PREPARED REMARKS

Opening Remarks
FTC Hearing #5: Competition and Consumer Protection in the 21st Century

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U.S. Federal Trade Commission

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Washington, D.C.
November 1, 2018

Good morning and thank you all for joining us today. I am pleased to be able to open this morning's hearings—originally set to be our second day in this series. Due to rescheduling, we have already had the opportunity to explore some fascinating topics, and today that trend will continue as we examine two critical competition issues: vertical mergers and the consumer welfare standard. Both have made headlines of late, including the attention devoted to the Department of Justice's ongoing litigation to block the merger of AT&T and TimeWarner, and to increasingly vocal criticisms of, and challenges to, the consumer welfare standard. That is the backdrop for what I expect will be very interesting discussions today.

Our first topic is vertical mergers, which combine two firms at different points in the supply chain. They are frequently juxtaposed with horizontal mergers, which combine direct competitors. In *The Antitrust Paradox*, building on work that went back decades, Robert Bork expressed skepticism of the likelihood of harm from foreclosure, and confidence in vertical efficiencies like eliminating double marginalization.[1] Vertical mergers may also mitigate free riding and align incentives between upstream and downstream firms. Studies have shown,

[1] ROBERT H. BORK, TB 0 6shu

consistent with this theory, that vertical integration is generally pro-competitive, or competitively neutral.[2] Accordingly, the Commission is, as a general matter, typically more skeptical of horizontal mergers than of vertical mergers.

But that is not to say vertical mergers never raise competitive concerns. We will hear today from, among others, Steve Salop, whose work from the 1980s

Modernization Commission and the ABA, repeatedly, have called for updating guidelines for vertical mergers. Critics note that the Agencies have updated the Horizontal Merger Guidelines (HMGs) a few times since then—most recently in 2010; that the HMGs have gained wide acceptance by the courts, and so today offer meaningful guidance for parties considering such transactions, as well as a tool for developing clear and consistent case law. They also note that the 1984 Non-

anticompetitive conduct, and which agencies around the globe have followed. It is an economically grounded standard, which requires there be some harm to consumers for conduct to be condemned. Mere harm to competitors is considered insufficient, because a less efficient firm losing sales to a cheaper, more innovative, or more efficient rival can be—and often is—consistent with vibrant competition and with outcomes that benefit consumers. Courts and the Agencies have embraced this standard for decades.

Today, there two important discussions about the consumer welfare standard happening simultaneously. One is a continuing discussion regarding whether enforcement under the consumer welfare standard is at the appropriate level, and is properly targeted. This is an introspective question, which antitrust scholars, economists, and practitioners routinely ask. Are we bringing the right kinds of cases? Using the right kinds of evidence? Should we be doing more or less in certain places? The antitrust bar benefits from the ongoing and active analysis into these questions.

The second discussion happening now—and the one on which today's consumer welfare standard panels will focus—questions whether consumer welfare is, in fact, the proper metric by which antitrust enforcers should judge conduct. Some argue that enforcement under the consumer welfare standard has failed because of the law; and, accordingly, that we should reform the law. The FTC's hearings have addressed, and will continue to address, various assumptions