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LATIN AMERICAN AND CARIBBEAN COMPETITION FORUM

**Session I: Disruptive innovation in Latin America and the Caribbean:
Competition enforcement challenges and advocacy opportunities**

-- Contribution from United States --

12-13 April 2016, Mexico City, Mexico

The attached document from the United States is circulated to the Latin American and Caribbean Competition Forum FOR DISCUSSION under Session I at its forthcoming meeting to be held on 12-13 April 2016 in Mexico.

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LATIN AMERICAN AND CARIBBEAN COMPETITION FORUM



14th Latin American and Caribbean Competition Forum
12-13 APRIL 2016, Mexico City, Mexico

Session I: Disruptive innovation in Latin America and the Caribbean: Competition enforcement challenges and advocacy opportunities

-- CONTRIBUTION FROM THE UNITED STATES --

1. Introduction

1. Innovation is the hallmark of a dynamic and competitive economy, but can pose challenges for legislative and regulatory bodies trying to keep pace with rapidly evolving businesses. Disruptive innovation¹ (including new products, services, and business models), in particular, often results in new, better, and/or lower-priced products and services to consumers, but may not fit within existing regulatory frameworks, and thus, can raise challenges for regulators. Competition authorities can play an important role shaping the inevitable transitions caused by disruptive innovation, by advocating for regulatory responses that do not unduly restrain competition, enforcing competition rules to ensure that incumbents do not foreclose new rivals from the market, and using studies and other research methods to foster greater understanding of new technologies and business models.

2. This paper first describes policy issues that may arise when disruptive innovation occurs in regulated industries, and explains the advocacy approaches taken by the Federal Trade Commission (“FTC” or “Commission”) and the Department of Justice’s Antitrust Division (“DOJ”) (collectively, “the Agencies”). The paper then highlights enforcement actions taken by the Agencies to prevent incumbent firms from blocking the growth or development of disruptive technologies and business models. The

¹ “Disruptive innovations,” as stated in the Background Paper for this session, include “new products, processes or business models that redefine a market and displace incumbent firms” (although definitions are subject to disagreement). See DAF/COMP/LACF(2016) at 4-5; see also Joseph Bower & Clayton Christensen, *Disruptive Technologies: Catching the Wave*, 73 HARV. BUS. REV. 43 (1995). Disruptive innovations generally have dramatic impacts on markets, and are not incremental technological developments nor regular, predictable improvements. The OECD Secretariat has noted that markets that are particularly susceptible to disruptive innovation are characterized by (1) strong network effects and, in some cases, (2) rigid regulation. See DAF/COMP/LACF(2016) at 5.

concluding section discusses the emergence of the “sharing” economy as an area of recent FTC engagement.

2. Disruptive Innovation and Regulation

3. Throughout the history of the United States, disruptive innovation has shaped and reshaped industries. Disruptive innovation often takes the form of wholly new products or services; in other instances, innovation may involve new ways of delivering existing products and services to consumers or new business models, often addressing unmet or under-served consumer needs. Recently, such innovations have transformed a number of U.S. industries in ways that have benefitted consumers. Historically, disruptive innovation itself has posed little concern for competition enforcement agencies in the United States, because it tends to spur greater competition. However, the responses to disruptive innovation by incumbent rival firms, as well as by regulators at the state and local levels in the United States, can raise competition concerns for the Agencies.

4. Innovation by new entrants in regulated sectors may give rise to tension between the innovator and incumbent regulated firms, especially when the existing regulatory system is based on a business model or technology the innovator does not use. In this scenario of regulatory mismatch, innovators may argue that they operate outside the existing regulatory framework and therefore are not subject to it. Incumbent firms, by contrast, may argue that these new competitors perform functions that are meant to be covered by the existing statutory and regulatory requirements or prohibitions, and that protection of the public and regulatory fairness require that innovators be held to the same standards as incumbents.

5. Incumbent firms sometimes attempt to use the existing regulatory process to make it more difficult for new products, services, and business models to compete by encouraging regulators to amend existing regulations to more explicitly cover the innovative product, service, or business model or to put in place regulations with which new businesses cannot comply. They also may advocate for regulations that raise the innovator’s cost of entry or create rules that entirely prevent entry, as has been occurring in transportation services, where incumbents and trade associations have argued against disruptive ride-sharing applications such as Uber, Lyft, and Sidecar.² Conversely, disruptive firms may begin providing service without complying with existing regulatory protections, arguing that the regulations do not apply and that compliance is not necessary to protect the public in light of the other mechanisms for protection offered by the new firms. This can potentially undermine the achievement of safety, consumer protection or other public policy goals, while disadvantaging incumbent firms that continue to be subject to existing regulations. In formulating a regulatory response to disruptive innovation, policymakers must strike a careful balance between promoting legitimate policy objectives, such as protection of consumers from unsafe, unfair, and deceptive practices, and adopting approaches that predominantly serve to protect incumbent providers.

² See, e.g., Andrew Zaleski, *Welcome to the Uber Wars*, POLITICO MAGAZINE (Sept. 2, 2014), <http://www.politico.com/magazine/story/2014/09/welcome-to-the-uber-wars-110498.html#.VWcQHrHD83E>; *Community-wide Taxi Service Endangered by “Ridesharing,” WHO’S DRIVING YOU?* (June 30, 2014), available at <http://www.whosdrivingyou.org/uploads/2/5/1/4/25145532/community-wide-access-fact-sheet.pdf> (“Uber, Lyft and Sidecar simply do not serve all areas of a community at all hours of the day. By stealing more lucrative fares, they will ultimately leave transportation deserts in underprivileged neighborhoods where people rely on taxicabs for daily errands.”—Robert Werth, President of the Taxicab, Limousine & Paratransit Association.”)

3. Possible Competition Agency Approaches

3.1 Competition Advocacy

6. The Agencies routinely provide comments to regulators urging consideration of the competitive implications of regulations and regulatory proposals.³ These comments have included competition advocacy relating to rules that may limit competition from innovators. In this work, the Agencies take into account the potential competitive impact of regulations, as well as potential health and safety benefits or other policy objectives, the likelihood that the regulations are well-suited to address well-founded concerns, and the availability of a less restrictive means to achieve the same legitimate policy goals without unduly restraining competition.⁴ Advocacy comments typically explain that vigorous competition can serve to enhance, rather than undermine, the quality of products and services, underscoring that policymakers do not necessarily have to choose between protecting consumers and promoting competition; rather, appropriate consumer protection and increased competition can occur at the same time. The role of the competition authority is to encourage regulators to take competition values and economic analysis into account and to determine whether the proposed regulation may impede competition. As highlighted in FTC and DOJ advocacy letters in a number of industries, including passenger motor vehicle transportation services, automotive distribution, mobile spectrum allocation, and real estate, described below, the regulator’s goal should be to avoid imposing restraints that may impair competition in a way that is greater than necessary to address legitimate public interest concerns.

3.1.1 Transportation Regulation

7. Traditionally, the market for passenger motor vehicle transportation services in the United States has been heavily regulated at the state and local levels, and the regulatory structures have remained largely unchanged for decades.⁵ In the past few years, however, this marketplace has been transformed by the introduction of new smartphone-based applications and platforms, such as Uber, Lyft, Sidecar, and Hailo. Transportation platform applications enable drivers and consumers to arrange and pay for commercial passenger motor vehicle transportation services in new ways, raising challenges when their business models may not fit well within existing regulatory frameworks. For example, the applications use the GPS capabilities of smartphones to enable consumers to locate nearby vehicles and track their arrival on a map.

³ Many relevant regulations in the U.S. exist at the state and local levels. As part of their missions, the Agencies consider how disruptive technologies may impact competition and, for the FTC, consumer protection. *See generally*, Edith Ramirez, Fed. Trade Comm’n, *Keynote Remarks of FTC Chairwoman Edith Ramirez* (Oct. 2, 2015), *available at* https://www.ftc.gov/system/files/documents/public_statements/810851/151002fordhamremarks.pdf. *See also* the Joint Statement of the FTC and DOJ to the Virginia Certificate of Public Need Work Group (Oct. 2015), *available at* <https://www.justice.gov/atr/case-document/file/788171/download>; DOJ/Patent and Trademark Office Joint Policy Statement on Remedies for Standards-Essential Patents Subject to Voluntary F/RAND Commitments (January 2013), *available at* <http://www.justice.gov/atr/public/guidelines/290994.pdf>.

⁴ FTC and staff advocacy comments, testimony, and letters are available on the FTC’s advocacy filings web page at <http://www.ftc.gov/policy/advocacy/advocacy-filings>. DOJ comments and testimony are available at <http://www.justice.gov/atr/public/comments-testimony.html>.

⁵ Regulations typically provide strict controls on entry, fares, and service. Mark W. Frankena & Paul A. Pautler, *An Economic Analysis of Taxicab Regulation* 15 (1984) (FTC Bureau of Economics Staff Report), *available at* <http://www.ftc.gov/be/econrpt/233832.pdf>. *See also* Organisation for Economic Co-operation and Development (“OECD”), Directorate for Financial and Enterprise Affairs, Competition Committee Working Party No. 2 on Competition and Regulation, *Taxi Services Regulation and Competition* 200 (Sept. 11, 2008) (submission of the United States), *available at* <http://www.oecd.org/regreform/sectors/41472612.pdf>.

They also utilize smartphone capabilities to enable new fare calculation methods based on factors such as distance, time, or demand. In addition, the applications use credit card payments and electronic receipts, allow riders to rate their experience with particular drivers, and vice-versa. These applications may be more responsive to consumer demand, may promote a more efficient allocation of resources (e.g., vehicles and drivers) to consumers, and may reduce consumers' payment transaction costs. At the very least, they provide new alternatives for consumers.

8. Providers of passenger motor vehicle transportation services compete on a variety of dimensions, including price, availability, timeliness, convenience, quality, vehicle type, payment mechanism, and other amenities. Since 2013, FTC staff has responded to requests from state and local legislators for its opinion on proposed transportation regulations. These advocacy letters suggest that legislators carefully consider the potential direct and indirect competitive impact of proposed transportation regulations.⁶ The letters emphasize that unwarranted restrictions on competition should be avoided and that any restrictions on competition should be no broader than necessary to address legitimate subjects of regulation, such as safety and consumer protection, and narrowly crafted to minimize any potential anticompetitive impact.⁷ Accordingly, FTC staff recognized that regulation might properly focus on ensuring qualified drivers, safe and clean vehicles, sufficient liability insurance, transparency of fare information, and compliance with other applicable laws, and that regulation of new smartphone applications should focus primarily on these issues as well as other consumer protection issues, such as privacy, data security, and the prevention of identity theft.⁸ The FTC advocacies also highlight that any resulting regulation should not, in purpose or effect, favor one group of competitors over another.⁹

9. In the field of civil aviation, the entry of low-cost carriers has proven to be a disruptive innovation to the business model of established legacy carriers. DOJ has sought to facilitate entry of low-cost carriers through advocacy directed at pro-competitive allocation of slots by government agencies. In

⁶ FTC advocacy letters are issued by staff and do not necessarily represent the views of the FTC or of any individual Commissioner. The Commission, however, votes to authorize staff to submit these comments. See, e.g., Federal Trade Commission Staff Letter to Alderman Brendan Reilly, Chicago City Council regarding Proposed Ordinance O2014-1367 (Apr. 15, 2014), available at <https://www.ftc.gov/policy/policy-actions/advocacy-filings/2014/04/ftc-staff-comment-honorable-brendan-reilly-concerning>; Federal Trade Commission Staff Letter to Jacques P. Lerner, General Counsel, District of Columbia Taxicab Commission regarding Second Proposed Rulemakings regarding Chapters 12, 14, and 16 of Title 31 (June 7, 2013), available at <https://www.ftc.gov/policy/policy-actions/advocacy-filings/2013/06/ftc-staff-comments-district-columbia-taxicab>; Federal Trade Commission Staff Letter to Colorado Public Utilities Commission regarding Docket No. 13R-0009TR (Mar. 6, 2013), available at <https://www.ftc.gov/policy/policy-actions/advocacy-filings/2013/03/ftc-staff-comment-colorado-public-utilities>. The FTC makes all advocacy letters available on its website so that other regulators and interested parties can benefit from FTC staff's analysis and recommendations when assessing regulatory regimes in other regions.

⁷ *Id.*

⁸ *Id.*

⁹ *Id.* See also Maureen K. Ohlhausen, Comm'r, Fed. Trade Comm., *Brother, May I?: The Challenge of Competitor Control Over Market Entry* 21 (May 29, 2015), available at https://www.ftc.gov/system/files/documents/public_statements/645861/150529gmukeynote.pdf; Joshua D. Wright, Comm'r, Fed. Trade Comm'n, *Regulation in High-Tech Markets: Public Choice, Regulatory Capture, and the FTC* 23-25 (Apr. 2, 2015), available at https://www.ftc.gov/system/files/documents/public_statements/634631/150402clemson.pdf; Andy Gavil, Debbie Feinstein & Marty Gaynor, Fed. Trade Comm'n, *Who decides how consumers should shop?* (Apr. 24, 2014), available at <https://www.ftc.gov/news-events/blogs/competition-matters/2014/04/who-decides-how-consumers-should-shop>.

2010, for example, DOJ filed comments with the Federal Aviation Administration with respect to an exchange of slots involving airports in Washington, DC and New York City.¹⁰

3.1.2 Automotive Distribution

10. In the U.S. auto industry, emerging sales methods are disrupting the long-standing distribution model, which is based on auto manufacturers selling their products through networks of franchised third-party dealers that also provide warranty and other services to auto purchasers. In many U.S. states, statutory regimes are no longer limited to regulating the franchise relationship between manufacturers and dealers, but include prohibitions on manufacturers' direct sale of vehicles to consumers. These prohibitions require the sale of new cars through franchised third-party dealers, discouraging new, innovative approaches to the sale of automobiles.¹¹ Blanket prohibitions on direct manufacturer sales to consumers are an anomaly within the larger economy. Most manufacturers and suppliers in other industries make decisions about how to design their distribution systems based on their own business considerations and consumer demand. These competitive dynamics weed out inefficient, unresponsive, or otherwise inadequate distribution practices without government intervention. Prohibitions on direct sales in most states has inhibited plans by at least two new auto manufacturers, Tesla and Elio, to distribute their products through alternative means rather than through a network of franchised dealers.¹²

11. FTC staff recently submitted advocacy letters to multiple state legislators considering legislation on direct car sales.¹³ FTC staff did not suggest that new methods of automotive sales are necessarily superior to traditional methods; rather, staff suggested that distribution models should be selected through the competitive process. FTC staff has cited economic literature showing that a manufacturer's decision concerning the distribution of its products is context specific, and that manufacturers compete to respond to consumer needs by choosing from among direct sales to consumers, reliance on independent dealers, or

¹⁰ See <http://www.justice.gov/atr/public/comments/257463.htm> and <http://www.justice.gov/atr/public/comments/257467.pdf>.

¹¹ See Andy Gavil, Debbie Feinstein & Marty Gaynor, Fed. Trade Comm'n, *Who decides how consumers should shop?* (Apr. 24, 2014), available at <https://www.ftc.gov/news-events/blogs/competition-matters/2014/04/who-decides-how-consumers-should-shop>.

¹² See Marina Lao, Debbie Feinstein, & Francine Lafontaine, Fed. Trade Comm'n, *Direct-to-consumer auto sales: It's not just about Tesla* (May 11, 2015), available at <https://www.ftc.gov/news-events/blogs/competition-matters/2015/05/direct-consumer-auto-sales-its-not-just-about-tesla>.

¹³ See, e.g., Fed. Trade Comm'n, Staff Letter to Senator Darwin L. Boohar, Michigan Senate regarding Senate Bill 268 (May 7, 2015), available at https://www.ftc.gov/system/files/documents/advocacy_documents/ftc-staff-comment-regarding-michigan-senate-bill-268-which-would-create-limited-exception-current/150511michiganautocycle.pdf (advocacy commenting on a bill in the Michigan legislature exempting a category of vehicles from that state's prohibition on direct car sales by all manufacturers); Fed. Trade Comm'n, Staff Letter to Assemblyman Paul D. Moriarty, General Assembly of the State of New Jersey regarding Several Bills Pending in the New Jersey Legislature (May 16, 2014), available at https://www.ftc.gov/system/files/documents/advocacy_documents/ftc-staff-comment-new-jersey-general-assembly-regarding-assembly-bills-2986-3096-3041-3216-which/140516nj-autoadvocacy.pdf (advocacy relating to a proposed partial repeal of New Jersey's prohibition on direct car sales by all manufacturers); Fed. Trade Comm'n, Staff Letter to Rep. Michael J. Colona, Missouri House of Representatives regarding House Bill No. 1124 (May 15, 2014), available at https://www.ftc.gov/system/files/documents/advocacy_documents/ftc-staff-comment-missouri-house-representatives-regarding-house-bill-1124-which-would-expand/140515mo-autoadvocacy.pdf (advocacy concluding that the proposed legislation, that would have expanded Missouri's prohibition on direct-to-consumer sales, requiring all new motor vehicles in the state to be sold through independent dealers, would render consumers unable to choose how and from whom they want to purchase their cars).

some combination of the two.¹⁴ Staff underscored that the vast majority of economic literature suggests that allowing firms in competitive marketplaces to decide how to distribute their products leads to better outcomes for consumers.¹⁵ Accordingly, staff’s auto distribution advocacy letters emphasized that, absent countervailing public policy considerations, automobile manufacturers should be permitted to choose the distribution method they believe is responsive to consumer preferences. Concurrent with the submission of these advocacy letters, FTC staff published blog posts on these issues.¹⁶

12. Subsequently, in at least one U.S. state, the legislature eased its ban on direct automobile sales. New Jersey enacted a law in early 2015 that allows Tesla to operate four direct-sale dealerships.¹⁷ The FTC also hosted a workshop on January 19, 2016 to explore competition and related issues in the U.S. auto distribution system, including how emerging trends in the industry may affect consumers.¹⁸ Like other FTC advocacy work, this workshop was used both to refine the FTC’s own understanding and expertise and to share learning on these evolving issues with the public, with the goal of ensuring that relevant competition issues are understood more broadly and considered in current and future regulatory reviews.

3.1.3 Mobile Spectrum Allocation

13. In the telecommunications sector, DOJ has advocated for policies to increase smaller networks’ access to valuable wireless spectrum. The two largest wireless carriers in the United States are successor companies of the Bell monopoly, and received allocations of spectrum in the early stages of the wireless industry’s development. Now that the Federal Communications Commission (“FCC”) plans to auction off additional spectrum for wireless use that was previously used for other purposes, DOJ has expressed concern that the two largest wireless carriers may have incentives to bid more for certain spectrum in order to foreclose the smaller carriers from acquiring it and using it to compete more aggressively, including through potential use of disruptive business models.¹⁹ Therefore, DOJ has commented that improving access to low-frequency spectrum for the smaller wireless carriers, some of which have challenged the incumbent carriers with innovative and potentially disruptive business models and aggressive pricing, has

¹⁴ See e.g. Timothy Bresnahan & Jonathan Levin, *Vertical Integration and Market Structure*, in HANDBOOK OF ORGANIZATIONAL ECONOMICS 85 (R. Gibbons & D.J. Roberts, eds., 2012), Francine Lafontaine & Margaret Slade, *Exclusive Contracts and Vertical Restraints: Empirical Evidence and Public Policy*, in HANDBOOK OF ANTITRUST ECONOMICS (Paolo Buccirossi, ed., 2008), Francine Lafontaine & Margaret Slade, *Vertical Integration and Firm Boundaries: The Evidence*, 45 J. ECON. LIT. 629–85 (2007), James C. Cooper, Luke M. Froeb, Dan O’Brien, & Michael G. Vita, *Vertical Antitrust Policy as a Problem of Inference*, 23 INT’L J. INDUS. ORG. 639–64 (2005), & Ronald Coase, *The Nature of the Firm*, 4 ECONOMICA 386 (1937).

¹⁵ See, e.g., Francine Lafontaine & Margaret Slade, *Exclusive Contracts and Vertical Restraints: Empirical Evidence and Public Policy*, in HANDBOOK OF ANTITRUST ECONOMICS (Paolo Buccirossi ed., 2008); James C. Cooper *et al.*, *Vertical Antitrust Policy as a Problem of Inference*, 23 INT’L J. INDUS. ORG. 639-64 (2005).

¹⁶ See *supra* notes 11-12.

¹⁷ See <https://legiscan.com/NJ/text/A3216/2014>. The law allows any “zero emission vehicle manufacturers” to sell directly; Tesla currently is the only such manufacturer certified in New Jersey.

¹⁸ See <https://www.ftc.gov/news-events/events-calendar/2016/01/auto-distribution-current-issues-future-trends>.

¹⁹ In addition, DOJ has noted that different types of spectrum have different competitive significance. In particular, low-frequency spectrum, with propagation characteristics that make it suitable for rural areas and building interiors, is an effective way for wireless carriers to meet growing consumer demand for data intensive applications and services across wide coverage areas. Moreover, there are some potential capacity and capital efficiencies associated with deploying larger blocks of spectrum.

significant potential to improve the competitive dynamics among nationwide carriers and benefit consumers. DOJ has filed comments with the FCC in 2013 and 2014.²⁰

3.1.4 Real Estate

14. The widespread use of the Internet has led to the proliferation of new technologies and business models that transformed the U.S. real estate industry by enabling consumers themselves to perform some services previously available only from traditional real estate brokers. These new technologies and business models include “limited service brokers” who provide a limited range of services compared to traditional full-service brokers, often for a reduced commission or on a “fee for service” basis; “virtual office websites” through which brokers give clients direct access to listings of multiple listing services (“MLSs”);²¹ and services for sellers who market their homes without a broker.

15. As new technologies and business models appeared, so did anticompetitive attempts to impede them. In response to these threats to competition, the Agencies have undertaken a variety of actions, including competition advocacy to persuade states not to adopt laws that would restrict competition between non-traditional and traditional brokers²² and publishing a report on competition issues in the real estate industry.²³

3.2 Enforcement

16. The Agencies have brought enforcement actions to prevent incumbent firms from blocking the growth or development of disruptive technologies and business models in a number of industries. The Agencies’ enforcement history provides numerous examples of enforcing competition rules to ensure that incumbents do not foreclose new rivals from the market.²⁴ In recent years, the Agencies have successfully challenged rules by incumbent credit card networks that have impeded development of new payment

²⁰ See <http://www.justice.gov/atr/public/comments/295780.pdf> and <http://www.justice.gov/atr/public/comments/305961.pdf>.

²¹ MLSs are local or regional joint ventures of real estate brokers, typically affiliated with the National Association of Realtors, that maintain a database containing almost all homes for sale in an area.

²² See, e.g., Letter from the FTC and the Justice Department to Loretta R. DeHay, Gen. Counsel, Texas Real Estate Comm’n (Apr. 20, 2005), available at https://www.ftc.gov/sites/default/files/documents/advocacy_documents/ftc-and-doj-comment-texas-real-estate-commission-concerning-proposed-amendments-22-tex.admin-code-%C2%A7-535.2-impose-minimum-service-requirements-real-estate-brokers/050420ftcdojtexasletter.pdf; Letter from the FTC and the Justice Department to Alabama Senate (May 12, 2005), available at https://www.ftc.gov/sites/default/files/documents/advocacy_documents/ftc-and-department-justice-comment-alabama-senate-concerning-alabama-h.b.156-impose-minimum-service-requirements-real-estate-brokers/050512ltralabamarealtors.pdf; Letter from the FTC and the Justice Department to the Honorable Alan Sanborn, Michigan Senate, and David C. Hollister, Michigan Dep’t of Labor & Economic Growth (Oct. 19, 2005), available at <https://www.ftc.gov/policy/policy-actions/advocacy-filings/2005/10/ftc-and-department-justice-comments-honorable-alan>.

²³ FTC & DOJ, *Competition in the Real Estate Brokerage Industry* (Apr. 2007), available at <https://www.ftc.gov/sites/default/files/documents/reports/competition-real-estate-brokerage-industry-report-federal-trade-commission-and-u.s.department-justice/v050015.pdf>.

²⁴ See, e.g., *United States v. Microsoft*, 253 F.3d 34 (D.C. Cir. 2001) (establishing that Microsoft had unlawfully inhibited the development of alternative platforms to its Windows operating system monopoly). See also Stephen Weissman, Fed. Trade Comm’n, *Pardon the Interruption: Competition and Disruptive Business Models*, available at https://www.ftc.gov/system/files/documents/public_statements/863443/151105disruptivebusinessspeech.pdf.

solutions²⁵ and from conspiring with competitors to protect existing business models in the publishing industry.²⁶ They have also taken enforcement action when incumbents have inappropriately attempted to use state regulatory processes to limit the emergence of innovative entrants.²⁷ Complementing their real estate industry advocacy described in the previous section, the Agencies have challenged a number of restrictive rules that discriminated against low-cost and discount non-traditional real estate brokers.²⁸

3.3 Study – “Sharing” Economy

17. “Sharing” economy platforms, which enable commercial transactions by connecting suppliers of products or services with buyers of those products and services and allowing them to do business with each other, have arisen in several markets subject to pervasive state or local regulation. Despite recent focus, peer-to-peer Internet marketplaces are not new, having existed at least since eBay began, and potential competitive concerns raised by the operation of these platforms also have existed for some time. However, the availability of products and services on “sharing” economy platforms has expanded dramatically in recent years,²⁹ and the rapid growth of these business models and their potential to benefit the economy and consumers warrant further study.³⁰

18. As part of this ongoing examination of disruptive innovations, on June 9, 2015, the FTC hosted a workshop entitled: “The ‘Sharing’ Economy: Issues Facing Platforms, Participants, and Regulators.”³¹ The FTC workshop brought together academics, policy makers, and industry participants active in the

²⁵ See, e.g., *United States v. American Express*, No. 10-CV-4496, slip op. at 100 (E.D.N.Y. Feb. 19, 2015) (finding American Express’s, Visa’s and MasterCard’s anti-steering rules “responsible for impeding development of novel payment solutions”).

²⁶ See *United States v. Apple, Inc.*, 952 F. Supp. 2d 638 (S.D.N.Y. 2013).

²⁷ The U.S. Supreme Court recently upheld an FTC challenge to such a restraint. See *North Carolina State Bd. of Dental Exam’rs v. FTC*, 135 S. Ct. 1101 (2015).

²⁸ See, e.g., *U.S. v. National Ass’n of Realtors*, <http://www.justice.gov/atr/cases/nar.htm>; *Realcomp II*, 635 F.3d 815 (6th Cir. 2011); FTC Press Release, *FTC Charges Pittsburgh-Area MLS With Illegally Restraining Competition* (Jan. 9, 2009), available at <https://www.ftc.gov/news-events/press-releases/2009/01/ftc-charges-pittsburgh-area-mls-illegally-restraining-competition>; FTC Press Release, *FTC Rules Michigan Realtors’ Group Reduced Competition, Harmed Consumers by Restricting Access to Discount Realtors’ Listings on its Multiple Listing Service and Public Web Sites* (Nov. 2, 2009), available at <https://www.ftc.gov/news-events/press-releases/2009/11/ftc-rules-michigan-realtors-group-reduced-competition-harmed>.

²⁹ See Jeremiah Owyang, *Collaborative Economy Honeycomb 2—Watch it Grow* (Dec. 7, 2014), <http://www.web-strategist.com/blog/2014/12/07/collaborative-economy-honeycomb-2-watch-it-grow/>.

³⁰ *Id.* See also PWC, *The Sharing Economy*, <http://www.pwc.com/us/en/industry/entertainment-media/publications/consumer-intelligence-series/assets/pwc-cis-sharing-economy.pdf>; Sara Cannon & Lawrence H. Summers, *How Uber and the Sharing Economy Can Win Over Regulators*, BUS. REV. BLOG NETWORK (Oct. 13, 2014), <https://hbr.org/2014/10/how-uber-and-the-sharing-economy-can-win-over-regulators/2>. In the accommodations sector, Airbnb has more than one million listings around the world. <https://www.airbnb.com/about/about-us>. In the transportation sector, Uber operates in fifty-seven countries. <https://www.uber.com/cities>.

³¹ See <https://www.ftc.gov/news-events/events-calendar/2015/06/sharing-economy-issues-facing-platforms-participants-regulators>. The webpage includes more than 2,000 public comments submitted in connection with the workshop. Public comments can be viewed at <https://www.ftc.gov/policy/public-comments/initiative-607>. A video recording of the workshop and a transcript of the discussion are available at <https://www.ftc.gov/news-events/events-calendar/2015/06/sharing-economy-issues-facing-platforms-participants-regulators>.

“sharing” economy, fostering engagement between regulators, regulated incumbent firms, and disruptive new entrants. The workshop explored issues across a range of business sectors, *e.g.*, the economics of platform design, the structure and operation of reputation systems adopted by platforms, and policy issues facing regulators in the sharing economy. One panel focused specifically on platform-based innovations in the transportation and accommodations sectors, where new, disruptive businesses sometimes conflict with traditional, regulated services such as taxis and hotels. FTC staff is preparing a workshop report, planned for release in Spring 2016.

19. In conclusion, the Agencies have pursued a number of advocacy and related initiatives to encourage proactive consideration of competition factors in key markets shaped by new disruptive technologies and business models. They continue to refine their understanding and expertise in these important areas and to share their learning. Additional advocacy through public outreach – including speeches by agency officials, thought pieces in the media, the use of social media, and other channels – allows the FTC and DOJ to further promote the views expressed in advocacy letters, emphasize important questions explored during workshops, and communicate a consistent message to legislative bodies, regulatory boards, other officials, and the public.