financing still appears to be lacking, with little focus on new methods of terrorist financing via the internet or a marrying of strategies to combat online financing trends available to practitioners in the field.

For instance, Sean Paul Ashley (2012) assessed the mobile banking phenomenon, which is prevalent in regions such as the Middle East and Africa, and provides extremists with the ability to easily connect to the internet and remit funds around the world. The decentralization of this kind of banking, due to the fact that brick-and-mortar facilities are not needed to conduct transactions, has allowed terrorist financiersto more efficiently move funds while avoiding detection from authorities. Other researchers,such as MichaelJacobson (2010), have studied the waysin which terrorists engage in cyber-crime to raise and move funds. For example, Jacobson (2010) found that online credit card fraud was a fairly major source of terrorist financing. By stealing a victim’s private credit information, terrorists are able to co-opt needed funds and provide support to themselves or their counterparts. Yet as James Okolie-Osemene and Rosemary Ifeanyi Okoh (2015) note, the internet is mostly used to augment and assist activities which occur in the physical world. In this way, it would appear that the internet is far more useful as a means to move funds globally in support of terrorism, rather than simply as a method to raise funds.

#### Nuclear terror causes nuclear war---cash is key

Dr. Peter J. Hayes 18, Executive Director of the Nautilus Institute for Security and Sustainability, Ph.D. in Energy and Resources from the University of California-Berkeley, Professor of International Relations at RMIT University, “Non-State Terrorism and Inadvertent Nuclear War”, NAPSNet Special Reports, 1/18/2018, <https://nautilus.org/napsnet/napsnet-special-reports/non-state-terrorism-and-inadvertent-nuclear-war/>

The critical issue is how a nuclear terrorist attack may “catalyze” inter-state nuclear war, especially the NC3 systems that inform and partly determine how leaders respond to nuclear threat. Current conditions in Northeast Asia suggest that multiple precursory conditions for nuclear terrorism already exist or exist in nascent form. In Japan, for example, low-level, individual, terroristic violence with nuclear materials, against nuclear facilities, is real. In all countries of the region, the risk of diversion of nuclear material is real, although the risk is likely higher due to volume and laxity of security in some countries of the region than in others. In all countries, the risk of an insider “sleeper” threat is real in security and nuclear agencies, and such insiders already operated in actual terrorist organizations. Insider corruption is also observable in nuclear fuel cycle agencies in all countries of the region. The threat of extortion to induce insider cooperation is also real in all countries. The possibility of a cult attempting to build and buy nuclear weapons is real and has already occurred in the region.[15] Cyber-terrorism against nuclear reactors is real and such attacks have already taken place in South Korea (although it remains difficult to attribute the source of the attacks with certainty). The stand-off ballistic and drone threat to nuclear weapons and fuel cycle facilities is real in the region, including from non-state actors, some of whom have already adopted and used such technology almost instantly from when it becomes accessible (for example, drones).[16]

Two other broad risk factors are also present in the region. The social and political conditions for extreme ethnic and xenophobic nationalism are emerging in China, Korea, Japan, and Russia. Although there has been no risk of attack on or loss of control over nuclear weapons since their removal from Japan in 1972 and from South Korea in 1991, this risk continues to exist in North Korea, China, and Russia, and to the extent that they are deployed on aircraft and ships of these and other nuclear weapons states (including submarines) deployed in the region’s high seas, also outside their territorial borders.

The most conducive circumstance for catalysis to occur due to a nuclear terrorist attack might involve the following nexi of timing and conditions:

1. Low-level, tactical, or random individual terrorist attacks for whatever reasons, even assassination of national leaders, up to and including dirty radiological bomb attacks, that overlap with inter-state crisis dynamics in ways that affect state decisions to threaten with or to use nuclear weapons. This might be undertaken by an opportunist nuclear terrorist entity in search of rapid and high political impact.
2. Attacks on major national or international events in each country to maximize terror and to de-legitimate national leaders and whole governments. In Japan, for example, more than ten heads of state and senior ministerial international meetings are held each year. For the strategic nuclear terrorist, patiently acquiring higher level nuclear threat capabilities for such attacks and then staging them to maximum effect could accrue strategic gains.
3. Attacks or threatened attacks, including deception and disguised attacks, will have maximum leverage when nuclear-armed states are near or on the brink of war or during a national crisis (such as Fukushima), when intelligence agencies, national leaders, facility operators, surveillance and policing agencies, and first responders are already maximally committed and over-extended.

At this point, we note an important caveat to the original concept of catalytic nuclear war as it might pertain to nuclear terrorist threats or attacks. Although an attack might be disguised so that it is attributed to a nuclear-armed state, or a ruse might be undertaken to threaten such attacks by deception, in reality a catalytic strike by a nuclear weapons state in conditions of mutual vulnerability to nuclear retaliation for such a strike from other nuclear armed states would be highly irrational.

Accordingly, the effect of nuclear terrorism involving a nuclear detonation or major radiological release may not of itself be *catalytic* of *nuclear* war—at least not intentionally–because it will not lead directly to the destruction of a targeted nuclear-armed state. Rather, it may be catalytic of non-nuclear war between states, especially if the non-state actor turns out to be aligned with or sponsored by a state (in many Japanese minds, the natural candidate for the perpetrator of such an attack is the pro-North Korean General Association of Korean Residents, often called Chosen Soren, which represents many of the otherwise stateless Koreans who were born and live in Japan) and a further sequence of coincident events is necessary to drive escalation to the point of nuclear first use by a state. Also, the catalyst—the non-state actor–is almost assured of discovery and destruction either during the attack itself (if it takes the form of a nuclear suicide attack then self-immolation is assured) or as a result of a search-and-destroy campaign from the targeted state (unless the targeted government is annihilated by the initial terrorist nuclear attack).

It follows that the effects of a non-state nuclear attack may be characterized better as a *trigger* effect, bringing about a *cascade* of nuclear use decisions within NC3 systems that shift each state increasingly away from nuclear non-use and increasingly towards nuclear use by releasing negative controls and enhancing positive controls in multiple action-reaction escalation spirals (depending on how many nuclear armed states are party to an inter-state conflict that is already underway at the time of the non-state nuclear attack); and/or by inducing concatenating nuclear attacks across geographically proximate nuclear weapons forces of states already caught in the crossfire of nuclear threat or attacks of their own making before a nuclear terrorist attack.[17]

#### Coherent FTC fraud enforcement is make or break for crypto stability

Kolhatkar, 10-6 – Sheelah, “The Challenges of Regulating Cryptocurrency,” The New Yorker, <https://www.newyorker.com/business/currency/the-challenges-of-regulating-cryptocurrency> -- Iowa

On September 14th, the new chair of the Securities and Exchange Commission, Gary Gensler, appeared before the Senate Banking Committee to talk about how his agency planned to handle the financial markets during his term. He praised the American financial system, discussed the future of corporate bonds, and ruminated on how the rules of the stock market might be modified to make it more efficient. Soon, he turned to cryptocurrency markets, which are notoriously volatile, and adopted a darker tone. “Frankly, as I’ve said before, I think it’s more like the Wild West,” Gensler said. On another occasion, he had described cryptocurrency investments as “rife with fraud, scams, and abuse.”

Gensler’s comments came after several years of a fraught relationship between the agency he now heads and the market for digital coins, tokens, and virtual currencies such as bitcoin, which are created using cryptography, and many of which reside on giant, decentralized electronic ledgers that use blockchain technology. The S.E.C. has so far failed to keep up as thousands of tokens and digital currencies have been introduced, and new companies and platforms have emerged to help store and trade them. The lack of regulations over this burgeoning area has created an opening for widespread fraud; in May the Federal Trade Commission reported that consumers lost more than eighty million dollars on cryptocurrency-investment scams between October, 2020, and March, 2021, more than ten times the amount lost during the same period in the prior year. (Two million of it was lost to scammers impersonating Elon Musk.) Gensler now faces the challenge of clarifying how the nascent market will be regulated in the future. The stakes are also high for the crypto industry: until it becomes a part of the regulated economy, it will be associated with a notion of criminality.

Gensler, who is sixty-three, has a long history in government and on Wall Street—a common résumé for officials selected for important economic posts. He spent eighteen years at Goldman Sachs, where he worked as a mergers-and-acquisitions banker and became one of the firm’s youngest partners, at age thirty. He was nominated by President Bill Clinton to be an Assistant Secretary of the Treasury. In 2009, President Barack Obama named Gensler to be the chair of the Commodity Futures Trading Commission, which regulates the derivatives markets. After leaving the C.F.T.C., in 2014, Gensler worked as a professor at M.I.T.’s Sloan School of Management. During his time there, much of his teaching focused on cryptocurrency. His first class, “Blockchain and Money,” covered the development of blockchain and its potential uses.

One of the biggest questions facing the industry is whether tokens—which are tradable assets that may serve as the units which denominate cryptocurrencies but can also represent other things of value—qualify as securities; if so, they would be subject to securities laws and regulations. And if they aren’t securities, what are they? The answer to that question would help determine which other agency might have oversight of them. To many in the field, the messages coming from the S.E.C. in the past few years have been confusing.

#### Crypto stability is key to food security – it drives sustainability, smart farming, enables exports, creates climate resiliency, and avoids supply disruptions

Wang, 20 – Puquin Wang, College of Economics and Management, Wuhan Polytechnic University along with Hang Xiong, Tobias Dalhaus, and Jiajin Huang. “Blockchain Technology for Agriculture: Applications and Rationale,” *Frontiers in Blockhain*, Feb 21, <https://doi.org/10.3389/fbloc.2020.00007> -- Iowa

The blockchain is a ledger of accounts and transactions that are written and stored by all participants. It promises a reliable source of truth about the state of farms, inventories and contracts in agriculture, where the collection of such information is often incredibly costly. The blockchain technology can track the provenance of food and thus helps create trustworthy food supply chains and build trust between producers and consumers. As a trusted way of storing data, it facilitates the use of data-driven technologies to make farming smarter. In addition, jointly used with smart contracts, it allows timely payments between stakeholders that can be triggered by data changes appearing in the blockchain This article examines the applications of blockchain technology in food supply chains, agricultural insurance, smart farming, transactions of agricultural products for both theoretical and practical perspectives. We also discuss the challenges of recording transactions made by smallholder farmers and creating the ecosystem for utilizing the blockchain technology in the food and agriculture sector.

Introduction

The use of data and information becomes increasingly crucial for the agriculture sector to improve productivity and sustainability. Information and Communication Technology (ICT) substantially increases the effectiveness and efficiency of collecting, storing, analyzing and using data in agriculture (Walter et al., 2017). It allows agricultural practitioners and farming communities to easily obtain update-to-date information and thus make better decisions in their daily farming (Kaddu and Haumba, 2016). For example, remotely sensed data on soil conditions can support farmers’ crop management (Brown, 2015), mobile phones reduce information cost and thus promote farmers’ access to markets and financial support (Kaske et al., 2018), and the development of Global Positioning System (GPS) facilitates filed mapping and machinery guidance and crop scouting (Yousefi and Razdari, 2015).

From ICT to Blockchain

Information and Communication Technology does not avoid bias in the collection and use of data. Individuals operating ICT always are motivated to use data in a way that favors their own interest. For example, stakeholders’ preference in a multi-criteria decision is highly influenced by the organization they represent (Collier et al., 2014) and NGOs can have a disproportionate focus on the issues to address due to its interest (Ngo Monitor, 2015). An effective way of avoiding such bias is to make data manipulation difficult or even impossible by distributing the power of data management to a very large number of individuals.

A blockchain is a ledger in which agents take turns recording information on the process of generating, transacting and consuming a product or service. The ledger is collectively managed by all participating parties typically through a peer-to-peer network. A new record must be verified by the network before adding it to the blockchain. Any alteration to the recorded data should follow consensus decision-making protocol, meaning the majority of the parties involved should agree. In addition, an alteration to one record will lead to the alteration of all its subsequent records. It is, therefore, almost impossible to change in data recorded in a blockchain in practice. Blockchain is viewed as “an open, distributed ledger that can record transactions between two parties efficiently and in a verifiable and permanent way” (Iansiti and Lakhani, 2017). Blockchain is a transformative ICT that have the potential to revolutionized how data is used for agriculture.

Potential Blockchain Technology Benefits for Agriculture

The blockchain technology allows peer-to-peer transactions to take place transparently and without the need for an intermediary like a bank (such as for cryptocurrencies) or a middleman in the agriculture sector. By eliminating the need for a central authority, the technology changes the way that trust is granted – instead of trusting an authority, trust is placed in cryptography and peer-to-peer architecture. It thus helps restore the trust between producers and consumers, which can reduce the transaction costs in the agri-food market.

The blockchain technology offers a reliable approach of tracing transactions between anonymous participants. Fraud and malfunctions can thus be detected quickly. Moreover, problems can be reported in real-time by incorporating smart contracts (Haveson et al., 2017; Sylvester, 2019). This helps address the challenge of tracking products in the wide-reaching supply chain due to the complexity of the agri-food system. The technology thus provides solutions to issues of food quality and safety, which are highly concerned by consumers, government, etc.

The blockchain technology provides transparency among all involved parties and facilitates the collection of reliable data. Blockchain can record every step in a product’s value chain, ranging a product’s creation to its death. The reliable data of the farming process are highly valuable for developing data-driven facilities and insurance solutions for making farming smarter and less vulnerable.

This article reviews applications of the blockchain technology in the agriculture and food sector.

Applications

In this section, we discuss four classes of applications in agricultural and food sectors: agricultural insurance, smart farming, food supply chain, and transactions of agricultural products.

Agricultural Insurance

Weather extremes threaten agricultural production, putting food security at risk (Lesk et al., 2016). Both, crop and livestock production are affected, and climate change is expected to further exacerbate weather extremes in the future (Lobell et al., 2011; Finger et al., 2018). Agricultural insurance schemes are traditionally a well-recognized tool to manage weather related risks. Here, farmers pay an insurance premium before the cropping cycle begins and receive an insurance payout whenever they experience a loss on their farm. Thus, the insurer bears all the insured risk and farmers are able to manage their financial exposure to weather extremes, i.e., financial losses caused by weather extremes. In addition, in case of weather threats that systemically affect all the insured farmers, the insurer can further hedge the systemic part of the risk with a reinsurance company (Miranda and Glauber, 1997).

Agricultural insurances differ with respect to how losses are assessed and consequently how payouts are triggered. Insurances that indemnify farmers based on a damage assessment that was made by an expert on the farm are denoted as indemnity-based insurances. Indemnity based insurances are able to precisely cover losses, however, they are prone to problems arising from asymmetric information problems (Just et al., 1999). More specifically, information on the riskiness of the agricultural production and production practices is asymmetrically distributed between farmer and insurer. Farmers are expected to be better informed about both which incentivizes adverse selection and moral hazard. The adverse selection indicates that farmers with a higher ex ante risk exposure are more likely to purchase insurance compared to farmers with lower risk. Moral hazard indicates that farmers shift to more risky production practices when being insured. Both phenomena lead to market failure of the insurance scheme if the insurer has insufficient information on the two cases. Thus, indemnity-based insurances are prone to costly damage assessment and need to implement measures to avoid problems arising from asymmetric information, such as deductibles. Moreover, productions that cannot be measured, e.g., grazed meadows, cannot be insured although leading to financial damage (Vroege et al., 2019).

Motivated by the drawbacks of indemnity-based insurances, the idea of index-based insurances was born either as an alternative or complement to the classical products (Turvey, 2001). Here the payout is not triggered by the loss itself but by a measurable index, such as rainfall at a nearby weather station (Barnett and Mahul, 2007; Barnett et al., 2008). If this weather station has sufficiently long historical weather records, both parties, the farmer and the insurer, have identical information about the insured value and moreover, farming practices have no impact on the insurance payout. Hence, adverse selection and moral hazard play no role and the technical procedure to trigger a payout became substantially simplified. Moreover, full insurance coverage without any deductibles is possible and payments can be made timely and automated just after an adverse weather event was measured. However, discrepancies between payout and on-farm loss can occur which is denoted as basis risk (Woodard and Garcia, 2008). Three sources of basis risk can occur. Spatial basis risk marks any differences between measured and on-farm weather, e.g., through spatial distance (Ritter et al., 2014; Dalhaus and Finger, 2016). Temporal basis risk indicates that an unprecise time window was chosen for index determination, e.g., whole year rainfall vs. growing season rainfall (Conradt et al., 2015; Dalhaus et al., 2018). Design basis risk summarizes all remaining sources, e.g., missing weather variables or biased technical implementation (Leblois et al., 2014).

Summarizing, index insurances are becoming an increasingly important risk management tool for farmers, while basis risk reduction is of central interest. Blockchain can contribute to improving index insurance in two dimensions. First, payments can be made timely and automated based on weather data that triggers the payout as defined in a smart contract. Second, weather information and other data sources, such as plant growth information or data collected by farm machinery, can be automatically integrated via a smart oracle improving basis risk reduction and making the index determination and payout process more efficient (Gatteschi et al., 2018). Smart contracts that integrate external data using smart oracles have already been proven useful in other crypto-economic applications (Harz et al., 2019).

First prototypes for smart index insurance contracts are already in preparation or launched. For instance, Etherisc1, a Swiss-based company, provides decentralized crop insurance based on blockchain technology that provides payouts based on weather data in DIP as native currency (DIP – Decentralized Insurance Protocol tokens). Furthermore, WorldCover2, an insurance provider based in New York City who provides index insurance contracts to smallholder farmers in Ghana, simulated the application of an Ethereum blockchain-based smart contract. Payouts would hence be made in the cryptocurrency Ether. Another smart crop insurance provider is Arbol3. At Arbol, a farmer can propose a contract that includes the premium payment, a payout and a weather event that triggers the payout. Afterward, an investor, serving as counterparty can agree to that proposed contract. Initial and final payments are made in Ether (Jha et al., 2018)

Besides the above advantages of decentralized insurances that are based on smart contracts making automated payouts, the usability of cryptocurrency payouts to compensate farmers needs to be proven in the field. Moreover, farmers, especially in the developing world, might not have access to the required infrastructure to participate in a decentralized blockchain-based insurance system. As a first solution, e.g., Etherisc proposes that third party organizations “[…] can offer payment gateways and integrations which remove the necessity to own cryptocurrency from the end customer” (Mussenbrock, 2017).

Smart Agriculture

Underlying the agri-food systems is the essential data and information on the natural resources that support all forms of farming. As shown in Figure 1, data and information flow while products flow from inputs to output through various value-adding stages as well as financial flow from output to inputs. Different actors and stakeholders generate and manage data and information as per their needs and capacities. Smart agriculture is featured by the utilization of ICT, internet of things (IoT), and various modern data collection and analysis technologies including unmanned aerial vehicles (UAV), sensors and machine learning. A key issue of establishing smart agriculture is developing a comprehensive security system that facilitates the use and management of data. Traditional ways manage data in a centralized fashion and are prone to inaccurate data, data distortion and misuse as well as cyber-attack. For example, environmental monitoring data is generally managed by centralized government entities that have their own interest. They can manipulate the decision-making related to data.

The blockchain technology serves to store data and information that various actors and stakeholders generate throughout the entire value-added process, from seed to sale, of producing an agricultural product. It ensures that the data and information are transparent to the involved actors and stakeholders and all recorded data are immutable. Figure 1 shows how what type of blockchain (permissioned or permissionless) used on what kind of platform (Ethereum or Hyperledger) along with which consensus mechanism [Proof of Work/Proof of Stake and (Practical) Byzantine Fault Tolerance] might be suitable to collecting data and information at different stages in crop agri-food systems. The blockchain technology generates security through decentralization rather “security of obscurity” that traditional technologies rely on (Ibm Institute for Business Value, 2015). Distributing data to stakeholders’ computers all is less vulnerable to data loss and distortion than storing data in servers centrally managed by administrators. A blockchain is a database that contains timestamped batches of transactions and activities related to a product. Storing data in servers centrally managed by administrators are more vulnerable to loss and distortion than distributing them to servers on the Internet. The database is incredibly helpful for developing data-driven mobile applications that help optimize farming. Moreover, the blockchain addresses the challenge of creating a comprehensive secure infrastructure for IoT and integrating numerous technologies used in ICT e-agriculture.

Many smart farming models are proposed and implemented based on the joint application of IoT and blockchain technology. For example, Patil et al. (2017) propose “a lightweight blockchain-based architecture for smart greenhouse farms.” In the greenhouses, IoT sensors act as a private local blockchain that centrally managed by the owner. Lin et al. (2018) propose a blockchain and IoT based smart agriculture framework for general use. The core of the framework is a platform that helps establish trust among actors using blockchain. Agents related to products from its plantation to sale can access the data stored in the blockchain through smart mobile phones. Lin et al. (2017) propose a blockchain-based ICT e-agriculture model for the use at the local and regional scale, in which each actor has a piece of real-time water quality data stored in the blockchain. Many companies devote themselves to the blockchain application to smart agriculture. For example, the company Fliament provides devices for connecting physical objects and networks through smart farming technology. It developed penny-sized hardware that can handily be used with existing machines or devices through any connected USB port for securely transacting against a blockchain. Blockchain is also used by farm organizations to make their farming practice smarter. For example, farmland irrigation associations in Taiwan use blockchain to archive the data collectively and better interact with the public (Lin et al., 2017). Each association operates as a “public juridical person” and publish their own data and information about irrigation management to the blockchain that can be accessed by the public. The transparency evokes the public’s contribution to irrigation management and increases its efforts to improve water resource use. Over time, the longitudinal database created using blockchain can be used to inform decision-making on such as the construction and maintenance of irrigation canals.

Smart agriculture with blockchain does not lower, if not raise, the technological barrier for farmers to participate. Importantly, it is better motivated to collect trustworthy data from large farmers than from smallholders for uploading to the blockchain. Large farmers are more likely to be involved in blockchain-based smart agriculture and benefit from it. This thus can create or increase the discrepancy between large farmers and smallholders.

Food Supply Chain

With increased globalization and intense competition in the market, food supply chains have become longer and more complex than ever before. There are some common problems in food supply chains such as food traceability, food safety and quality, food trust and supply chain inefficiency, which add additional risks on the entire society, economy and the health of human.

From the producers’ perspective, the use of blockchain technology helps establish a trust relationship with consumers and build up the reputation of their products, by transparently providing individual product information in the blockchain. Enterprises can better achieve the value of their products and thus increase their competitiveness. This would make it difficult for suppliers of fraud and low-quality products to stay in markets and force all suppliers to improve the quality of products in the whole agricultural and food sectors. From the consumers’ perspective, the blockchain makes true and reliable information about how food is produced and transacted available. It helps address consumers’ concern about the safety, quality and environmental friendliness of food (Ge et al., 2017). The use of blockchain provides the possibility for consumers to interact with producers because consumers can understand the food production process more conveniently and in more detail. It supports consumers by removing obstacles in the exchange of goods to tighten their relationship, and thus strengthen consumer trust and confidence in food safety. From the regulatory agencies’ perspective, blockchain makes reliable and accurate information available for them to carry out informed and efficient regulations (Zhou et al., 2016; Chen, 2018).

Blockchain is capable of recording the information of a product from its provenance to the retail store. It provides a secure and immutable way of storing data collected at the start of the supply chain, e.g., DNA of livestock animals, pesticide residues of grain or vegetables. Such information can be checked and verified by any party involved in the supply chain of the product. Collecting such data for all products can be very costly, but it can be done on samples. The transparence of such information can help detect, e.g., the containment of undeclared meat like happened in the 2013 horse meat scandal in Europe (Kamath, 2018; Montecchi et al., 2019).

Many solutions facilitated by blockchain technology have been proposed to improve the traceability of agricultural products. Tian (2016) proposes an agricultural food supply chain traceability system using Radio Frequency Identification (RFID), a non-contact automatic identification communication technology. It can trace products with trusted information in the entire supply chain. The use of blockchain guarantees that the records of production, process, store and distribution in the system are reliable and genuine. Caro et al. (2018) proposed blockchain-based traceability system that is seamlessly linked with IoT devices, which provide digital data of production and consumption. The traceability is achieved using both Ethereum and Hyperledger Sawtooth blockchain platforms.

Many companies have committed to exploring the application of blockchain technology in food safety management and actively carrying out into practice. For example, Wal-Mart, Alibaba, and JD.com are actively implementing blockchain food traceability projects and using blockchain technology to track the entire process of food production, processing and sales. In October 2016, retail giant Wal-Mart, Tsinghua University and IBM applied the Hyperledger blockchain system to food supply chain management, exploring the Chinese pork supply chain and the United States mango supply chain as a pilot to explore the practical application methods and benefits of blockchain technology. In March 2017, Alibaba and Australia Post explored the blockchain to combat food adulteration. In August 2017, the world’s 10 largest food and fast-moving consumer goods (FMCG) suppliers, including Wal-Mart, Nestle, Dole, and Golden Food, reached a partnership with IBM integrating the blockchain into its supply chain so that food suppliers’ misconduct can be detected more quickly. In this collaboration, IBM’s blockchain platform is designed to help food companies improve the visibility and traceability of their supply chains and make food safer.

The current blockchain technology in the food supply chain is still in the early stages of development. At the same time, there are many immature and imperfect places in the process of blockchain technology implementation. Furthermore, the application of blockchain technology needs wide participation and collaboration of involving parties in the food supply chain, which is significant to play its full role. Due to its characteristics of transparency, security and decentralization, blockchain technology makes it possible to track the information of food quality in the entire supply chain. This helps prevent fraud in food transaction and reduce the costs of food supply chain management. All parties, including producers, consumers and government regulatory bodies, can thus be benefited.

E-Commerce of Agricultural Products

The e-commerce and trade of agricultural product face some crucial problems to solve. First, as Tiago et al. (2017) have demonstrated that consumer with high overall trust is more willing to purchase online, however, the basic information of agriculture products is not easy to be confirmed and trusted by consumers. Meanwhile, Cash on delivery and Logistics service are the most crucial challenges faced by e-commerce companies, especially in developing countries (Reddy and Divekar, 2014). Besides, e-commerce retailers also need to handle time-demanding small orders with diverse items (Boysen et al., 2019), which causes high operating costs for e-commerce companies.

Blockchain technology may provide proper solutions for many aspects of these problems: (1) information security. Blockchain technology provides private key encryption which is a powerful tool that provides the authentication requirements (Xu et al., 2016). It can thus link the data of all aspects of planting and harvesting of agricultural products safely and unchangeably. (2) Supply chain management. Blockchain technology could enable supply chain management more efficiently than traditional monitoring mechanisms by lowering signaling costs for each entity (Chod et al., 2019). Every link in the supply chain – the producer, the place of origin, the shipping company, the destination, the multimodal transport, the warehouse and the final last mile – represents a “block” of information, with the advantage of visibility, aggregation, validation, automation and resiliency (Babich and Hilary, 2018). (3) Payment methods. The blockchain provides a digital payment solution with zero rates. Furthermore, application of cryptocurrency in the transaction of agricultural products will reduce transaction costs more substantially. (4) Consumer confidence. Through the decentralized mechanism, the distributed accounting system of the blockchain is time-stamped, so that all information on the chain is transparent and unmodifiable. Consumers will be liberated from fakes and regain confidence in e-commerce (Karame, 2016). (5) Reduce the cost of farmers. Many agricultural products are produced by households. Due to the low transaction volume and small scale, traditional e-commerce is neither willing nor able to provide services for them, thus excluding these participants from the market. Blockchain technology can greatly reduce transaction costs and incorporate them into the market again.

Some companies are already using this technology for practice, although it may not be used in the whole process. For example, after using blockchain technology, all the goods in the Old Farmers’ Shopping Mall, an e-commerce company in Hubei Province of China, can be traced back to the source and all the production information can be queried by customers4. Before the goods are put into the platform, detail information has been recorded including seeding, watering, fertilization and de-worming5. They also provide basic knowledge of producers, transportation logistics, storage days, and storage temperature. Customers only need to scan the QR code on the goods, which is unique, and all the information will be available to visit. This method can effectively avoid the forgery of bad merchants, and reconstruct consumers trust in agricultural products from e-commerce and its suppliers.

The application of blockchain technology in e-commerce and trade of agricultural product is still in its infancy and the current case is not simply perfect. For example, how to ensure the authenticity of the uploading process of data into blockchain is still a problem. A potential solution in the future may be IoT. What’s more, blockchain’s characteristics of distributed, non-tamperable, traceable need to be more widely and deeply explored to improve the productivity and efficiency of agricultural production and trade.

#### Food insecurity is an existential risk – it’s a threat multiplier for all nuclear conflict

Bryce, 20 – Emma, citing Nelson, Roman, and Kemp---Cassidy *Nelson* is Co-lead of the biosecurity team at Oxford), Sabin *Roman* earned a PhD in Complex Systems Simulation from the University of Southampton, and both Roman and Luke *Kemp* are research associates at the Cambridge University. "What Could Drive Humans to Extinction?" Real Clear Science, 7-27-2020, <https://www.realclearscience.com/articles/2020/07/27/what_could_drive_humans_to_extinction.html> -- Iowa

The accompaniments to climate change — food insecurity, water scarcity, and extreme weather events — are set to increasingly threaten human survival, at regional scales. But looking to the future, climate change is also what Kemp described as an "existential risk multiplier" at global scales, meaning that it amplifies other threats to humanity's survival. "It does appear to have all these relationships to both conflict as well as political change, which just makes the world a much more dangerous place to be." Imagine: food or water scarcity intensifying international tensions, and triggering nuclear wars with potentially enormous human fatalities.

This way of thinking about extinction highlights the interconnectedness of existential risks. As Kemp hinted before, it's unlikely that a mass extinction event would result from a single calamity like a nuclear war or pandemic. Rather, history shows us that most civilizational collapses are driven by several interwoven factors. And extinction as we typically imagine it — the rapid annihilation of everyone on Earth — is just one way it could play out.

#### **Regs can’t address market-wide harms from false advertising, only antitrust can**

Tushnet and Carrier, 21 – Rebecca Tushnet is a Professor at Harvard Law School and former NDT Finalist. Michael Carrier is a Professor at Rutgers Law School. *An Antitrust Framework for False Advertising*, May, 106 Iowa L. Rev. 1841, p. Nexis – Iowa

[\*1844] False advertising law allows consumers to receive some redress for the money they paid for "unlimited" data that wasn't, 5 but there's no obvious remedy for the damage AT&T caused to the market as a whole. Antitrust law has been kneecapped by the courts and thus is powerless to act. In short, the law's neglect of the injuries caused by false advertising threatens structural harm to competitive markets.

In this Essay, we address these problems. We do so by focusing on the actors most likely to harm the market: monopolists and attempted monopolists. These actors are a numerically small percentage of businesses (and of false advertising defendants), but they can do great harm. Our emphasis on monopolists and attempted monopolists addresses courts' concerns of overbroad enforcement, preventing false advertising from morphing automatically into an antitrust violation. And it carves out a critical role for antitrust while embracing - rather than neglecting - antitrust's partner in fighting unfair competition, false advertising law.

We begin by introducing the laws of antitrust and false advertising, explaining the regimes' objectives and methods. We then survey the antitrust caselaw, critiquing three approaches courts considering false advertising claims have taken. Finally, we introduce our antitrust framework for false advertising claims. At the heart of the framework is a presumption that monopolists engaging in false advertising violate antitrust law, with that presumption rebuttable if the defendant can show that the false advertising was ineffective. The framework also applies to cases of attempted monopolization by incorporating factors (falsity, materiality, and harm) inherent in false advertising law, along with competition-centered issues on targeting new market entrants and entrenching barriers to entry. To illustrate how our framework should work, we apply it to an important area: advertising for biosimilars, which are pharmaceutical products with a substantial and growing role in treating numerous diseases.

False advertising that exacerbates monopoly power has been dismissed by antitrust law for too long. This Essay seeks to resolve the contradiction in the law by showing how false advertising threatens the proper functioning of markets.

# 2ac

### T - antitrust

### Scope

#### 

#### C/I---“Expand” requires increasing the extent of the scope of antitrust.

Merriam Webster, No Date, "expand," Merriam Webster, https://www.merriam-webster.com/dictionary/expand

ex·​pand | \ ik-ˈspand  \

expanded; expanding; expands

Definition of expand

[transitive verb](https://www.merriam-webster.com/dictionary/transitive)

1: to open up : [UNFOLD](https://www.merriam-webster.com/dictionary/unfold)

2: to increase the extent, number, volume, or scope of :

[ENLARGE](https://www.merriam-webster.com/dictionary/enlarge)

3 a: to express at length or in greater detail

b: to write out in full

//expand all abbreviations

c: to subject to mathematical [expansion](https://www.merriam-webster.com/dictionary/expansion)

//expand a function in a power series

#### C/I---Scope is the extent of the area or subject matter that antitrust deals with.

Oxford Languages 21 (Oxford Languages, 2021, accessible via Google, “scope,” https://www.google.com/search?q=scope+definition&rlz=1C1GCEB\_enUS961US961&sxsrf=AOaemvKDcVc2Ak4LwXnA66Yv\_O40pSkDyw%3A1631333557327&ei=tSw8YeGqE66k\_QblsI2IBA&oq=scope+definition&gs\_lcp=Cgdnd3Mtd2l6EAMyBAgjECcyBAgjECcyBQgAEIAEMgUIABCABDIFCAAQgAQyBQgAEIAEMgUIABCABDIFCAAQgAQyBQgAEIAEMgUIABCABDoHCCMQsAMQJzoHCAAQRxCwAzoHCAAQsQMQQzoKCAAQsQMQgwEQQzoECAAQQzoECC4QQ0oLCJFOEgY0Niw0ODRKBAhBGABQpZkBWNuhAWD0ogFoAXACeACAAWmIAdIHkgEEMTAuMZgBAKABAcgBCrgBAsABAQ&sclient=gws-wiz&ved=0ahUKEwih2caJh\_byAhUuUt8KHWVYA0EQ4dUDCA4&uact=5)

noun

1.

the extent of the area or subject matter that something deals with or to which it is relevant.

"we widened the scope of our investigation"

### 2ac - T Subsets

#### C/I – private sector just means non-public.

Blacks Law ND, "What is PRIVATE SECTOR? definition of PRIVATE SECTOR (Black's Law Dictionary)," Law Dictionary, https://thelawdictionary.org/private-sector/

An industry that is composed of private companies. The corporate sector and the personal sector are encompassed in the private sector and they are responsible for the allocation of the majority of resources within the economy.

### 2ac States

#### Uniformity

Carrier and Tushnet 21, Michael A. Carrier Rutgers Law School Distinguished Professor, Rebecca Tushnet Harvard Law School Professor of Law (Iowa Law Review 2021 “An Antitrust Framework for False Advertising” https://papers.ssrn.com/sol3/papers.cfm?abstract\_id=3593914)//ellie

Second, unlike the federal Lanham Act, which denies consumers standing to sue despite the direct harm they suffer from false advertising, antitrust law, importantly, allows customers to challenge the harms they experience from false advertising. State consumer protection laws are limited in important ways, including state-law variation that makes multistate consumer class actions all but impossible107 and restrictions in many states that preclude businesses from bringing claims in their roles as consumers108 even though businesses are often important customers for the subset of false advertising cases involving monopolists and would-be monopolists. Thus, antitrust provides remedies that would otherwise be unavailable to plaintiffs who were themselves deceived by a monopolist or threatened monopolist’s false advertising.

### AT: regs cp

#### Scope - antitrust is key to determine overarching effects – if the CP solves these deficits it crosses threshold into antitrust and links to the net benefit

Carrier and Tushnet 21, Michael A. Carrier Rutgers Law School Distinguished Professor, Rebecca Tushnet Harvard Law School Professor of Law (Iowa Law Review 2021 “An Antitrust Framework for False Advertising” https://papers.ssrn.com/sol3/papers.cfm?abstract\_id=3593914)//ellie

A separate and independently compelling reason to use antitrust where appropriate is that, in antitrust law, it would be possible to consider false advertising as part of an overarching scheme used to harm a competitor, something false advertising law by definition can’t do. In fact, the inclusion of this behavior could push the range of conduct over the threshold of antitrust liability. For example, in In re Suboxone Antitrust Litigation, the court found that the plaintiff could not demonstrate that its claim that the defendant had refused to participate in a safety program required by the U.S. Food and Drug Administration (“FDA”) individually made out a violation of antitrust law.109 But it found that “a plaintiff can allege a series of actions that when taken together make out antitrust liability even though some of the individual actions, when viewed independently, are not all actionable.”110 Such global assessment can allow consideration of a monopolist software provider’s practices of promising “vaporware” that it couldn’t deliver to prevent customers from turning to competing software alternatives and of creating fear, uncertainty, and doubt about the competition as part of a larger constellation of anticompetitive activities.111 As the Third Circuit noted in LePage’s Inc. v. 3M, “courts must look to the monopolist’s conduct taken as a whole rather than considering each aspect in isolation.”112

### Biz con

#### Thumpers – their card says doj cases rn are thumping it

#### False ads empower counterfeiters and crush market signals for legitimate business – FTC action is vital

Chopra and Levine, 21 – Rohit Chopra is a Federal Trade Commissioner. Samuel A.A. Levine is Acting Director of the Bureau of Consumer Protection. *The Case for Resurrecting the FTC Act’s Penalty Offense Authority*, Social Science Research Network (SSRN), Feb 16 last revised, originally published 11/3/20, [https://papers.ssrn.com/sol3/papers.cfm?abstract\_id=3721256](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3721256&download=yes) – Iowa

The Commission’s overreliance on Section 13(b) has also hampered its efforts to tackle fake review and influencer fraud, as well as other deceptive disinformation campaigns online. According to one estimate, companies spent $8 billion on advertising through social media influencers in 2019, which is projected to increase to $15 billion by 2022.132 Facebook’s Instagram and Google’s YouTube are major vehicles for influencer advertising campaigns. Individuals with a significant following can often generate major fees for posts and videos that promote a product or brand. Unsurprisingly, fake likes, fake followers, and fake reviews are now polluting the digital economy, making it difficult for families and small businesses looking for truthful information. These fake reviews can have a huge impact on sales. A highly cited study estimated that a one-star rating increase on Yelp translated to an increase of 5 to 9 percent in revenues for a restaurant.133 Another study found that a one-point boost in a hotel's online ratings at sites like Travelocity and TripAdvisor is tied to an 11 percent jump in room rates, on average.134 There is also a growing body of research suggesting that early, positive signals can even create a herd effect, leading many more consumers to purchase a product.135 In addition to distorting sales in otherwise legitimate markets, fake reviews have also been weaponized by counterfeiters. As detailed in a comprehensive report by the Government Accountability Office, counterfeiters are using pseudonymous reviews to boost their fake products, harming honest firms that are forced to compete with those operating unlawfully.136 In spite of the substantial distortion caused by fake reviews fraud, the Commission has opted to pursue no-money settlements that do little to deter the practice. In the 2019 Sunday Riley matter, the Commission charged that the founder and chief executive officer of a successful cosmetics brand was personally ordering her employees to write fake reviews, while giving them instructions on how to evade detection.137 The scheme was ongoing for more than two years, and many of these reviews appear to have been written to smear competitors and otherwise give Sunday Riley an unfair advantage.138 In spite of the egregiousness of these allegations, the Commission resolved its investigation with a settlement that simply ordered the company not to repeat its lawbreaking.139 The Commission’s overreliance on Section 13(b) also hamstrings its approach to companies that launder advertising through high-priced influencers. The Commission has sent warning letters to dozens of influencers who fail to disclose their material connections to sellers,140 but third party analysis suggests that many ignored the Commission’s warnings.141 For both fake reviews and advertising laundered through influencers, deploying the Penalty Offense Authority offers substantial benefits over the Commission’s current approach. Forty years ago, the Commission issued an order in Cliffdale Associates finding that it was deceptive to portray endorsements as objective when in fact they were written by the seller’s paid employees or contractors.142 This is the exact theory the Commission pursued against Sunday Riley to condemn fake reviews,143 and is likewise the theory the agency has deployed against influencers who fail to disclose material connections.144 If the Commission or another party notified major advertisers about conduct condemned in the Cliffdale order, it would expose these parties to civil penalty liability for some of the most common forms of digital deception, including fake reviews and undisclosed influencer payments. In Sunday Riley, this would have meant real relief for cheated customers and real deterrence against fake review fraud. Designating the failure to disclose material connections as a penalty offense is long overdue. In the current environment, firms are under huge pressure to generate fake reviews or otherwise engage in deceptive “organic” advertising. The upside can be huge, and because the practices are so widespread, many believe they will be put at a competitive disadvantage if they do not engage in the same practices.145 At the same time, the vast majority of wrongdoers likely will not be caught, underscoring the importance of steep penalties for those who are. Given this incentive structure, we do not believe the Commission’s historic reliance on no-money orders (or on settlements that disgorge illgotten gains with no penalty) is adequate, especially when the agency has the authority to exact real penalties on those who break the law. Disinformation is polluting our digital markets, harming both consumers and honest firms. Tackling this problem will require stepped up enforcement both by major platforms, which can benefit from these illegal practices,146 and the Commission. Rather than waiting for Congress or counting on self-policing by major platforms, the FTC should do its part by using its existing authority to pursue penalties against those who break the law.147

### 2AC AT: Infrastructure DA

#### 1. Won’t pass, PC fails, Biden not key

O'Keefe, 10-28-2021 – Ed, "House will not vote on infrastructure hours after Biden unveils revamped social spending plan," CBS News, <https://www.cbsnews.com/news/biden-spending-bill-build-back-better-social-climate-change/> -- Iowa

The House will not vote Thursday night on the infrastructure bill, hours after progressives said they would not vote on President Biden's revamped social policy and climate change plan. In unveiling the bill earlier Thursday, Mr. Biden urged Democrats to unite.

The White House released details of the plan, known as the Build Back Better Act, as the president prepared to leave Thursday for Europe to attend two major global summits. Hours later, the House released legislative text of the plan, running at 1,684 pages, which could assuage progressive lawmakers' push to see the bill's language.

The president is leaving the work of passing the new $1.75 trillion proposal, plus the bipartisan infrastructure plan awaiting final passage in the House, up to top congressional leaders who've struggled to wrangle the disparate wings of the Democratic Party over the course of the protracted negotiations. The plan does not include paid leave, a pivotal piece of the president's original proposal and campaign promises, nor does it include free community college.

But many Democrats, including progressives in the House, had insisted on seeing the legislative text of the measure before agreeing to pass the more targeted $1 trillion bipartisan infrastructure bill, which revamps the nation's roads, bridges, railways and water lines.

Although Speaker Nancy Pelosi had said the House could vote on the infrastructure bill as early as Thursday, the only vote that happened Thursday evening was to extend highway funding, which passed 358-59.

Pramila Jayapal, chair of the Congressional Progressive Caucus, told reporters there are "too many no votes" for the infrastructure bill, known as BIF, to pass Thursday. And Congresswoman Ilhan Omar, the Congressional Progressive Caucus whip, told reporters progressives need to have a vote on the social spending agenda before they'll support the infrastructure bill.

#### **2. No PC and watered down**

Bhadra-kumar, 10-28 – Ambassador M K Bhadra-kumar served the Indian Foreign Service for more than 29 years. “Biden's Taiwan gaffe meant no harm,” Kashmir Times, p. Nexis – Iowa

Third, Biden is fully well aware that China has no intentions to annex Taiwan through military means and his grandstanding wouldn't change Beijing's grand strategy. On the other hand, at a juncture when his political capital is depleting and public rating plummeting, it looks good to sound resolute and strong. The reality is that Biden began his presidency with an ambitious agenda to remake the US economy that drew comparison with FDR's New Deal. But, bogged down in negotiations and Senate rules, and coping with a schism within his own party, Biden has been forced to trim sails and his most ambitious proposals have been dropped, some of them indefinitely.

#### Antitrust is popular – at worst zero link

it has support from the public, Congress, media, and interest groups.

Robert Manduca 19, Assistant Professor, Sociology, University of Michigan, "Antitrust Enforcement as Federal Policy to Reduce Regional Economic Disparities," The ANNALS of the American Academy Political and Social Science, Vol. 685, Issue 1, 09/10/2019, SAGE.

Among possible federal regional development policies, reinvigorated antitrust enforcement stands out in several ways that make its establishment as a policy more likely. First, it is salient and familiar to voters. Most voters have encountered monopolies in their daily lives, whether they be airlines, utilities, internet providers, or tech platforms. Almost everyone has had a negative experience with a company too large or omnipresent to avoid in the future. Breaking such companies up offers a response to angry customers who would otherwise not have any way to express their frustration.

Moreover, aggressive antitrust enforcement has a long history in the United States, and it was widely practiced within the lifetimes of many voters. It has been a stated principle of capitalist economics since Adam Smith (Smith 1827), albeit one that has often been honored in the breach. In the United States specifically, antitrust enforcement fits with a longstanding American skepticism toward “bigness” (Lemann 2016; Rosen 2016). Perhaps for these reasons, the current antitrust movement has managed to find support among both liberals and conservatives. A poll conducted in September 2018, for instance, found that 65 percent of Americans—and 54 percent of Trump voters—think the government “should do more to break up corporate monopolies” (Dayen 2018). And leading proponents of antitrust enforcement in Congress and the media are found on both sides of the aisle (Crane 2018).

Perhaps more important than its broad appeal among voters, antitrust enforcement has the potential to attract support, or at least avoid opposition, from a wide range of organized interest groups. Of particular note is the potential for corporate ambivalence on this issue. Unlike many progressive economic policies, many companies—including quite powerful ones—stand to benefit from a reinvigorated antitrust regime. Yelp, for instance, has been a major critic of Google’s abuse of its search monopoly for several years (Dougherty 2017). When AT&T attempted to acquire T-Mobile in 2010, some of the most vocal opposition came from competitor Sprint (Singel 2011), though that did not stop Sprint from initiating its own bid for T-Mobile recently. Even Walmart, the largest retailer in the country, recently joined with other brick and mortar retailers to call on the Federal Trade Commission (FTC) to examine “persistent oligopolies in other parts of the retail system,” specifically singling out the market power of Amazon and Google (Dodge 2019). Companies like these could potentially become strong supporters of specific antitrust enforcement actions or a new antitrust movement in general.

### Missiles DA

#### POA action against for-profit colleges thumps DAs and proves POA can be revived

Stern, 10-11-2021, John E. Villafranco & Bezalel A. Stern. "Pushing the Boundaries of Existing Authority: Section 19 Post-AMG Capital Management," Ad Law Access, <https://www.adlawaccess.com/2021/10/articles/pushing-the-boundaries-of-existing-authority-section-19-post-amg-capital-management/> -- Iowa

It was an extraordinary week as the FTC continued to press the frontier of the post-AMG Capital Management landscape. On Friday, the Commission, making good on promises to creatively explore all of its options for enforcement, announced by a 3-2 vote that it had reached a settlement pursuant to Section 19 of the FTC Act with Resident Home LLC and its owner Ran Reske. At issue were allegedly false claims that the company’s imported mattresses are made from materials fully manufactured in the United States. As part of the settlement, Resident Home and Reske agreed to pay $753,000. This action follows the FTC’s announcement earlier in the week that it had notified 70 for-profit higher educational institutions that it intends to make use of its long dormant Penalty Offense Authority. As contemplated by the FTC, the Penalty Offense Authority would allow the Agency to obtain civil penalties when institutions make misrepresentations about their programs, and job and earnings prospects.

#### Thumper. FTC agenda expanded drastically *beyond* data.

Paul, Weiss, Rifkind, Wharton & Garrison Llp, 9-27-2021, "Recent FTC Announcements Shed Light on Competition Enforcement Agenda," Lexology, https://www.lexology.com/library/detail.aspx?g=6150ea1d-5532-4a7d-bca3-92989e136d1a

Recent FTC documents outline several areas of particular focus for the Commission’s enforcement agenda, including: mergers, single-firm conduct, common ownership and interlocking directorates, and private equity ownership. Firms within the areas of FTC focus may receive investigative demands, and investigations could lead to the FTC seeking to promulgate industry-wide rules. A recent memo from Chair Lina Khan to the Federal Trade Commission (FTC) Staff and Commissioners and a series of investigatory resolutions recently approved by the FTC shed some light on the Commission’s enforcement agenda. Taken together, these documents outline several areas of particular focus, including: mergers, single-firm conduct, common ownership and interlocking directorates, and private equity ownership. In her memo, Chair Khan said that the FTC would seek to use its “full set of tools and authorities—including rulemaking and research in addition to adjudication,” and would take a “holistic approach to identifying harms, recognizing that antitrust and consumer protection violations harm workers and independent businesses as well as consumers.” She also wrote that the Commission’s focus would be “on the most significant actors, where our enforcement actions can have the greatest impact on the everyday lives of Americans.” Areas of Focus Mergers With respect to mergers, Chair Khan wrote in her memo that the FTC “needs to address rampant consolidation and the dominance that it has enabled across markets” and needs “to find ways to deter unlawful transactions.” She said that the “rate at which firms propose facially illegal deals heavily strains agency resources and compromises our ability to investigate significant mergers, raising the risk of false negatives.” She wrote that she is seeking to identify “ways to reduce the agency resources and burden associated with investigating and filing lawsuits against unlawful mergers.” The FTC has noted the burden of an increase in merger filings several times in recent months. Earlier this year (before Chair Khan joined the FTC) the Commission suspended the practice of granting early terminations of the waiting period required for deals notified under the HSR Act, and this suspension remains in effect. More recently, the FTC has been sending warning letters to parties when it does not finish merger reviews within the statutory timeline. Apart from investigations of individual proposed mergers, in July the FTC authorized an investigation into consummated mergers, acquisitions or transactions. Chair Khan also wrote that revising merger guidelines will be a “key project” and described prior guidelines as representing “a somewhat narrow and outdated framework for assessing mergers.” Indeed, following the issuance of President Biden’s Executive Order on Competition in the American Economy in early July – which called for the FTC and Department of Justice (DOJ) to review the then-existing horizontal and vertical guidelines – the agencies said that they would examine whether the merger guidelines should be updated “to reflect a rigorous analytical approach consistent with applicable law.” The FTC recently rescinded the Vertical Merger Guidelines, though, at least for now, they remain in place at the DOJ. In her memo, Chair Khan said that “revising the guidelines is an opportunity to close gaps between theory and practice, setting the foundation for more effective and empirically grounded enforcement work.” Dominant-Firm Conduct and Market Power Abuses Chair Khan also outlined a focus on conduct by “dominant” firms and “power asymmetries and the unlawful practices those imbalances enable.” While she did not posit a metric to determine if a firm is “dominant,” the memo did suggest a focus on firms acting as “gatekeepers.” In particular, Chair Khan wrote, “gatekeepers and dominant middlemen across the economy have been able to use their critical market position to hike fees, dictate terms, and protect and extend their market power.” She also wrote that “[b]usiness models that centralize control and profits while outsourcing risk, liability, and costs also warrant particular scrutiny, given that deeply asymmetric relationships between the controlling firm and dependent entities can be ripe for abuse.” She wrote that the FTC should be “especially attentive to next-generation technologies, innovations, and nascent industries across sectors,” and that “[t]imely intervention—be it checking anticompetitive conduct that would lead markets to tip, or targeting unfair practices before they become widely adopted—can help us tackle problems at their inception, both limiting harms and saving resources over the long term.” Chair Khan also urged “taking aim at the ways in which certain contract terms, particularly those that are imposed in take-it-or-leave-it contracts, constitute unfair methods of competition or unfair or deceptive practices” and that “market power abuses and consumer protection concerns can emerge when one-sided contract provisions are imposed by dominant firms.” She specifically pointed to “non-competes, repair restrictions, and exclusionary clauses.” Relatedly, the FTC has broadly authorized Staff to “investigate whether any persons, partnerships, corporations, or others have monopolized or are monopolizing, have attempted to monopolize or are attempting to monopolize, or have conspired or are conspiring to monopolize.” According to the FTC, “digital markets” will be a focus. The FTC also authorized staff to investigate “unfair, deceptive, anticompetitive, collusive, coercive, predatory, exploitative, or exclusionary acts or practices . . . relating to abuse of intellectual property.” The press release accompanying this resolution specifically mentioned the effect of alleged “abuse of intellectual property rights” on competition in “pharmaceuticals, technology and gasoline refining.” Private Equity In her memo, Chair Khan also wrote about what she termed “extractive business models.” She asserted that “the growing role of private equity and other investment vehicles invites us to examine how these business models may distort ordinary incentives in ways that strip productive capacity and may facilitate unfair methods of competition and consumer protection violations,” and that “[e]vidence suggests that many of these abuses target marginalized communities, and combatting practices that prey on these communities will be a key priority.” In addition to Chair Khan, others at the FTC have taken a skeptical view of private equity. For example, Commissioner Chopra – who may soon leave the Commission to become head of the Consumer Financial Protection Bureau – dissented from the FTC’s acceptance of a proposed consent order which involved, among other things, a divestiture to a private equity sponsored purchaser. He wrote that he believed there are “special considerations with financial buyers” and that “private equity participation is . . . associated with . . . firm behavior that can reduce long-term competition, including opportunistic asset sales.” This view of private equity can be seen to contrast with a view taken by the DOJ in the prior administration that private equity may support competition in certain instances, for example by funding a divestiture buyer in a merger remedy. In September 2020, the DOJ published a Mergers Remedy Manual which recognized that “in some cases a private equity purchaser may be [a] preferred” purchaser of divestiture assets. At the very least, according to the manual, the DOJ Antitrust Division “will use the same criteria to evaluate both strategic purchasers and purchasers that are funded by private equity or other investment firms.” Common Ownership and Interlocking Directorates In its recent set of resolutions, the FTC authorized staff to investigate “whether any persons, partnerships, corporations, or others simultaneously have served, or are serving, as an officer or director of two or more competing corporations or partnerships or simultaneously have had, or have, financial interests of any kind in two or more competing corporations or partnerships.” With respect to interlocking directorates, Section 8 of the Clayton Act, 15 USC §19, states that, if the corporations are above a certain size, “[n]o person shall, at the same time, serve as a director or [board-appointed] officer in any two corporations . . . that are . . . by virtue of their business and location of operation, competitors, so that the elimination of competition by agreement between them would constitute a violation of any of the antitrust laws.” The law has certain safe harbor exceptions based on the magnitude of the “competitive sales” of the corporations – i.e., “all products and services sold by one corporation in competition with the other.” Section 8 does not prohibit interlocking directorates below these thresholds. Section 8 has been interpreted to cover both “direct” interlocks – i.e., when the same individual serves as a director or officer of competing corporations – and on occasion “indirect” interlocks – i.e., where different individuals serve as directors or officers of competing corporations, but both have been “deputized” to act on behalf of the same third entity (e.g., a private equity fund). Earlier this year, the DOJ expressed concerns that interlocking directorates between two companies involved in promoting and selling tickets to live entertainment and sports events violated Section 8 of the Clayton Act. Here, according to the DOJ, two individuals served as directors of one company; and, at the same time, one of the individuals served as a director and the other individual served as an officer of another company involved in the same business as the first. The two individuals resigned their positions on the Board of the first company in order to address the DOJ’s concerns. Common ownership – specifically, whether a firm’s simultaneous ownership of the stock of competing firms can have competitive effects – has been the subject of academic debate for several years. It also featured as a topic at one of former Chairman Simons’ Hearings on Competition and Consumer Protection in the 21st Century. Other Areas of Focus In addition to the compulsory process resolutions discussed above, the FTC also authorized an investigation into unfair or anticompetitive acts or practices affecting children and an investigation

into unfair or anticompetitive acts or practices affecting armed forces service members and veterans. Algorithmic and biometric bias, deceptive and manipulative conduct in the internet, and repair restrictions are also the subjects of authorized investigations. Earlier resolutions authorized investigations into “healthcare markets, including those regarding pharmaceuticals, pharmacies, pharmacy benefit managers, medical devices, hospitals, or other healthcare facilities or services”; “markets with participants that provide technology platform services, including platforms that connect users, buyers, sellers, or other market actors”; and unfair or deceptive acts or practices “targeting current or prospective workers or small business operators.” Significance The authorizations of compulsory process contained in the FTC’s recent investigatory resolutions will allow the Commission’s Staff, over the signature of any one Commissioner, to compel companies to produce documents and provide testimony pursuant to civil investigative demands (CIDs). In the near term, companies within the target areas of focus could receive CIDs (and indeed some may already have). It should also be noted that, while we would expect these priorities to receive near-term attention, the investigations have been authorized for a period of ten years. Beyond the possibility of receiving compulsory process from the FTC, companies in the targeted areas may be affected by future FTC rulemaking. While the outcome of any individual investigation of course remains to be seen, Chair Khan’s reference to rulemaking in her memo – and her prior support of the FTC engaging in rulemaking – suggests that in the future the FTC may seek to promulgate industry-wide rules governing certain conduct and industries under investigation. If the FTC does indeed promulgate such rules, they would be enforceable by Commission action, and violators could face FTC-imposed fines. For example, while interlocking directorates have historically been an enforcement focus, they are typically resolved by having the parties resign a position to get rid of the interlock. While no such rule has yet been proposed, if the FTC does promulgate a rule against interlocking directorates, this may signal a desire by the FTC to assess fines in those situations.

# 1ar

#### Finishing

Paul, Weiss, Rifkind, Wharton & Garrison Llp, 9-27-2021, "Recent FTC Announcements Shed Light on Competition Enforcement Agenda," Lexology, https://www.lexology.com/library/detail.aspx?g=6150ea1d-5532-4a7d-bca3-92989e136d1a

Recent FTC documents outline several areas of particular focus for the Commission’s enforcement agenda, including: mergers, single-firm conduct, common ownership and interlocking directorates, and private equity ownership. Firms within the areas of FTC focus may receive investigative demands, and investigations could lead to the FTC seeking to promulgate industry-wide rules. A recent memo from Chair Lina Khan to the Federal Trade Commission (FTC) Staff and Commissioners and a series of investigatory resolutions recently approved by the FTC shed some light on the Commission’s enforcement agenda. Taken together, these documents outline several areas of particular focus, including: mergers, single-firm conduct, common ownership and interlocking directorates, and private equity ownership. In her memo, Chair Khan said that the FTC would seek to use its “full set of tools and authorities—including rulemaking and research in addition to adjudication,” and would take a “holistic approach to identifying harms, recognizing that antitrust and consumer protection violations harm workers and independent businesses as well as consumers.” She also wrote that the Commission’s focus would be “on the most significant actors, where our enforcement actions can have the greatest impact on the everyday lives of Americans.” Areas of Focus Mergers With respect to mergers, Chair Khan wrote in her memo that the FTC “needs to address rampant consolidation and the dominance that it has enabled across markets” and needs “to find ways to deter unlawful transactions.” She said that the “rate at which firms propose facially illegal deals heavily strains agency resources and compromises our ability to investigate significant mergers, raising the risk of false negatives.” She wrote that she is seeking to identify “ways to reduce the agency resources and burden associated with investigating and filing lawsuits against unlawful mergers.” The FTC has noted the burden of an increase in merger filings several times in recent months. Earlier this year (before Chair Khan joined the FTC) the Commission suspended the practice of granting early terminations of the waiting period required for deals notified under the HSR Act, and this suspension remains in effect. More recently, the FTC has been sending warning letters to parties when it does not finish merger reviews within the statutory timeline. Apart from investigations of individual proposed mergers, in July the FTC authorized an investigation into consummated mergers, acquisitions or transactions. Chair Khan also wrote that revising merger guidelines will be a “key project” and described prior guidelines as representing “a somewhat narrow and outdated framework for assessing mergers.” Indeed, following the issuance of President Biden’s Executive Order on Competition in the American Economy in early July – which called for the FTC and Department of Justice (DOJ) to review the then-existing horizontal and vertical guidelines – the agencies said that they would examine whether the merger guidelines should be updated “to reflect a rigorous analytical approach consistent with applicable law.” The FTC recently rescinded the Vertical Merger Guidelines, though, at least for now, they remain in place at the DOJ. In her memo, Chair Khan said that “revising the guidelines is an opportunity to close gaps between theory and practice, setting the foundation for more effective and empirically grounded enforcement work.” Dominant-Firm Conduct and Market Power Abuses Chair Khan also outlined a focus on conduct by “dominant” firms and “power asymmetries and the unlawful practices those imbalances enable.” While she did not posit a metric to determine if a firm is “dominant,” the memo did suggest a focus on firms acting as “gatekeepers.” In particular, Chair Khan wrote, “gatekeepers and dominant middlemen across the economy have been able to use their critical market position to hike fees, dictate terms, and protect and extend their market power.” She also wrote that “[b]usiness models that centralize control and profits while outsourcing risk, liability, and costs also warrant particular scrutiny, given that deeply asymmetric relationships between the controlling firm and dependent entities can be ripe for abuse.” She wrote that the FTC should be “especially attentive to next-generation technologies, innovations, and nascent industries across sectors,” and that “[t]imely intervention—be it checking anticompetitive conduct that would lead markets to tip, or targeting unfair practices before they become widely adopted—can help us tackle problems at their inception, both limiting harms and saving resources over the long term.” Chair Khan also urged “taking aim at the ways in which certain contract terms, particularly those that are imposed in take-it-or-leave-it contracts, constitute unfair methods of competition or unfair or deceptive practices” and that “market power abuses and consumer protection concerns can emerge when one-sided contract provisions are imposed by dominant firms.” She specifically pointed to “non-competes, repair restrictions, and exclusionary clauses.” Relatedly, the FTC has broadly authorized Staff to “investigate whether any persons, partnerships, corporations, or others have monopolized or are monopolizing, have attempted to monopolize or are attempting to monopolize, or have conspired or are conspiring to monopolize.” According to the FTC, “digital markets” will be a focus. The FTC also authorized staff to investigate “unfair, deceptive, anticompetitive, collusive, coercive, predatory, exploitative, or exclusionary acts or practices . . . relating to abuse of intellectual property.” The press release accompanying this resolution specifically mentioned the effect of alleged “abuse of intellectual property rights” on competition in “pharmaceuticals, technology and gasoline refining.” Private Equity In her memo, Chair Khan also wrote about what she termed “extractive business models.” She asserted that “the growing role of private equity and other investment vehicles invites us to examine how these business models may distort ordinary incentives in ways that strip productive capacity and may facilitate unfair methods of competition and consumer protection violations,” and that “[e]vidence suggests that many of these abuses target marginalized communities, and combatting practices that prey on these communities will be a key priority.” In addition to Chair Khan, others at the FTC have taken a skeptical view of private equity. For example, Commissioner Chopra – who may soon leave the Commission to become head of the Consumer Financial Protection Bureau – dissented from the FTC’s acceptance of a proposed consent order which involved, among other things, a divestiture to a private equity sponsored purchaser. He wrote that he believed there are “special considerations with financial buyers” and that “private equity participation is . . . associated with . . . firm behavior that can reduce long-term competition, including opportunistic asset sales.” This view of private equity can be seen to contrast with a view taken by the DOJ in the prior administration that private equity may support competition in certain instances, for example by funding a divestiture buyer in a merger remedy. In September 2020, the DOJ published a Mergers Remedy Manual which recognized that “in some cases a private equity purchaser may be [a] preferred” purchaser of divestiture assets. At the very least, according to the manual, the DOJ Antitrust Division “will use the same criteria to evaluate both strategic purchasers and purchasers that are funded by private equity or other investment firms.” Common Ownership and Interlocking Directorates In its recent set of resolutions, the FTC authorized staff to investigate “whether any persons, partnerships, corporations, or others simultaneously have served, or are serving, as an officer or director of two or more competing corporations or partnerships or simultaneously have had, or have, financial interests of any kind in two or more competing corporations or partnerships.” With respect to interlocking directorates, Section 8 of the Clayton Act, 15 USC §19, states that, if the corporations are above a certain size, “[n]o person shall, at the same time, serve as a director or [board-appointed] officer in any two corporations . . . that are . . . by virtue of their business and location of operation, competitors, so that the elimination of competition by agreement between them would constitute a violation of any of the antitrust laws.” The law has certain safe harbor exceptions based on the magnitude of the “competitive sales” of the corporations – i.e., “all products and services sold by one corporation in competition with the other.” Section 8 does not prohibit interlocking directorates below these thresholds. Section 8 has been interpreted to cover both “direct” interlocks – i.e., when the same individual serves as a director or officer of competing corporations – and on occasion “indirect” interlocks – i.e., where different individuals serve as directors or officers of competing corporations, but both have been “deputized” to act on behalf of the same third entity (e.g., a private equity fund). Earlier this year, the DOJ expressed concerns that interlocking directorates between two companies involved in promoting and selling tickets to live entertainment and sports events violated Section 8 of the Clayton Act. Here, according to the DOJ, two individuals served as directors of one company; and, at the same time, one of the individuals served as a director and the other individual served as an officer of another company involved in the same business as the first. The two individuals resigned their positions on the Board of the first company in order to address the DOJ’s concerns. Common ownership – specifically, whether a firm’s simultaneous ownership of the stock of competing firms can have competitive effects – has been the subject of academic debate for several years. It also featured as a topic at one of former Chairman Simons’ Hearings on Competition and Consumer Protection in the 21st Century. Other Areas of Focus In addition to the compulsory process resolutions discussed above, the FTC also authorized an investigation into unfair or anticompetitive acts or practices affecting children and an investigation

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into unfair or anticompetitive acts or practices affecting armed forces service members and veterans. Algorithmic and biometric bias, deceptive and manipulative conduct in the internet, and repair restrictions are also the subjects of authorized investigations. Earlier resolutions authorized investigations into “healthcare markets, including those regarding pharmaceuticals, pharmacies, pharmacy benefit managers, medical devices, hospitals, or other healthcare facilities or services”; “markets with participants that provide technology platform services, including platforms that connect users, buyers, sellers, or other market actors”; and unfair or deceptive acts or practices “targeting current or prospective workers or small business operators.” Significance The authorizations of compulsory process contained in the FTC’s recent investigatory resolutions will allow the Commission’s Staff, over the signature of any one Commissioner, to compel companies to produce documents and provide testimony pursuant to civil investigative demands (CIDs). In the near term, companies within the target areas of focus could receive CIDs (and indeed some may already have). It should also be noted that, while we would expect these priorities to receive near-term attention, the investigations have been authorized for a period of ten years. Beyond the possibility of receiving compulsory process from the FTC, companies in the targeted areas may be affected by future FTC rulemaking. While the outcome of any individual investigation of course remains to be seen, Chair Khan’s reference to rulemaking in her memo – and her prior support of the FTC engaging in rulemaking – suggests that in the future the FTC may seek to promulgate industry-wide rules governing certain conduct and industries under investigation. If the FTC does indeed promulgate such rules, they would be enforceable by Commission action, and violators could face FTC-imposed fines. For example, while interlocking directorates have historically been an enforcement focus, they are typically resolved by having the parties resign a position to get rid of the interlock. While no such rule has yet been proposed, if the FTC does promulgate a rule against interlocking directorates, this may signal a desire by the FTC to assess fines in those situations.