

21ST CENTURY FOX, INC. / SKY PLC MERGER INQUIRY

INITIAL SUBMISSION TO THE COMPETITION AND MARKETS AUTHORITY REGARDING
BROADCASTING STANDARDS

1. INTRODUCTION AND EXECUTIVE SUMMARY

- 1.1 This initial submission is made to the Competition and Markets Authority (CMA) on behalf of Twenty-First Century Fox, Inc. (21CF) in relation to 21CF's proposed acquisition of the remaining shares in Sky plc (Sky) (the **Transaction**). This submission addresses matters relevant to the CMA's assessment of the broadcasting standards public interest consideration. 21CF has separately commented on matters relating to media plurality.
- 1.2 The context to the Secretary of State's reference of the Transaction to the CMA is highly unusual, in that the reference was made contrary to the clear and consistent advice of the independent expert regulator with responsibility for the monitoring and enforcement of broadcasting standards, Ofcom, that there are not broadcasting standards concerns that may justify a reference. This is a position Ofcom has stated clearly on three separate occasions: in its report dated 20 June 2017 (which followed three months of detailed investigation),¹ again on 25 August 2017 in response to a request from the Secretary of State for further advice,² and yet again on 4 September 2017 in response to a request from the Secretary of State for further clarification.³
- 1.3 The standard to be applied in the Secretary of State's final decision following a Phase II reference is higher than that applicable to a decision on reference. Under Article 12(2) of the Order,⁴ the Secretary of State must decide whether the Transaction "*operates or may be expected to operate against the public interest*", i.e., whether, on the balance of probabilities, it will do so.⁵ This is also the standard that the CMA must address in its decision under Article 6(3) of the Order. 21CF submits that had the Secretary of State exercised her discretion correctly at Phase I, based on the evidence available to her and the advice of the expert independent regulator, she would have concluded that no reference was justified. In any case, Ofcom's conclusions that the Transaction gives rise to no broadcasting standards concerns that justify a reference necessarily remain valid *a fortiori* based on the higher Phase II standard.
- 1.4 21CF would submit that the evidence in fact shows clearly that the Transaction cannot be expected to operate against the public interest in terms of the broadcasting standards consideration.
- (i) The broadcasting standards consideration concerns the specific question of commitment to the attainment of the broadcasting standards objectives set out in the Communications Act 2003 and enshrined in Ofcom's Broadcasting Code (the **Broadcasting Code**). Its purpose is primarily to ensure that where a UK broadcaster is acquired by an entity without UK broadcast licences (and therefore without a track record of compliance with broadcasting standards in the UK) its commitment to those standards can be tested prospectively. The UK regulatory regime also provides for additional and distinct safeguards, including the requirement for Ofcom to be satisfied on an on-going basis that holders of broadcast licences remain 'fit and proper' to hold those licences. In assessing whether someone is fit and

¹ Page 5: "Therefore, we consider that there are no broadcasting standards concerns that may justify a reference by the Secretary of State to the Competition and Markets Authority".

² Page 1: "We consider there are not sufficient concerns that may justify a reference in relation to the broadcasting standards consideration".

³ Page 1: "we do not consider that these are such as may justify a reference in relation to the broadcast standards public interest consideration".

⁴ Enterprise Act 2002 (Protection of Legitimate Interests) Order 2003.

⁵ By analogy with *IBA Health Ltd v OFT* [2004] EWCA Civ 142, at paragraph 46.

proper to hold a broadcast licence, Ofcom is required to take account of both compliance with regulatory standards and licence conditions (which overlaps with the broadcasting standards consideration), and conduct beyond the broadcast arena that could affect their standing as a broadcaster (which is *outside the scope* of the broadcasting standards consideration).⁶ In order to provide certainty in relation to the Transaction, Ofcom has already considered, on a prospective and hypothetical basis, whether Sky would remain a fit and proper holder of broadcasting licences under full ownership by 21CF. In this context, Ofcom carried out an extensive review of 21CF's fitness and propriety, including of its general compliance arrangements and how 21CF responded to instances of wrongdoing, and concluded that Sky would remain fit and proper under full ownership by 21CF.

- (ii) With regard to the prospective assessment of a commitment to broadcasting standards to be carried out under the Enterprise Act, statutory guidance indicates a range of factors that may be relevant to this analysis.⁷ These include compliance with broadcasting standards in the UK and other jurisdictions, past compliance of any relevant non-broadcast media enterprise with standards applicable to those non-broadcast media enterprises, and comments, statements and other plans made by the acquiring media owner.
- (iii) In the case of a broadcaster of long standing in the UK (such as 21CF, which has been present in the UK broadcast market for more than 20 years and currently holds 14 broadcast licences), the most directly relevant evidence to this assessment is clearly its actual track record of meeting those broadcasting standards. Ofcom, as the expert regulator with responsibility for such matters, considered 21CF's record carefully and concluded that, like that of Sky, it is "good" and in line with other comparable broadcasters.⁸ Indeed, 21CF has never been sanctioned by Ofcom under any of its broadcasting licences; a record which is in contrast to the position of many other broadcast licence holders in the UK, including all of the public service broadcasters. As a secondary consideration, Ofcom also assessed 21CF's record of compliance with broadcasting standards outside the UK (while correctly recognising the need to take into account cultural and political differences with the UK) and concluded nothing in this record raised concerns. 21CF's acquisition of Sky will not change the commitment to broadcasting standards reflected in these findings. Indeed, in announcing the Transaction, 21CF publicly stated its intention in relation to Sky News to "*continue to broadcast news under the Sky brand maintaining its excellent record of compliance with the Ofcom Broadcasting Code*".⁹
- (iv) Ofcom also gave careful consideration to the arrangements 21CF had put in place to ensure compliance with broadcasting standards in the UK. No criticism at all was made of compliance arrangements across the channels that accounted for the vast majority of 21CF's audience in the UK at the time of Ofcom's assessment (and are now the only 21CF channels that are broadcast in the UK, namely those broadcast under the FOX, YourTV, National Geographic, STAR and BabyTV brands). Again, this is concrete, practical evidence of 21CF's commitment to broadcasting standards. While Ofcom raised some concerns around legacy compliance arrangements at Fox News (which no longer broadcasts in the UK), 21CF promptly and comprehensively addressed these in a manner that Ofcom considered demonstrated a commitment to broadcasting standards.
- (v) As to wider corporate governance matters, as Ofcom correctly recognised, given the specific scope of the broadcasting standards consideration, these can only be of indirect relevance,

⁶ Ofcom Decision under Section 3(3) of the Broadcasting Act 1990 and Section 3(3) of the Broadcasting Act 1996: Licences held by British Sky Broadcasting Limited (the **Fit and Proper Decision**), paragraph 16.

⁷ Department for Trade and Industry, *Enterprise Act 2002: public interest intervention in media mergers – Guidance on the operation of the public interest merger provisions relating to newspaper and other media mergers*, May 2004, para. 7.22.

⁸ Page 4 of Ofcom's advice to the Secretary of State dated 25 August 2017 and, more generally, paragraphs 10.12-10.22 of Ofcom's report to the Secretary of State dated 20 June 2017.

⁹ Rule 2.7 announcement dated 15 December 2017, page 14.

insofar as they give rise to an identifiable risk in terms of UK broadcasting standards compliance. There is no such risk, and the Secretary of State's decision did not posit one, merely making vague assertions that ran directly contrary to Ofcom's clear conclusion that the governance arrangements at all 21CF UK licensees are likely to prevent misconduct from arising and to secure that any misconduct is escalated appropriately. Moreover, the evidence is clear that 21CF does in fact take corporate governance matters seriously in all areas of its business. 21CF has implemented substantial measures since 2012 to overhaul corporate governance across its entire organisation. These should leave no doubt that regulatory compliance is a matter of the highest importance for 21CF.

- 1.5 21CF is confident that the CMA's detailed and impartial review will confirm the conclusion reached by Ofcom at Phase I, and enable it to advise the Secretary of State accordingly.

2. THE SCOPE OF THE BROADCASTING STANDARDS CONSIDERATION

- 2.1 In relation to the broadcasting standards consideration, the question before the CMA is whether the Transaction may be expected to operate against the public interest in terms of "*the need for persons carrying on media enterprises, and for those with control of such enterprises, to have a genuine commitment to the attainment in relation to broadcasting of the standards objectives set out in section 319 of the Communications Act 2003*".
- 2.2 As guidance published by the Department for Trade and Industry (as it then was) (the **DTI Guidance**) explains, these objectives relate to various specific aspects of broadcast services:

*These standards objectives relate to the protection of minors; the prohibition of material likely to encourage crime or disorder; the due impartiality and accuracy of television and radio news services, and impartiality requirements more generally; the exercise of responsibility with respect to the content of religious programmes; the protection of the public from offensive and harmful material; the exclusion of prohibited political advertising; the prevention of misleading, harmful or offensive advertising and unsuitable sponsorship; the fulfillment of the international obligations of the United Kingdom in respect of broadcast advertising; the prevention of undue discrimination between advertisers; and the prohibition of broadcasts of subliminal material.*¹⁰

- 2.3 These standards are set out in a number of codes, including the Broadcasting Code, with which holders of broadcasting licences in the UK must comply.
- 2.4 The purpose of the broadcasting standards consideration is primarily to ensure that where a UK broadcaster is acquired by an entity without UK broadcast licences, and therefore without a track record of compliance with broadcasting standards in the UK, its commitment to those standards can be tested prospectively. In addition, the regulatory regime also provides for separate on-going safeguards, including the continuing requirement for Ofcom to be satisfied that holders of broadcast licences remain 'fit and proper' to hold those licences. In assessing whether someone is fit and proper to hold a broadcast licence, Ofcom is required to take account of both compliance with regulatory standards and licence conditions (which overlaps with the broadcasting standards consideration), and conduct beyond the broadcast arena that could affect their standing as a broadcaster (which is *outside* the scope of the broadcasting standards consideration).¹¹ In order to provide certainty in relation to the Transaction, Ofcom has already considered, on a prospective and hypothetical basis, whether Sky would remain a fit and proper holder of broadcasting licences under full ownership by 21CF, and concluded that it would.

¹⁰ Para. 7.22.

¹¹ Fit and Proper Decision, paragraph 16.

- 2.5 With regard to the prospective analysis of a commitment to broadcasting standards at the point of acquisition under the Enterprise Act, the DTI Guidance notes a number of potentially other relevant considerations, including compliance with broadcasting standards in the UK and other jurisdictions (which, of course, must be judged on the basis of the requirements of those jurisdictions), past compliance of any relevant non-broadcast media enterprise with standards applicable to those non-broadcast media enterprises, and comments, statements and other plans made by the acquiring media owner.
- 2.6 As this is the first occasion on which the CMA has been called upon to advise the Secretary of State in relation to the broadcasting standards consideration, there is little precedent or guidance regarding the interpretation of these criteria. However, in the case of an established broadcaster in the UK (such as 21CF) the most directly relevant consideration in assessing its commitment to broadcasting standards must be its track record of compliance with broadcasting standards in the UK. As described further in Section 4 of this submission, Ofcom's advice to the Secretary of State was clear on this point.¹²
- 2.7 With regard to wider corporate governance matters, as recognised by Ofcom in its advice to the Secretary of State, and discussed further in Section 6 of this submission, such matters are relevant to the broadcasting standards consideration only insofar as they *"give rise to an identifiable risk in terms of compliance with UK broadcasting standards"*.¹³ Ofcom considered wider corporate governance matters, including 21CF's general compliance arrangements and how 21CF responded to instances of wrongdoing, in the context of its extensive review of whether Sky would remain fit and proper to hold broadcasting licences under full ownership by 21CF. As noted above, Ofcom concluded that Sky would remain fit and proper under full ownership by 21CF.

3. 21CF IS AN ESTABLISHED UK BROADCASTER

- 3.1 21CF has been present in the UK broadcast market for more than 20 years. In addition to its role as a founding shareholder in Sky, 21CF group companies have broadcast channels to UK audiences for many years. Its current UK channels are broadcast by Fox Networks Group (FNG) under the FOX and YourTV brands, by National Geographic Channels and by STAR, 21CF's Asian television business.
- 3.2 In total, these businesses hold 13 UK broadcast licences. The following tables provide details of these licences and the services to which they relate.¹⁴

Table 1: UK broadcast licences held by FNG

Licensee and licence number	Channel(s) covered by licence	Content/type of service ¹⁵	Description of programming	UK audience share(%) ¹⁶	Licence held since
Fox Networks Group (UK) Ltd (TLCS000678BA/2)	FOX	General Entertainment /Editorial	An entertainment channel with a mix of UK, American and international programming. Compiled specifically for audiences in the UK and Ireland.	0.5	2 October 2003
Fox Networks Group (UK) Ltd	FOX+1	General Entertainment	A one-hour timeshift broadcast of FOX channel.	N/A	28 September

¹² See, e.g. page 2 of Ofcom's advice to the Secretary of State dated 4 September 2017.

¹³ Page 2 of Ofcom's advice to the Secretary of State dated 4 September 2017.

¹⁴ In addition, 21CF has a 50.1% stake in Baby TV which holds a broadcast licence (licence no: TLCS000903BA/1). Baby TV is an entertainment channel targeted at infants, toddlers and parents, which is compiled for audiences in the UK and Ireland.

¹⁵ As listed on Ofcom's website.

¹⁶ BARB data for 2015.

Licensee and licence number	Channel(s) covered by licence	Content/type of service ¹⁵	Description of programming	UK audience share(%) ¹⁶	Licence held since
(TLCS000976BA/3)		/Editorial			2005
Fox Networks Group (UK) Ltd (TLCS001187BA/2)	FOX HD	General Entertainment /Editorial	An HD broadcast of FOX channel.	N/A	12 October 2007
Fox Networks Group (UK) Ltd (TLCS101191BA/1 and DTPS101188BA/3)	YourTV and YourTV+1	General Entertainment /Editorial	An entertainment channel with a focus on “reality TV”, factual entertainment and drama content (and a one-hour timeshift broadcast of this channel). Compiled specifically for audiences in the UK and Ireland.	0	8 September 2016 and 3 September 2016.

Table 2: UK broadcast licences held by National Geographic Channels

Licensee and licence number	Channel(s) covered by licence	Content/type of service ¹⁷	Description of programming	UK audience share(%) ¹⁸	Licence held since
NGC Europe Limited (TLCS000187BA/1)	National Geographic Channel	General Entertainment /Editorial	A documentary channel featuring blue chip premium and high end factual entertainment concentrating on adventure, science, exploration and conservation. Compiled specifically for audiences in the UK and Ireland.	0.1	1 September 1997
NGC Europe Limited (TLCS001031BA/1)	National Geographic Channel HD	General Entertainment /Editorial	An HD version of National Geographic channel.	N/A	6 February 2006
NGC Europe Limited (TLCS000312BA/1)	Wild	General Entertainment /Editorial	A documentary channel featuring blue chip premium programming and high end animal documentaries produced by the National Geographic Society. Compiled for a European audience and not specifically for UK and Ireland.	0.1	20 October 1999
NGC Europe Limited (TLCS001365BA/2)	Wild HD	General Entertainment /Editorial	An HD version of Wild channel.	N/A	9 June 2010

¹⁷ As listed on Ofcom’s website.¹⁸ BARB data for 2015.

Table 3: UK broadcast licences held by STAR

Licensee and licence number	Channel(s) covered by licence	Content/type of service ¹⁹	Description of programming	UK audience share (%) ²⁰	Licence held since
STAR India Private Limited (TLCS001066BA/2)	STAR Gold	General Entertainment /Editorial	A 24x7 Hindi language general entertainment movies channel focussing on Bollywood produced content. This channel is a feed broadcast across Europe, including the UK and Ireland.	0.04	16 May 2011 ²¹
STAR India Private Limited (TLCS000386BA/1)	STAR Plus	General Entertainment /Editorial	A Hindi language general entertainment channel targeted at the South Asian community featuring long running dramas, comedy shows, reality programmes, chat shows and lifestyle shows amongst others. This channel is a feed broadcast across Europe, including the UK and Ireland.	0.4	6 October 2000 ²²
STAR India Private Limited (TLCS000387BA/2)	STAR Utsav	General Entertainment /Editorial	A predominantly Hindi language general entertainment channel, typically featuring archive content (action, thriller, comedy, drama, reality, format shows, chat shows and lifestyle shows) from the STAR library. This channel is a feed broadcast across Europe, including the UK and Ireland.	0	6 October 2010 ²³
STAR India Private Limited (TLCS001065BA/1)	Star Life OK	General Entertainment /Editorial	A 24x7 Hindi language general entertainment channel that showcases long running family drama series, reality shows and mythological programming. This channel is a feed broadcast across Europe, including the UK and Ireland.	0.05	16 May 2006 ²⁴

¹⁹ As listed on Ofcom's website.²⁰ BARB data for 2015.²¹ The licence was originally issued in the name of Star Middle East FZ LLC (formerly Asian Broadcasting FZ LLC) and was transferred to Star India Private Limited with effect from 7 September 2011.²² The licence was originally issued in the name of Star Television Entertainment Limited and was transferred to Star India Private Limited with effect from 12 September 2011.²³ The licence was originally issued in the name of Star Television Entertainment Limited and was transferred to Star India Private Limited with effect from 1 September 2011. The said licence was first granted in relation to the Star News channel, moved to ABP News on 1 June 2012, then to Star Jalsha on 7 November 2012 and then to STAR Utsav on 4 July 2016.

- 3.3 The Fox News Channel, a channel broadcasting news and opinion programming produced for a US audience, was formerly available to audiences in the UK on the Sky platform. This was an international feed identical to the US feed, except for “Fox Extra” content used to fill airtime during US advertising breaks, and averaged around 2,000 simultaneous viewers across the day. Service ceased in the UK on 29 August 2017. At present, Fox News still holds a UK broadcasting licence (TLCS000458BA/1, held by Fox News Network LLC), but it is anticipated this will be surrendered shortly.

4. **21CF’S TRACK RECORD OF COMPLIANCE IS THE MOST DIRECTLY RELEVANT EVIDENCE AND CONFIRMS ITS COMMITMENT TO BROADCASTING STANDARDS**

21CF’s track record of compliance with broadcasting standards in the UK

- 4.1 As described in Section 2 above, for an established broadcaster in the UK (such as 21CF), the most directly relevant consideration in assessing its commitment to broadcasting standards is its track record of compliance with broadcasting standards in the UK. Ofcom is the expert regulator with responsibility for monitoring and enforcing broadcasting standards, and its advice to the Secretary of State was clear in this regard; confirming that 21CF’s track record of compliance with the Broadcasting Code is the correct starting point for the assessment of the broadcasting standards consideration and that it “*placed significant weight*” on the compliance record of 21CF.²⁵
- 4.2 During the course of its investigation, Ofcom carefully assessed 21CF’s record of compliance with the Broadcasting Code over a five-year period, and compared it to that of other similar broadcasters. The assessment took into account both the number and the seriousness of the breaches of broadcasting standards over that period.
- 4.3 In total, 21CF was found to have breached broadcasting standards 13 times (together with one resolved case) in that period, a track record Ofcom considered on a par with that of comparable broadcasters, such as Viacom and Discovery, as illustrated in Table 4 below.²⁶

Table 4: broadcasting track records of 21CF, Viacom and Discovery

Broadcaster	Breaches	Resolved cases	Sanctions
21CF	13	1	0
Viacom	12	4	0
Discovery	13	1	1

- 4.4 None of these breaches by 21CF was considered sufficiently serious to warrant a sanction (imposed in cases involving deliberate, serious, repeated or reckless breaches). Indeed, 21CF has never been sanctioned by Ofcom under any of its broadcasting licences; a record which is in contrast to the position of many other broadcast licence holders in the UK, including all of the public service and major free-to-air broadcasters.
- 4.5 Ofcom’s overall conclusion regarding 21CF’s record of compliance with broadcasting standards was that it, like that of Sky, is “*good*”.²⁷ This is direct, concrete evidence of 21CF’s commitment to broadcasting standards, on which Ofcom correctly placed “*significant weight*”.²⁸

²⁴ The licence was originally issued in the name of Star Middle East FZ LLC (formerly Asian Broadcasting FZ LLC) for the channel Star One and was transferred to Star India Private Limited with effect from 7 September 2011. The licence was changed from Star One to Star Life Ok effective 6 March 2012.

²⁵ Page 4 of Ofcom’s advice to the Secretary of State dated 25 August 2017.

²⁶ Paragraphs 10.12-10.22 of Ofcom’s report to the Secretary of State. Data for the table is drawn from figures 10.2, 10.3 and 10.4 of the same report.

²⁷ Page 4 of Ofcom’s advice dated 25 August 2017.

²⁸ Page 4 of Ofcom’s advice dated 25 August 2017.

- 4.6 With regard to Fox News' compliance record specifically, in its 20 June 2017 report to the Secretary of State, Ofcom explained that – in response to concerns raised – it had paid particular attention to the extent to which Fox News' approach to impartiality and accuracy may call into question 21CF's commitment to broadcasting standards. However, Ofcom confirmed that it had never found Fox News to have breached the accuracy and impartiality requirements of the Broadcasting Code in respect of news programming. Ofcom noted that it has recorded breaches against Fox News in respect of non-news content under rules concerning misleading content on one occasion and the rules of due impartiality and elections on three occasions. It did not consider any of these breaches sufficiently serious to warrant the imposition of a sanction. On this basis, Ofcom advised that *"we do not consider that the approach to accuracy and impartiality by Fox News is suggestive of a lack of genuine commitment to broadcasting standards"*.²⁹ 21CF submits that Ofcom's conclusions in this regard should carry particular weight given that it actively monitored Fox News during the 2017 UK election period, and that the compliance record considered in its report captured this period of monitoring.³⁰

21CF's track record of compliance with broadcasting standards internationally

- 4.7 While compliance with broadcasting standards outside the UK may be a relevant consideration bearing on the propensity of an entity to comply with broadcasting standards, regard must be had to differences between regulatory regimes and the different economic, political and cultural considerations that underpin enforcement. Ofcom, as an expert regulator with international experience, is aware of these important features and took them into account in its advice.
- 4.8 In considering 21CF's record outside the UK, Ofcom placed most weight on EU jurisdictions, on the basis that these have the most similar broadcasting regulatory regimes to the UK. Ofcom considered that useful parallels could not be drawn with other jurisdictions, given the political and cultural differences between them and the UK (and, in particular, that Fox News' broadcasts in the US and Australia are not a guide to its commitment to broadcasting compliance in the UK, since the broadcasts did not breach broadcasting regulation in those jurisdictions).³¹
- 4.9 Having conducted this careful assessment, Ofcom concluded that nothing in 21CF's international track record was indicative of concerns in relation to the broadcasting standards consideration.³²

5. 21CF'S TRACK RECORD REFLECTS ITS ROBUST BROADCASTING STANDARDS COMPLIANCE ARRANGEMENTS

- 5.1 Reflective of its track record of compliance, each of 21CF's businesses that broadcast in the UK take their obligations with regard to UK broadcasting standards very seriously, and have put in place effective arrangements to secure compliance with them.
- 5.2 Ofcom considered these arrangements in detail during its investigation, and made no criticism of the compliance arrangements at the channels which accounted at the relevant time for the vast majority of 21CF's UK audience (and are now the only 21CF channels available to viewers in the UK, i.e. the channels listed in Tables 1 to 3 above). Although Ofcom raised some concerns around legacy compliance arrangements at Fox News (which no longer broadcasts in the UK), 21CF quickly and comprehensively addressed these in a manner that Ofcom considered demonstrated commitment to broadcasting standards.
- 5.3 An overview of the compliance arrangements at each of these channels is provided below.

²⁹ Page 96.

³⁰ Page 4 of Ofcom's advice dated 25 August 2017; page 3 Ofcom's advice dated 4 September 2017.

³¹ Page 5 of Ofcom's advice to the Secretary of State dated 25 August 2017.

³² Paragraph. 10.40 of Ofcom's report to the Secretary of State.

FNG and National Geographic channels

- 5.4 In relation to the FNG and National Geographic channels, oversight of compliance with the Broadcasting Code is undertaken by FNG's compliance team and legal department, located in the UK.
- 5.5 FNG has a dedicated team that oversees Broadcasting Code compliance for the FNG and National Geographic channels (the Code Compliance Team). This is composed of four compliance viewers/editors dedicated to UK programming, and the Head of Programming Operations and Compliance (the Head of Programming Compliance), who oversees the Code Compliance Team. Each member of the Code Compliance Team has substantial practical compliance relating to the Broadcasting Code (in the region of 10 years each), gained at major broadcasting organisations.
- 5.6 For the Baby TV channel (distributed by FNG and in which 21CF holds a 50.1% shareholding), the compliance function is carried out by the Vice-President and Deputy General Counsel in FNG's legal team in London, under the provisions of a shareholders' agreement between FNG and BabyTV. The relevant individual has over 10 years' experience in business and legal affairs in television distribution, production and broadcasting, with compliance with the Broadcasting Code a part of all these functions. As well as legal training, the relevant individual has participated in various workshops and seminars regarding Ofcom compliance, both in-house, online and during topical sessions provided by law firms.³³
- 5.7 New joiners to the Broadcasting Code Compliance Team receive training and shadowing experience as well as key documents, including an overview of the compliance process. On-going training and updates are also provided to the team by a combination of internal and external speakers, the Ofcom broadcast bulletins and updates from legal counsel. These include training from a highly experienced Ofcom compliance consultant, as well as three training sessions at Clearcast. The Code Compliance Team also meets weekly to review, discuss and learn from rulings and correspondence with Ofcom.
- 5.8 Changes to the Broadcasting Code or Ofcom's guidance notes, as well as any important Ofcom rulings, are communicated to the compliance team by the Head of Programming Compliance and discussed at weekly meetings, and are also raised in the weekly management meetings attended by all department heads. In addition, FNG's and National Geographic's entire ad sales team receives training on rules relating to sponsorship, product placement and advertising-funded programming.
- 5.9 All of FNG and National Geographic's UK premieres are viewed by the Code Compliance Team in their entirety for compliance against the Broadcasting Code and assessed for suitability against the scheduled time slot. They are then categorised as either: (i) fine for their scheduled slot in which case they are processed accordingly; (ii) in need of editing for their scheduled slot (in which case, where such editing is straightforward, it takes place before the content is aired; where it is not it is referred up to the Head of Programme Compliance for assessment); or (iii) unable to be edited for their scheduled slot, in which case the content is referred up to the Head of Programming for a schedule amendment. Once a programme has been edited and scheduled appropriately, the Code Compliance Team carries out a further thorough check to ensure that the correct version of the programme is broadcast.

³³ Due to the nature of the BabyTV channel, the number of personnel required to deal with Broadcasting Code compliance matters is less than for other channels. Since its inception, BabyTV has targeted the 0-3 year old demographic. It therefore does not broadcast commercials, cross-promotions, religious content or prize-oriented programming. Moreover, the audience requires much less content than a typical entertainment channel. No live or 'pre-recorded' live programming is created or broadcast, and BabyTV's schedules can be created several months in advance, with no further edits or changes required on a regular basis. A further safeguard is that BabyTV produces all of its programming in-house, with no outside purchases of content, in order to maintain strict control over the quality of that content. BabyTV's head of production, who has been with the channel since its launch, is familiar with the relevant provisions of the Broadcasting Code, and is therefore in a position to ensure that programming produced by BabyTV meets those requirements.

- 5.10 The vast majority of FNG and National Geographic programming is pre-recorded; however, where exceptionally live programming is scheduled, FNG puts in place bespoke procedures to ensure compliance. For example, National Geographic's broadcast of Brain Surgery Live in October 2015 (a majority scripted show with pre-recorded content) involved months of preparation and discussions between producers, lawyers and compliance teams in both the UK and US, was shown at 2am with a 10-second delay while being viewed by the compliance team live on air, and a contingency plan was prepared. Producers and participants were reminded of the Broadcasting Code and, in particular, asked not to use strong language or make commercial references; and a warning slate was scheduled prior to the show and at the start of every part of the show, to warn viewers of the graphic content of the show.
- 5.11 FNG has internal reporting procedures in place providing for matters to be escalated where required to the Head of Programming Compliance, Head of Scheduling for the channel, and to the UK GM & Legal Counsel at the earliest possible time.

STAR channels

- 5.12 In relation to the STAR channels, oversight of compliance with the Broadcasting Code is undertaken by STAR's Standards & Practices Department (**S&P Department**), located in India, and referred to STAR's external adviser based in the UK where required. The S&P Department currently comprises 24 members, with up to 14 years' experience each in this area.
- 5.13 Each new member of the team that will handle UK broadcasts goes through a training process aimed at acquainting the team member with all relevant Ofcom guidelines, conducted by a senior member of the S&P Department. The team also receives two annual training programmes conducted by senior members of the S&P department.
- 5.14 In addition, in August 2014, 16 of the current members of STAR's S&P team (including the head of the S&P department and the compliance officer, who is responsible for international edits), attended a two-day compliance training programme conducted by STAR's external adviser, which covered the Broadcasting Code and accompanying Ofcom guidance, as well as the British Board of Film Classification Guidelines. This training was also attended by members of STAR's international business and content teams.
- 5.15 Each member of the team has a direct line of contact with STAR's UK-based external adviser, who advises them in the event of any concerns with respect to interpretation of the Broadcasting Code. He also keeps the S&P Department apprised of any changes or updates to the Broadcasting Code.
- 5.16 The S&P Department undertakes the following compliance procedures: (i) reviewing all programming content on the STAR channels to ensure compliance with local regulatory and Ofcom requirements; (ii) editing content as required prior to broadcast; (iii) reviewing advertising and sponsorship content to ensure compliance with local regulatory and Ofcom requirements; (iv) editing movies and assigning them appropriate scheduling times, guided by the relevant BBFC classification; and (v) working with STAR's international content and scheduling team to ensure content is scheduled appropriately, including after the watershed if required.
- 5.17 Where required, issues are escalated to the Head of S&P, the Legal Head for Content and the Content Head for the relevant channel; and, ultimately, to STAR's General Counsel and STAR's Content CEO.
- 5.18 As with the FNG and National Geographic Channels, STAR's channels carry only a minimal amount of live content; but specific arrangements are put in place to ensure compliance on these occasions, including the distribution of codes to producers in advance, briefing sessions with participants and

the presence of S&P personnel on location to raise any concerns and provide immediate support. Repeats of live events are edited where required.

Fox News

- 5.19 As described in Section 3 above, Fox News ceased broadcasting in the UK on 29 August 2017. Historically, Fox News handled matters relating to compliance with UK broadcasting standards on a case-by-case basis as they were brought to its attention, in consultation with external counsel where required and under the supervision of Fox News' general counsel. 21CF had considered that Fox News' handling of UK broadcasting standards matters was appropriate and proportionate, given (i) the general controls and procedures that are in place to ensure proper source checking and accuracy in factual news stories prior to them being broadcast,³⁴ (ii) the nature of its content (news and opinion programming produced for US audiences), and (iii) its minimal penetration with audiences in the UK (which averaged under 2000 simultaneous viewers across the day, when the channel was broadcast in the UK) .
- 5.20 However, when Ofcom raised concerns regarding these matters during the course of its review, 21CF responded promptly and comprehensively, with measures including: (i) the appointment of a dedicated Ofcom compliance officer; (ii) putting in place Ofcom-specific written compliance procedures for Fox News employees; (iii) conducting a series of training seminars in respect of Broadcasting Code compliance issues (led by [CONFIDENTIAL]); (iv) ensuring that Ofcom specific guidance is incorporated into its compliance, legal and regulatory training, under the direct supervision of one of 21CF's Group Chief Compliance Officers; (v) ensuring that Fox News has access to external consultants and Ofcom experts as required, including those that support 21CF's other channels that hold broadcast licences; and (vi) introducing a new system for the dissemination of relevant Ofcom decisions and policies.
- 5.21 In its advice to the Secretary of State, Ofcom concluded that the enhanced compliance arrangements introduced at Fox News in response to its concerns "*demonstrated a commitment to the attainment of broadcast standards*".³⁵ 21CF would note that the robustness of the procedures introduced at Fox News withstood a set of complaints that that were made to Ofcom following their implementation (the so called 'new evidence', referred to in DCMS' letter to Ofcom dated 7 August 2017). Ofcom reviewed these complaints carefully and advised the Secretary of State that none of the programmes that it was asked to review "*raises any issues which we would consider warrant us opening an investigation*".³⁶
- 5.22 21CF would emphasise that while the changes to the compliance arrangements at Fox News were made in the context of Ofcom's review, 21CF would have responded in a similarly comprehensive manner regardless of this context, as it has the utmost respect for the regulatory regimes in the jurisdictions in which it chooses to operate.

6. WIDER CORPORATE GOVERNANCE MATTERS AT 21CF DO NOT RAISE BROADCASTING STANDARDS CONCERNS

- 6.1 As noted by Ofcom, there is a statutory regime that exists for securing broadcast standards compliance, which provides an upfront commitment to compliance through licensing requirements, together with on-going ex post protection. The regime seeks to strike a balance between securing the application of standards (which protects audiences), while allowing freedom of expression in the interest of audiences and the wider interests of a democratic society. Against this framework, Ofcom is clear that wider corporate governance matters can only be (indirectly) relevant to the broadcasting

³⁴ As described to Ofcom, this is a multi-layered process that includes background research by Fox News' in-house research team, cross-verification of statements made by interviewees, and approval of scripts by copy editors, senior producers and the reporter's Bureau Chief.

³⁵ Page 2 of Ofcom's advice dated 4 September 2017.

³⁶ Page 6 of Ofcom's advice dated 25 August 2017, together with the accompanying annex.

standards ground if they “give rise to an identifiable risk in terms of UK broadcast standards compliance”.³⁷ (As noted above, these issues were comprehensively considered by Ofcom as part of its separate review of whether Sky would remain fit and proper to hold broadcasting licences under full ownership by 21CF.)

- 6.2 The Secretary of State’s decision to make a reference on the basis of concerns around failings of corporate culture at 21CF, but which does not posit an identifiable risk in relation to the narrower issue of 21CF’s commitment to broadcast standards, runs directly contrary to this principle. In doing so, the Secretary of State chose to ignore Ofcom’s unequivocal advice that “*the governance arrangements at all Fox UK licensees are likely to prevent misconduct from arising and to secure that if it does it is escalated as appropriate*” and that it “*does not consider that this evidence [re. alleged corporate failings] demonstrates that the merged entity would lack a genuine commitment to the attainment of broadcasting standards*”.³⁸
- 6.3 That is not to say that 21CF does not take the wider corporate governance issues that were considered by Ofcom seriously. 21CF is committed to complying with the law and the highest standards of corporate governance, and to providing an inclusive workplace that treats every employee with respect. This is reflected in substantial measures to transform and enhance its compliance arrangements that 21CF has introduced since 2012. These arrangements were described in detail to Ofcom and are summarised below for completeness.
- (i) **The establishment of a global Compliance Steering Committee**, led by 21CF’s Group General Counsel and Chief Compliance Officer, with responsibility for ensuring compliance across 21CF’s businesses.
 - (ii) **Strengthened reporting protocols**, requiring that any material compliance issue is rapidly escalated from individual businesses, through the Compliance Steering Committee and to the independent directors of the Audit Committee and the full Board.
 - (iii) **Appointment of Group Chief Compliance Officers (GCCOs) to supervise compliance in each 21CF division**. Each of these GCCOs is an experienced legal professional, with experience at regulatory authorities or in corporate compliance, and works full-time on compliance matters. The GCCOs are supported by business unit compliance leads. They report directly to 21CF’s Group General Counsel and Chief Compliance Officer.
 - (iv) **A Monitoring, Auditing and Risk Assessment Protocol** has been put in place to ensure that compliance measures remain effective and has three principal components: (i) regular risk evaluations for 21CF’s businesses, conducted by GCCOs; (ii) on-going compliance monitoring by GCCOs; and (iii) compliance-specific audits and regular evaluation of internal controls by 21CF’s Corporate Audit function.
 - (v) **Global business conduct standards**. 21CF has clearly articulated expectations regarding corporate and employee behaviour in its Standards of Business Conduct, which have been distributed company-wide, with the strong support of 21CF’s Chairmen and CEO. Amongst other things, these standards make 21CF’s employees aware of the multiple ways that they can report concerns in relation to business conduct.
 - (vi) **Compensation incentives for management to focus on compliance matters**. The Board and Compensation Committee amended 21CF’s Compensation Committee Charter and Long-Term Incentive Plan to establish implementation and enforcement of effective

³⁷ Page 2 of Ofcom’s advice dated 4 September 2017.

³⁸ Page 3 of Ofcom’s advice dated 25 August 2017.

compliance programs as an explicit factor to be considered in determining compensation paid to senior executives.

- (vii) **A central tracking function for all reported complaints and investigations.** This is monitored by 21CF's Internal Audit team.
- (viii) **Regular compliance training for employees throughout 21CF.** As well as live training delivered or arranged by GCCOs, compliance or legal personnel, all employees complete annual online training. The training platform permits monitoring and tracking of training arrangements throughout 21CF. In addition, all employees must certify as part of this training that they have received, read and understood the relevant policies and, will comply with them, and understand that any person making a good faith report of an actual or suspected violation is protected from retaliation.
- (ix) **Strengthening 21CF's HR function and policies.** This includes the appointment of a new global Chief Human Resources Officer at 21CF and a new head of Human Resources at Fox News. Both of these individuals have been authorised to take all necessary steps to ensure 21CF's commitment to a diverse, inclusive and welcoming work environment is supported across the entire company. 21CF has also conducted a review of its HR training practices and of its policies relating to equal employment opportunities, fair working environments, discrimination, harassment and business conduct to ensure that they are robust and presented clearly in its standards of business conduct.

7. CONCLUSION

- 7.1 As an established broadcaster in the UK, the most directly relevant consideration in assessing 21CF's commitment to broadcasting standards is its track record of complying with these standards in the UK. The expert regulator, Ofcom, carefully considered the track record of 21CF's channels that broadcast in the UK – and the compliance arrangements that are in place at these channels – and identified no concerns that would merit a referral on broadcasting standards grounds. Nor did Ofcom consider that a referral was justified in relation to any secondary considerations, reflecting 21CF's commitment to broadcasting standards in other jurisdictions or its commitment to wider corporate governance issues.
- 7.2 The standard applicable both to the CMA's decision under Article 6(3) of the Order, and to the Secretary of State's final decision under Article 12(2), is higher than that applicable to a decision on reference. Both must address whether the Transaction "*operates or may be expected to operate against the public interest*"; that is, whether on the balance of probabilities it will do so. 21CF respectfully submits that an objective in-depth review, applying this standard, should allow the CMA to conclude without substantial difficulty that an adverse finding in relation to the broadcasting standards consideration cannot be justified.

Allen & Overy LLP
27 September 2017