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UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
WASHINGTON, D.C. 20580

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**Before the Subcommittee on Antitrust, Commercial and Administrative Law
of the Judiciary Committee
United States House of Representatives**

**Concerning “*Reviving Competition Part 3: Strengthening the Laws to Address Monopoly
Power*”**

**Washington, D.C.
March 18, 2021**

Chairman Cicilline, Ranking Member Buck, members of the Subcommittee, thank you for the opportunity to appear before you today. I am pleased to be here with my colleague and friend, the Acting Chairwoman of the Federal Trade Commission, and the other esteemed panelists, to discuss the subject of antitrust reform.

This is a critical time for our nation’s antitrust laws. The agencies are engaged in vigorous enforcement in a variety of industries, from tech to pharmaceuticals to consumer products. In FY 2020, the FTC brought a record-setting 27 merger enforcement actions, the highest number in a single year in the past two decades.² Over the last three years, we have also

¹ My comments today are my own and do not necessarily reflect the views of the Commission or my fellow Commissioners.

² See Fed. Trade Comm’n Annual Performance Report For Fiscal Year 2020, at 27, https://www.ftc.gov/system/files/documents/reports/fy-2020-performance-report/fy20_perform_plan_report_update.pdf (last accessed Mar. 16, 2021). Prior to FY 2020, FTC merger enforcement actions peaked at 25 in FY 2012.

brought seven monopolization cases.³ We appreciate the additional funding the Commission received as part of this year’s appropriations. This money will help us continue to enforce effectively the antitrust laws.

The discussion we are having today reflects a broader debate about whether those laws suffice. Congress will play a critical role in resolving that debate, and how it does will have far reaching consequences throughout our economy. How we proceed will require careful consideration and leadership, and I encourage this Subcommittee to continue to engage thoughtfully with these questions.

The purpose of antitrust law is competition

As designed originally over 130 years ago, and still today, our antitrust laws protect competition. Competition benefits society—and consumers—by spurring innovation, improving quality, and lowering prices. Companies—even industries—rise and fall, but the competitive process ensures that American consumers benefit. That is why antitrust analysis appropriately focuses on whether the merger, acquisition, or other business conduct has caused or is likely to cause harm to consumers. Consistent with the original statutory injunctions against “restraints of

³ See FTC Press Release, *FTC Again Charges Endo and Impax with Illegally Preventing Competition in U.S. Market for Oxymorphone ER* (Jan. 25, 2021), <https://www.ftc.gov/enforcement/cases-proceedings/1910104/endo-pharmaceuticals-incarneal-pharmaceuticals-inc>; FTC Press Release, *FTC Sues Facebook for Illegal Monopolization* (Dec. 9, 2020), <https://www.ftc.gov/news-events/press-releases/2020/12/ftc-sues-facebook-illegal-monopolization>; FTC Press Release, *Indivior, Inc. to Pay \$10 Million to Consumers, Settling FTC Charges that the Company Illegally Maintained a Monopoly over the Opioid Addiction Treatment Suboxone* (July 24, 2020), <https://www.ftc.gov/news-events/press-releases/2020/07/indivior-inc-pay-10-million-consumers-settling-ftccharges>; FTC Press Release, *FTC and NY Attorney General Charge Vyera Pharmaceuticals, Martin Shkreli, and Other Defendants with Anticompetitive Scheme to Protect a List-Price Increase of More Than 4,000 Percent for Life Saving Drug Daraprim* (Jan. 27, 2020), <https://www.ftc.gov/news-events/press-releases/2020/01/ftc-ny-attorneygeneral-charge-vyera-pharmaceuticals-martin>; FTC Press Release, *FTC Challenges Illumina’s Proposed Acquisition of PacBio* (Dec. 17, 2019), <https://www.ftc.gov/news-events/press-releases/2019/12/ftc-challenges-illumina-proposed-acquisition-pacbio>; FTC Press Release, *Reckitt Benckiser Group plc to Pay \$50 Million to Consumers, Settling FTC Charges that the Company Illegally Maintained a Monopoly over the Opioid Addiction Treatment Suboxone* (July 11, 2019), <https://www.ftc.gov/news-events/press-releases/2019/07/reckitt-benckiser-group-plc-pay-50-million-consumers-settling-ftc>; FTC Press Release, *FTC Charges Surescripts with Illegal Monopolization of E-Prescription Markets* (Apr. 24, 2019), <https://www.ftc.gov/news-events/press-releases/2019/04/ftc-charges-surescripts-illegal-monopolization-e-prescription>.

trade” and “unfair methods of *competition*”,⁴ this inquiry is grounded in economic principles. We look at prices—and none of us should work to make Americans pay more for our food, healthcare, and other needs—but welfare-enhancing competition can occur on multiple fronts, including output, quality, and innovation. Businesses compete to hire workers and buy inputs, just like they compete to sell products and services. Antitrust cares about all of these things.

Antitrust is a powerful tool, but—like any body of law—it has limits. The antitrust laws are not designed to address every problem large companies create, because they protect competition; and even perfect competition cannot solve every problem. So we must be realistic about the antitrust laws, and reforms to them. Some calls for reform seem to promise that antitrust can solve a host of issues in our society, from the political power of large corporations to privacy to labor rights to racial inequality. These are serious matters, worthy of serious attention; but antitrust is a poor tool for addressing them. Does competition help address social problems? Without a doubt. When companies compete to lower prices, for example, people with fewer means have access to more products. That is good for distributional equity. But antitrust is not, and should not be, a regulatory catch-all.⁵

Many reform proposals go beyond technology companies

As this Subcommittee well knows, the increasing presence of large technology companies in our daily lives and in our economy animates recent calls for antitrust reform. As the COVID-19 epidemic has highlighted, we rely on technology (including the largest platforms)

⁴ Sherman Act, 15 U.S.C. § 1 (1890) (“Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce ... is declared to be illegal.”); Fed. Trade Comm’n Act, 15 U.S.C. § 45(a)(1) (1976) (“Unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are hereby declared unlawful.”).

⁵ To be clear, the point is not that antitrust is value-neutral, but that antitrust should not lose sight of the values it cares very much about—competition and consumer welfare.

to work, pray, go to school, shop for groceries, visit the doctor, and stay connected with family and friends.

This Subcommittee has conducted extensive hearings, collected evidence, and done its homework to understand some of the major technology platforms today. But many reform proposals are not limited to technology companies, much less four of them. The antitrust laws apply to almost every industry and sector of our economy; and many legislative proposals I have seen go much broader than “Big Tech”.

The antitrust laws are written broadly on purpose. Their breadth gives plaintiffs and courts the flexibility to deal with many competition issues, including in the technology sector. During mine and the Acting Chairwoman’s tenure, for example, the FTC has sued to block mergers,⁶ break up companies,⁷ protect platform competition,⁸ encourage new drugs to market,⁹ and stop contracts protecting monopolies.¹⁰ Antitrust is fundamentally a fact-intensive inquiry, which lends itself to any industry, sector, or company. That is why the important work we do is not just in tech, but hospitals, and energy, and consumer products, and gas stations, and pharmaceuticals. As you consider proposals for reform, animated by the conduct of a handful of

⁶ See *supra* notes 2 and 3.

⁷ See e.g., FTC Press Release, *FTC Sues Facebook for Illegal Monopolization* (Dec. 9, 2020), <https://www.ftc.gov/news-events/press-releases/2020/12/ftc-sues-facebook-illegal-monopolization>.

⁸ See e.g., FTC Press Release, *FTC Charges Surescripts with Illegal Monopolization of E-Prescription Markets* (Apr. 24, 2019), <https://www.ftc.gov/news-events/press-releases/2019/04/ftc-charges-surescripts-illegal-monopolization-e-prescription>; FTC Press Release, *FTC Challenges Illumina’s Proposed Acquisition of PacBio* (Dec. 17, 2019), <https://www.ftc.gov/news-events/pressreleases/2019/12/ftc-challenges-illumina-proposed-acquisition-pacbio>.

⁹ See e.g., FTC Press Release, *FTC Again Charges Endo and Impax with Illegally Preventing Competition in U.S. Market for Oxymorphone ER* (Jan. 25, 2021), <https://www.ftc.gov/enforcement/cases-proceedings/1910104/endo-pharmaceuticals-incarneal-pharmaceuticals-inc>.

¹⁰ See e.g., FTC Press Release, *FTC and NY Attorney General Charge Vyera Pharmaceuticals, Martin Shkreli, and Other Defendants with Anticompetitive Scheme to Protect a List-Price Increase of More Than 4,000 Percent for Life Saving Drug Daraprim* (Jan. 27, 2020), <https://www.ftc.gov/news-events/press-releases/2020/01/ftc-ny-attorneygeneral-charge-vyera-pharmaceuticals-martin>.

the largest technology firms, I urge you to consider the impact on all the businesses these reforms will affect.

Antitrust legislation can have unintended consequences

Taking care is important, as the history of antitrust legislation includes unintended consequences: some reforms have taken money out of the pockets of American consumers, or failed meaningfully to advance the other goals articulated in favor of reform. For example, the Robinson-Patman Act of 1936 was passed with the intent to protect small, retail business from larger, more efficient chain stores.¹¹ Historians, lawyers, and economists generally agree on the result: American consumers paid more money for the groceries and household products they use every day.¹² The 1950 Celler-Kefauver Amendments to the Clayton Act ushered in an era of greater hostility to horizontal and vertical mergers.¹³ We enforce these merger laws today—and they are good—but the Subcommittee should keep in mind that their passage was followed by a two-decade merger wave.¹⁴ Contrary to what the authors may have hoped, the result was not the diminishment of powerful corporations, but rather the rise of gargantuan, unwieldy conglomerate corporations—no less powerful but, as it turns out, unsuccessful in practice.¹⁵

Our nation is emerging from a crisis, with a terrible economic component that has put tens of millions out of work and shuttered businesses. We want to encourage companies, big and

¹¹ See Herbert Hovenkamp, *The Robinson-Patman Act and Competition: Unfinished Business*, 68 ANTITRUST L.J. 125 (2000).

¹² See e.g., Kenneth G. Elzinga & Thomas F. Hogarty, *Utah Pie and the Consequences of Robinson-Patman*, 21 J.L. & ECON. 427 (1978); Timothy Muris & Jonathan E. Nuechterlein, *Antitrust in the Internet Era: The Legacy of United States v. A&P*, 54 REV. INDUST. ORG. 651 (2019).

¹³ See Gerald F. Davis, Kristina A. Diekmann & Catherine H. Tinsley, *The Decline and Fall of the Conglomerate Firm in the 1980s: The Deinstitutionalization of the Organizational Form*, 59 AM. SOC. REV. 547, 547 (1994).

¹⁴ See Laurence Capron, *Historical Analysis of Three Waves of Mergers and Acquisitions in the United States (1887-1904, 1916-1929, 1950-1970): Triggering Factors, Motivations, and Performance* (1996), <https://faculty.insead.edu/laurence-capron/documents/historical-analysis-of-three-waves-of-mergers.pdf>.

¹⁵ See *supra* notes 13 and 14.

small, to enter and meet consumer need. Mergers and acquisitions are one way they do that. For example, Thermo Fisher, the scientific instruments company, recently acquired Mesa Biotech, a medical diagnostics company developing rapid PCR testing for COVID-19 and the flu.¹⁶

According to the companies, the combination of Mesa’s technology and Thermo Fisher’s scale will enable the combined company to bring more and better tests to more people. That is a very good thing as we race to put this pandemic behind us.

Markets work better when companies are allowed to give consumers what they want. Government intervention is sometimes necessary to protect us, but too often it just gets in the way. State laws that prevent new hospital expansions or impose unnecessary occupational licensing requirements are good examples—and the FTC advocates against them.¹⁷ Burdensome environmental and “NIMBY” permitting slowed the plans of Presidents Obama and Trump to improve American infrastructure, including “shovel ready” projects promised as fixes to the financial crisis of 2008-2009.¹⁸ Competitive M&A is no different. We can and do stop bad ones, but over-regulating will stop good ones, too. The ability of companies and investors willing to buy companies also encourages people to innovate and start companies, and venture capitalists to

¹⁶ Thermo Fisher Scientific Press Release, *Thermo Fisher Scientific to Acquire Point-of-Care Molecular Diagnostics Provider Mesa Biotech* (Jan. 19, 2021), available at <https://thermofisher.mediaroom.com/2021-01-19-Thermo-Fisher-Scientific-to-Acquire-Point-of-Care-Molecular-Diagnostics-Provider-Mesa-Biotech>.

¹⁷ See e.g., Statement of the Fed. Trade Comm’n to the Att’y Gen. of Tex. Concerning Certified Registered Nurse Anesthetists (Sep. 11, 2020), https://www.ftc.gov/system/files/documents/advocacy_documents/ftc-staff-comment-attorney-general-texas-concerning-certified-registered-nurse-advocacy-crna/v200010txagcrnaadvocacy.pdf; Statement of the Fed. Trade Comm’n to the Alaska Senate Comm. on Labor & Commerce on Certificate of Need Laws and SB 62 (Feb. 6, 2018), https://www.ftc.gov/system/files/documents/advocacy_documents/statement-federal-trade-commissionalaska-senate-committee-labor-commerce-certificate-needlaws/p859900_ftc_testimony_before_alaska_senate_re_con_laws.pdf; Joint Statement of the Fed. Trade Comm’n and the Antitrust Div. of the U.S. Dep’t of Just. to the Va. Certificate of Public Need Work Group (Oct. 26, 2015), <https://www.ftc.gov/policy/policy-actions/advocacy-filings/2015/10/joint-statement-federal-trade-commissionantitrust>.

¹⁸ See David Harrison, *Speed Limits on Trump’s Infrastructure Drive: Federal Laws, Rare Species and Nimbys*, WALL ST. J. (Feb. 12, 2017), available at <https://www.wsj.com/articles/speed-limits-on-trumps-infrastructure-drive-federal-laws-rare-species-and-nimbys-1486931892>.

fund them, in tech, biotech, consumer products, etc. On the flip side, sand in the gears prevents the market from working. As you think about reform of the antitrust laws, including those governing mergers, I urge you to keep this in mind.

Again, thank you for inviting me today, and I look forward to your questions.