Competition and Consumer Protection: Strange Bedfellows or Best Friends?

Julie Brill

Many practitioners of consumer protection or competition law have no doubt noticed an increasing number of issues at the Federal Trade Commission involving both consumer protection and competition claims. Consumer protection and competition are, of course, the two core missions of the FTC, and their intersection is of growing significance to the business community, consumers, and practitioners, as well as to regulators. Sometimes the principles at the heart of these two areas of law point to conflicting results, while at other times they work in harmony towards the same end. This article discusses some of the different modes of interaction between consumer protection and competition law, with a particular focus on cases and other actions by the FTC. The Commission's recent antitrust case *Intel* and its recently proposed framework for privacy present two particularly salient examples of the interplay of consumer protection and competition concerns, and demonstrate that the FTC is uniquely positioned to harmonize these two areas of the law.

Consumer Protection and Competition Laws Both Address Distortions in the Marketplace

Consumer protection and competition law share at least one core concept: protecting consumers by removing distortions in the marketplace. Often the underlying conduct prohibited by these two areas of law impacts consumers in different ways. Conduct prohibited by consumer protection law usually involves individual businesses acting in a way that has a direct impact on consumers—for example, by deceiving or misleading them through false or deceptive advertising. Conduct prohibited by competition law also affects consumers, but the impact may not be as direct because the prohibited practices in the first instance affect competition between businesses, and then have an impact on consumers—for example, in the form of higher prices.

But as former FTC Commissioner Tom Leary has noted, it takes only a few more moments of thinking about consumer protection and competition law to understand that these two areas of law share the common goal of addressing distortions in the marketplace that are designed to increase, or have the effect of increasing, the sales and profitability of a business or an industry to the detriment of consumers. Consumer protection law addresses distortions that take place on the demand side of the transaction: consumers' choices in the marketplace are infringed, for example, by deceptive advertising that gives consumers the false impression that a product or service is worth more than it really is. Competition law addresses distortions that take place on the supply side: anticompetitive practices like price fixing or exclusive dealing restrict supply among competitors and elevate prices.[1]

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[1] *See* Thomas B. Leary, *Competition Law and Consumer Protection Law: Two Wings of the Same House*, 72 ANTITRUST L.J. 1147, 1147–48 (2005).

However, as with most things in the real world, the distinction is not always so neat. Occasionally, competition law addresses distortions that take place on the demand side—for example, when challenging anticompetitive practices that increase consumer switching costs. On these occasions, competition law is even more closely aligned with consumer protection law because the competition law focuses on demand side conduct that decreases consumer choice or autonomy. Similarly, consumer protection law occasionally addresses conduct aimed at competitors—for example, deceptive practices targeting the perceived performance of competitor products, which in turn harms consumers. An examination of some cases will illustrate how the principles promoted by consumer protection and competition law have interacted in the recent past.

Tension Between Competition and Consumer Protection Laws

Consumer protection and competition law share at least one core concept: protecting consumers by removing distortions in the marketplace.

Sometimes the principles promoted by competition law have the potential to trump consumer protection concerns. The *California Dental* case is a good illustration.[2] There, the FTC challenged the association's ethical code that governed competing dentists' advertisements of the price, quality, and availability of their services. For example, in order to ensure truthful and nondeceptive advertising, the ethical code prohibited the dentists from making claims of across-the-board discounts off the dentists' regular prices for certain groups of patients, such as senior citizens.[3]

The dental association claimed that the restrictions were needed because, even though some of the ads truthfully described the dentists' fees, the association was concerned that the inability of the ads to disclose all variables related to the fees could render them misleading. Officials of the association testified that in making a determination of whether a particular ad was in violation of the code, they would attempt to determine whether the ad in its entirety would be misleading to a prudent person.[4]

Superficially, the prohibitions seemed consistent with consumer protection objectives. But the Commission concluded that, as enforced, the code was anticompetitive because it effectively prohibited even accurate advertising of prices and quality, and restricted broad categories of advertising claims, without distinguishing between those that were deceptive and those that were not.[5] As such, the dentists' ability to compete through advertisements was impaired. Thus, the Commission viewed its enforcement action as ensuring that practices aimed at promoting consumer protection objectives did not violate antitrust principles.

The Ninth Circuit essentially upheld the Commission's opinion,[6] but the Supreme Court concluded that the Ninth Circuit used a standard for analyzing the advertising restrictions—a "quick look" rule of reason analysis—that was too abbreviated under the circumstances, and remanded the case for further proceedings.[7] The Court did not say the restrictions had to be examined under a full-blown rule of reason (which would require the FTC to define a market and demonstrate anticompetitive effects using a more elaborate analysis of the industry). Rather, the Court simply said that the justifications for the restraints were sufficiently substantive that "[f]or now, at least, a less

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[2] Cal. Dental Ass'n v. FTC, 526 U.S. 756 (1999).

[3] Cal. Dental Ass'n, 121 F.T.C. 190, 192–94 (1996), *aff'd sub nom.* Cal. Dental Ass'n v. FTC, 128 F.3d 720 (9th Cir. 1997), *vacated*, 526 U.S. 756 (1999).

[4] *Id.* at 347–48 (Azcuenaga, Comm'r, dissenting).

[5] *Id.* at 300–03, 307.

[6] *See* Cal. Dental Ass'n v. FTC, 128 F.3d 720, 726-30 (9th Cir. 1997), *vacated*, 526 U.S. 756 (1999).

[7] *See California Dental*, 526 U.S. at 769–81.

quick look was required."[8] The Court based its ruling on a belief that the advertising restrictions could have had a net procompetitive effect on competition, or no effect at all, and that the restrictions were, on their face, designed to avoid false and deceptive advertising, something particularly important in a market characterized by disparities in the information available as between patients and dentists.[9]

An important lesson to be drawn from the *California Dental* case is that it is not always easy to strike the right balance between competition and consumer protection concerns. Under a reasonable interpretation of the Supreme Court's ruling, the Commission's analysis of the association's activities did not strike the appropriate balance. While misuse of consumer protection objectives can clearly lead to liability under the competition laws, in the *California Dental* case the Commission was not adequately sensitive to the consumer protection aspects of the underlying conduct. This raises the obvious question of what the appropriate level of legal scrutiny should be in matters where consumer protection is asserted as a justification for conduct that encroaches on competition concerns. At a minimum, before competition principles can trump consumer protection concerns, any legitimate consumer protection issues must be identified and balanced against the competitive harm.

An important lesson to be drawn from the California Dental case is that it is not always easy to strike the right balance between competition and consumer protection concerns.

The fact that the *California Dental* case involved a self-regulatory body is an important aspect of the competitive analysis and judicial decision. The California Dental Association was a large professional association composed of competing members engaging in self-regulation.[10] Industry self-regulation is often a very good thing and should be encouraged. It can be the most efficient way for an industry to combat fraud in the marketplace and otherwise protect consumers. This theme is implicit in the Supreme Court's opinion.

Association self-regulation, however, may heighten concerns about harm to competition among members of the profession or trade. When competitors form a trade association to self-regulate, and collectively have a dominant position in the marketplace, the risk of competitive concerns grows, and the conduct must be closely examined. In *California Dental*, the fact that the members accounted for 75 percent of practicing dentists in California bolstered the Commission's competition concerns: the association's dominant position exacerbated the harm from the advertising restrictions; if the membership complied with the code requirements, then 75 percent of the practicing dentists would not engage in vigorous competition based on price.[11]

Other matters involving industry self-regulation addressed concerns that adopted regulations may further entrench competitors' positions. Notably, the Commission recently brought several cases involving professional licensing boards that have taken self-regulatory actions or issued rules under the auspices of "consumer protection," which the Commission believed harmed competition and consumers because they reduced competitive alternatives. For example, in 2007 the Commission settled a case against the South Carolina Board of Dentistry involving the board's newly imposed requirement that a dentist examine every child before a dental hygienist could provide preventive care, such as cleanings.[12] The rule prohibited the previously common practice of

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[8] *Id.* at 781.

[9] *Id.* at 771–72; *see also id.* at 774–76, 778.

[10] *Id.* at 759–62.

[11] *See* Cal. Dental Ass'n, 121 F.T.C. 190, 314–16 (1996), *aff'd sub nom.* Cal. Dental Ass'n v. FTC, 128 F.3d 720 (9th Cir. 1997), *vacated*, 526 U.S. 756 (1999).

[12] Press Release, Fed. Trade Comm'n, South Carolina Board of Dentistry Settles Charges that It Restrained Competition in the Provision of Preventive Care by Dental Hygienists (June 20, 2007), *available at* http://www.ftc.gov/opa/2007/06/dentists.shtm.

using dental hygienists as an alternative to dentists in certain settings, such as schools. The Commission found that the rule led to fewer children receiving preventive dental care. The rule was particularly egregious in the Commission's view because it largely affected economically disadvantaged children.[13] In another recent case, the Commission filed an adjudicative complaint against the North Carolina Dental Board for taking actions to block non-dentists from providing teeth whitening services.[14]

In both of these cases, the dental boards argued that the rule was needed to prevent physical harm to consumers from non-dentists, an objective grounded in consumer protection. But the Commission's pursuit of both cases struck a different balance between consumer protection and competition concerns. In both cases, the Commission believed that the boards were using a consumer protection rationale as a pretext for their desire to limit competition from non-dentists.

In a variety of other important matters, consumer protection principles often take precedence over competition principles. For example, consumer protection principles may have the effect of limiting entry into markets by new firms and products, even though the concept of "entry" traditionally plays an important role in addressing competition concerns.

From the standpoint of competition law, there is less likely to be competitive harm from mergers in markets where entry by new firms and products is unimpeded. Relatively easy entry decreases the chances of both unilateral competitive effects and coordinated interaction among the competitors in a market. Concomitantly, competition law frowns on activities that make entry in a market more difficult. For instance, some practices can violate the Sherman Act if they have the effect of making entry by rivals more difficult. Illegal tying is one example.[15] The competition agencies also frown on state regulations that increase barriers to entry, such as state Certificate of Need (CON) laws in the health care industry.[16]

Notwithstanding the important role of market entry to competition, consumer protection concerns sometimes trump the otherwise important goal of promoting entry. Advertising substantiation in the food industry presents one example of the primacy of consumer protection over competition concerns. New food products introduced in a market often are heavily advertised to gain consumer awareness. But new entrants can get into trouble if, for example, their advertising contains health claims that are not substantiated. The Commission imposes a fairly rigorous sub-

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[13] Opinion and Order of the Commission at 1–3, South Carolina State Bd. of Dentistry, FTC Docket No. 9311 (July 30, 2004), *available at* http://www.ftc.gov/os/adjpro/d9311/040728commissionopinion.pdf.

[14] Press Release, Fed. Trade Comm'n, Federal Trade Commission Complaint Charges Conspiracy to Thwart Competition in Teeth-Whitening Services (June 17, 2010), http://www.ftc.gov/opa/2010/06/ncdental.shtm; *see also* Complaint, North Carolina Bd. of Dental Examiners, FTC Docket. No. 9343 (filed June 17, 2010), *available at* http://www.ftc.gov/os/adjpro/d9343/100617dentalexamcmpt.pdf. Note that the *North Carolina Board of Dentistry* matter is currently in litigation; I did not participate in voting to authorize filing the complaint due to my previous position at the North Carolina Attorney General's office.

[15] *See* Jefferson Parish Hosp. Dist. No. 2 v. Hyde, 466 U.S. 2, 14–15 (1984), *abrogated on other grounds by* Ill. Tool Works, Inc. v. Indep. Ink, Inc., 574 U.S. 28 (2006).

[16] *See, e.g.*, U.S. Dep't of Justice & Federal Trade Comm'n, Joint Statement Before the Illinois Task Force on Health Care Planning Reform on Competition in Health Care and Certificates of Need 1–2 (Sept. 15, 2008) ("By their very nature, CON laws create barriers to entry and expansion to the detriment of health care competition and consumers."), *available at* http://www.ftc.gov/os/2008/09/V080018illconlaws.pdf.

stantiation standard for health or safety claims in food products. These claims must be supported by competent and reliable scientific evidence.[17]

Complying with substantiation requirements understandably can be burdensome for new entrants because in some cases performing the scientific studies necessary to substantiate some claims may require significant resources. Some potential entrants might therefore view substantiation requirements to be entry barriers. However, in the context of advertising health claims about food, entry through unsubstantiated claims is not considered legitimate entry. Thus, the need to comply with substantiation requirements trumps the competition objective of reducing barriers to entry.

The Commission's Endorsements and Testimonials Guides might be said to pose entry barriers as well.[18] These Guides set forth important principles of truth-in-advertising. For example, an advertisement featuring a consumer conveying that her experience with a product is "typical," when that is not the case, should disclose, clearly and conspicuously, the typical consumer experience.[19] Similarly, ads featuring statements by endorsers who have been paid to sing the praises of a product should disclose the payment.[20]

The principles underlying the Endorsements and Testimonials Guides could constrain the very type of advertising required for new market entrants to gain market share. Indeed, the Guides apply to advertising through blogs and other social media, among the lowest cost forms of advertising available to new market entrants. The Guides therefore arguably make it harder for new entrants to gain market share through such inexpensive, on-line advertising. Yet the Commission has determined that consumer protection principles supporting full disclosure about testimonials and endorsements should trump these competition concerns.

The balance between consumer protection and competition concerns seems fairly easy in these examples. Unsubstantiated health claims and deceptive testimonials have obvious harmful effects on consumers. But in other situations, it can be more difficult to make the right call. In *California Dental*, for example, the potential for harm to competition was strong, but the consumer protection concerns were arguably strong as well. The fact that the Supreme Court was more influenced by the consumer protection aspects of the conduct than both the Commission and the Ninth Circuit shows that in some matters where the two principles pull in opposite directions, it is not easy to reach the right outcome.

Where Consumer Protection and Competition Concerns Harmonize Towards the Same Result

In other matters, consumer protection and competition principles converge and mutually support each other in the analysis of conduct harmful to consumers. One area that has received close attention for possible anticompetitive conduct involves high-tech markets where firms appear to

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[17] *See, e.g.*, Agreement Containing Consent Order, Dannon Co., FTC File No. 082-3158 (Dec. 15, 2010) (requiring "competent and reliable scientific evidence that is sufficient in quality and quantity based on standards generally accepted in the relevant scientific fields, when considered in light of the entire body of relevant and reliable scientific evidence, to substantiate that the representation is true," and defining "competent and reliable scientific evidence" to mean "tests, analyses, research, or studies that have been conducted and evaluated in an objective manner by qualified persons and are generally accepted in the profession to yield accurate and reliable results"), *available at* http://www.ftc.gov/os/caselist/0823158/101215dannonagree.pdf; Order to Show Cause & Order Modifying Order, Kellogg Co., FTC Docket No. C-4262 (May 28, 2010) (same), *available at* http://www.ftc.gov/os/caselist/0823145/100602kelloggorder.pdf.

[18] Guides Concerning the Use of Endorsements and Testimonials in Advertising, 16 C.F.R. pt. 255 (2010).

[19] *Id.* § 255.2(b).

[20] *Id.* § 255.5.

be attaining dominance. In this area, consumer protection problems can be intermixed with exclusionary conduct. The FTC's very recent *Intel* case is a good example.[21] Another area where consumer protection and competition concerns converge involves privacy.

Intel. In December 2009, the Commission filed a complaint against Intel alleging that, since 1999, it had unlawfully maintained a monopoly in the market for central processing units (CPUs), and sought to acquire a second monopoly in graphics processing units (GPUs), using a variety of practices that violated the competition laws as well as both prongs of Section 5 of the FTC Act.[22] The Complaint alleged that in 1999 and again in 2003, an Intel competitor, AMD, started to release products that were superior in performance and quality. With its monopoly threatened, Intel engaged in several practices that the Commission believed were designed to block or slow down the adoption of competitive products and allow Intel to maintain its monopoly, all to the detriment of consumers. Among the practices of concern were Intel's attempts to punish its own customers—computer manufacturers—for using AMD's products. For example, Intel allegedly used market share discounts to render competing products economically unfeasible to its customers.[23]

Intel also used practices that the Commission alleged created the misimpression that competing products did not perform as well as they actually did.[24] In the GPU market, the Complaint alleged that Intel had become threatened by emerging competitors and had again found itself behind its competitors with respect to technological innovation. Specifically, technological advances had allowed GPUs to add more CPU functionality with each product generation, making CPUs less relevant. In response, Intel allegedly engaged in unfair methods of competition in the GPU market that were designed to maintain its monopoly in the CPU market, and to create a dangerous probability that Intel would acquire a monopoly in the GPU market.[25]

The consumer protection aspects of the case involved Intel's compiler.[26] Intel introduced a new version of its compiler shortly before AMD released its technologically superior CPU. Intel's new compiler slowed the performance of software on AMD's CPU. To manufacturers, software vendors, and the unknowing public, the slower performance of computers using AMD's and other competitors' products when running certain software applications was mistakenly attributed to the performance of the competitors' products, and not to the undisclosed design of Intel's compiler. Intel failed to adequately disclose that the changes it had made to its compilers were the cause of the slower performance of AMD's CPUs.[27] The Commission believed that Intel intentionally misrepresented the cause of the performance differences and whether these differences could be solved, in an effort to portray its competitors' products as inferior.[28] In summary, the Complaint alleged that

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[21] Press Release, Fed. Trade Comm'n, FTC Settles Charges of Anticompetitive Conduct Against Intel (Aug. 4, 2010), http://www.ftc.gov/opa/2010/08/intel.shtm; Decision & Order, Intel Corp., FTC Docket No. 9341 (Oct. 29, 2010), *available at* http://www.ftc.gov/os/adjpro/d9341/101102inteldo.pdf.

[22] Section 5 of the FTC Act prohibits "[u]nfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce." 15 U.S.C. § 45(a) (1). The first part of the statutory language (unfair methods of competition) covers competition violations, and the second part (unfair or deceptive acts or practices) covers consumer protection violations.

[23] Complaint ¶¶ 4–7, Intel Corp., FTC Docket No. 9341 (Dec. 16, 2009), *available at* http://www.ftc.gov/os/adjpro/d9341/091216intelcmpt.pdf.

[24] *Id.* ¶ 5.

[25] *Id.* ¶¶ 12–20.

[26] *Id.* ¶ 9. A compiler is a tool used by developers to write software. The compiler translates the "source code" of programs into "object code" that can be run as software on consumers' computers. *Id.* ¶ 57.

[27] *Id.* ¶¶ 58–59.

[28] *Id.* ¶ 60.

this course of conduct over the last decade had stalled the widespread adoption of non-Intel products and unlawfully maintained Intel's monopoly in the CPU market.[29]

Intel settled the case in August 2010.[30] The Commission's Order puts Intel under important restrictions that will improve the competitive landscape for the CPU and GPU markets. Among other things, the Order prohibits Intel from providing benefits to computer manufacturers in exchange for their promise to buy processors from Intel exclusively or their promise to refuse to buy processors from others. It also prohibits Intel from retaliating against computer manufacturers that do business with non-Intel suppliers. For example, Intel is not permitted to withhold benefits from computer manufacturers that buy CPUs from Intel competitors.[31] Importantly, the Order also contains consumer protection requirements, including corrective advertising about the compilers, and a program to reimburse software developers and vendors harmed by Intel's allegedly deceptive conduct.[32]

Thus, the combined competition and consumer protection violations in* Intel *were enforced in a harmonious manner to protect consumers.

Thus, the combined competition and consumer protection violations in *Intel* were enforced in a harmonious manner to protect consumers. The Commission's ability to protect competition and consumer protection simultaneously in this case was facilitated by the fact that Intel aimed its allegedly anticompetitive and deceptive conduct at the same target: its competitors.

Privacy. Privacy is another area where competition and consumer protection principles may converge and mutually support each other in the analysis of conduct harmful to consumers. Privacy is a central element of the Commission's consumer protection mission. In recent years, advances in computer technology have made it possible for detailed information about consumers to be stored, sold, shared, aggregated, and used more easily and cheaply than ever, in ways not feasible, or even conceivable, before. These advances in technology have allowed online companies to engage in targeted advertising, a practice that has many important benefits. Consumers receive information about products and services in which they are more likely to be interested. Businesses can better target their advertising dollars to reach the right audience. Perhaps most importantly, this type of advertising supports a great deal of the Internet's free access to rich sources of information.

Yet serious privacy concerns arise when companies can easily collect, combine, and use so much information from consumers. The dramatic changes in technology have challenged the vitality of the Commission's traditional approach to privacy.

The Commission has been grappling with these issues over the past year. The FTC staff recently issued a report for policymakers like Congress, as well as for the technology industry itself, that proposes a framework for rethinking their approach to privacy.[33] As the report notes, it is hardly a surprise to discover that there are significant gaps in older privacy protection models. In the mid-1990s, the fair information practices model was prevalent, with its call for businesses to provide

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[29] *Id.* ¶ 11.

[30] *See* Press Release, Fed. Trade Comm'n, FTC Settles Charges of Anticompetitive Conduct Against Intel (Aug. 4, 2010), http://www.ftc.gov/opa/2010/08/intel.shtm; Decision & Order, Intel Corp., FTC Docket No. 9341 (Oct. 29, 2010), *available at* http://www.ftc.gov/os/adjpro/d9341/101102inteldo.pdf.

[31] Decision & Order at 9–10, *Intel Corp.*

[32] *Id.* at 14–17.

[33] Fed. Trade Comm'n, Protecting Consumer Privacy in an Era of Rapid Change: A Proposed Framework for Businesses and Policymakers (2010) (preliminary FTC staff report) [hereinafter Privacy Report], *available at* http://www.ftc.gov/os/2010/12/101201privacyreport.pdf.

consumers with notice and choice about how their personally identifiable information is used.[34] Then in the early 2000s, the Commission and others shifted to a harm-based model, under which the regulatory framework focused on data security, data breaches, and identity theft.[35]

However, the "notice and choice" model, as it is being used today, places too great a burden on consumers, and simply is not practical when the notice is being delivered to mobile devices. Furthermore, a model that focuses on consumer "harms" may not sufficiently address the myriad harms that can result from insufficient privacy protections surrounding information about medical conditions, children, and sexual orientation, to name a few salient examples. The harm-based model is also fundamentally reactive: it addresses and corrects privacy and data security breaches after they have been discovered, rather than focusing on creating a climate in which privacy is part of the fundamental design of products and services being offered.[36] And both models focus on "personally identifiable" information, which may be out of touch with technological advances that allow previously non-identifiable data to be "re-identified" with a consumer. It is for these reasons that the FTC staff's report proposes a new framework for thinking about privacy.

The proposed framework is designed to push both policymakers and the industry toward a more dynamic approach to addressing privacy in today's technologically advanced landscape, such as in the area of online behavioral advertising. The main elements of the framework include the following:

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[34] For example, Title V, Subtitle A, of the Gramm-Leach-Bliley (GLB) Act, 15 U.S.C. §§ 6801–6809, requires, among other things, that financial institutions provide their customers with annual notices explaining their privacy practices and their customers' rights to limit some sharing of the customers' information. For more detail, see Federal Trade Comm'n, Bureau of Consumer Protection Bus. Ctr., *In Brief: The Financial Privacy Requirements of the Gramm-Leach-Bliley Act*, http://business.ftc.gov/documents/bus53-brief-financial-privacy-requirements-gramm-leach-bliley-act.

[35] The FTC's Safeguards Rule, for example, sets forth standards that certain financial institutions must use in developing, implementing, and maintaining reasonable safeguards to protect the security, confidentiality, and integrity of any nonpublic personal information pertaining to their customers. *See* 16 C.F.R. pt. 314 (2010) (implementing GLB Act §§ 501(b), 505(b)(2), 15 U.S.C. §§ 6801(b), 6805(b)(2)). In addition, numerous states have enacted breach notification laws. *See, e.g.*, Samuelson Law, Tech. & Public Pol'y Clinic, Univ. of Cal.-Berkeley Sch. of Law, *Security Breach Notification Laws: Views from Chief Security Officers*, App. A, at 40–46 (Dec. 2007), *available at* http://www.law.berkeley.edu/files/cso_study.pdf.

Both the FTC and the states have brought numerous law enforcement actions in the data security context. *See, e.g.*, Press Release, Fed. Trade Comm'n, Twitter Settles Charges that It Failed to Protect Consumers' Personal Information; Company Will Establish Independently Audited Information Security Program (June 24, 2010), *available at* http://www.ftc.gov/opa/2010/06/twitter.shtm; Agreement Containing Consent Order, Twitter, Inc., FTC File No. 092-3093 (June 24, 2010), *available at* http://www.ftc.gov/os/caselist/0923093/100624twitteragree.pdf; Stipulated Final Judgment and Order for Permanent Injunction and Other Equitable Relief as to Defendants LifeLock and Davis, FTC v. LifeLock, Inc., No. 2:10-CV-00530-NVW (D. Ariz. Mar. 15, 2010), ECF No. 9; Press Release, Office of the Atty. Gen., Cal. Dep't of Justice, Brown Stops LifeLock from Misleading Consumers about Identity Theft Protection Services (Mar. 9, 2010) (announcing settlement entered into jointly with FTC and 34 other states), *available at* http://ag.ca.gov/newsalerts/release.php?id=1869; Assurance of Discontinuance, State v. TJX Cos., No. 46S-6-09 WNCV (Vt. Super. Ct. June 23, 2009) (settlement entered into with 40 states and District of Columbia), *available at* http://www.atg.state.vt.us/assets/files/TJX%20AOD.pdf; Decision & Order, TJX Cos., FTC Docket No. C-4227 (July 29, 2008) (consent order), *available at* http://www.ftc.gov/os/caselist/0723055/080801tjxdo.pdf; Press Release, Office of the Atty. Gen., State of Vt., Attorney General Sorrell Reaches Agreement with Choicepoint (May 31, 2007), http://www.atg.state.vt.us/news/attorney-general-sorrell-reaches-agreement-with-choicepoint.php; Stipulated Final Judgment and Order for Civil Penalties, Permanent Injunction and Other Equitable Relief, United States v. ChoicePoint, Inc., No. 1:06-CV-0198-JTC (N.D. Ga. Feb. 15, 2006), ECF No. 5; Decision & Order, BJ's Wholesale Club, Inc., FTC Docket No. C-4148 (Sept. 20, 2005) (consent order), *available at* http://www.ftc.gov/os/caselist/0423160/092305do0423160.pdf; Stipulated Consent Agreement & Final Order, FTC v. Toysmart.com, LLC, No. 00-11341-RGS, 2000 WL 34016434 (D. Mass. July 21, 2000).

[36] Daniel J. Solove, *Identity Theft, Privacy, and the Architecture of Vulnerability*, 54 HASTINGS L.J. 1227, 1232–46 (2003).

- Companies should adopt a "privacy by design"[37] approach that involves building privacy protections into their everyday business practices, such as providing reasonable security for consumer data, collecting only the data needed for a specific business purpose, retaining data only as long as necessary to fulfill that purpose, safely disposing of data no longer in use, and implementing reasonable procedures to promote data accuracy.
- Companies should provide information to consumers about their data practices that includes simple, more streamlined choices than have been used in the past. Choices should be clearly and concisely described, and offered at a time and in a context in which the consumer is making a decision about his or her data.
- Companies should improve the transparency of their data practices, including improving their privacy notices so that consumer groups, regulators, and others can compare data practices and choices across companies.

The proposed new framework for privacy would promote both competition and consumer protection principles . . .

The consumer protection concerns surrounding privacy issues are closely connected to competition concerns. Recently, several commentators have urged a world where firms compete based on how they collect, use, store, and dispose of consumers' information—that is, competition based on privacy.[38] Our current privacy models do little to foster competition on privacy, and as a result there has been too little competition with respect to privacy in the marketplace.[39] Rethinking the way the Commission views privacy, and encouraging "privacy by design," may present firms with greater incentives to compete on privacy, thereby increasing consumer choice and opportunities in this area.

In addition, the proposed new framework's principles may move regulators and businesses away from a reactive model that focuses on privacy concerns after harm is done and towards a model where companies are encouraged to entice consumers to use their products and services based, in part, on their privacy practices.

The proposed new framework for privacy would promote both competition and consumer protection principles: both areas of law would be aligned to address demand side distortions of the marketplace. This harmonization of the two areas enhances the Commission's ability to develop effective guidance with respect to privacy.

It is worth noting that the Commission previously expressed a strong belief that its competition policies should include efforts to promote competition on privacy. In the Google/Doubleclick merger investigation closing statement nearly three years ago,[40] the Commission emphasized that competition on non-price attributes like privacy is an important consideration for antitrust enforce-

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[37] Privacy by Design is an approach that Ann Cavoukian, Ph.D., Information and Privacy Commissioner of Ontario, has advocated. *See* Ann Cavoukian, Ph.D., Ont. Info. & Privacy Comm'r, *PbD: Privacy by Design*, *available at* http://www.ipc.on.ca/images/Resources/privacybydesign.pdf.

[38] *See* Emily Gray, *FTC to Boost Competition in Privacy Protection*, GLOBAL COMPETITION REV., Sept. 23, 2010, http://www.globalcompetitionreview.com/news/article/29065/ftc-boost-competition-privacy-protection-/; Pamela Jones Harbour & Tara Isa Koslov, *Section 2 in a Web 2.0 World: An Expanded Vision of Relevant Product Markets*, 76 ANTITRUST L.J. 769, 773–75, 792–97 (2010).

[39] There have been a few positive developments with respect to competition in the privacy realm. Some companies have taken positive steps to improve baseline security, including Microsoft, which has called for data security standards for cloud computing services, and Google, which recently announced that it would use encryption by default for its email service. *See* FED. TRADE COMM'N, PRIVACY REPORT, *supra* note 33, at 47–48 & n.122. In addition, major search engines have shortened their retention periods for search data. *See id.* at 47–48 & n.122. Several companies have also developed new tools that allow consumers to control their receipt of targeted advertisements and to see and manipulate the information companies collect about them for targeted advertising. *See id.* at 63 & n.149.

[40] *See* Statement of the Federal Trade Commission Concerning Google/Doubleclick, FTC File No. 071-0170 (Dec. 20, 2007), *available at* http://www.ftc.gov/os/caselist/0710170/071220statement.pdf.

ment. And the recently revised Horizontal Merger Guidelines, issued jointly with the Department of Justice, reaffirm this point. A newly added section on innovation in the Guidelines stresses the importance of non-price competition, thus providing ample room to consider the impact of a transaction on privacy-based competition.[41]

The proposed new privacy framework nonetheless poses some complications for competition policy. For example, the new framework arguably could impact the ability of new firms to enter a market. Can new firms design the kinds of dynamic, just-in-time notices that should now be provided? Can they adequately address concerns about personally identifiable information, secondary uses of information, and use of so-called "legacy" data collected under prior privacy regimes? Or will these new recommendations create a barrier to entry in markets that have been the hallmark of dynamism in our economy?

Rather than viewing the proposed new privacy framework as imposing a barrier to market entry for new firms, the new framework might instead present market entrants with an *advantage*, by providing them with a guidepost for creating business models that address privacy concerns from the outset, rather than as an afterthought. Indeed, some data brokers and other information firms believe it is much easier for firms to design privacy protections into their new business models and new forms of consumer communications than it is to retrofit old systems to meet the realities of today's privacy concerns. Thus, new firms may well have a "leg up" on existing players if they implement these recommendations at the start of their business endeavors.

And in cases where the industry implements the proposed framework under the auspices of self-regulation, the Commission will need to watch developments closely to ensure that such requirements, ostensibly aimed at protecting privacy, are not simply a means to keep out new entrants. As in other Commission actions involving self-regulatory regimes, there may be a tipping point at which self-regulation turns anticompetitive, particularly in cases where the framework is developed by industry players that have a dominant market position.

Conclusion

The Commission will undoubtedly continue to take a strong interest in matters that involve both consumer protection and competition issues. In today's global economy, businesses are under great pressure to come up with new products and ideas rapidly, and such pressure can cause businesses to stray from competition and consumer protection laws that govern their practices. Moreover, the fast-paced, dynamic marketplace that typifies high technology industries—which regulators should strive to promote—presents special challenges at the intersection of competition and consumer protection law enforcement. In light of its unique and exclusive focus on both consumer protection and competition concerns, the Commission is well positioned to tackle these challenges at the intersection as they arise in future cases. ●

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[41] *See* U.S. Dep't of Justice & Fed. Trade Comm'n, Horizontal Merger Guidelines § 6.4, at 23–24 (2010), *available at* http://www.ftc.gov/os/2010/08/100819hmg.pdf.