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August 20, 2018

Chair Joseph Simons and Members of the Commission
Federal Trade Commission
600 Pennsylvania Avenue NW
Washington, DC 20580

Re: Competition and Consumer Protection in the 21st Century Hearings, Project Number P181201, Topic 1

Via Online Submission

Dear Chairman Joseph Simons and Members of the Commission:

On behalf of Public Citizen's more than 500,000 members and supporters, we provide comments on competition and consumer protection in the 21st century. In accordance with the announcement, we limit our written comments at this time to the question of the state of antitrust and consumer protection law and enforcement as described in the hearing announcement topic one. We will provide additional comments as warranted by forthcoming announcements and hearings.

U.S. Supreme Court Justice Louis Brandeis long ago warned against the "curse of bigness" in corporate power. Speaking at a time when American trustbusters sought to rein in excessive corporate power by enacting bold laws to protect competition, he warned against what has now come to pass, seeing the growth of corporate power overwhelm the rights of the citizenry. The laws of the progressive era and the challenges of the present day alike have been repeatedly hamstrung by short-sighted court decisions and the failures of our pro-competition agencies, which have failed to adapt to changing markets and technology. These failures have resulted in an overwhelming amount of corporate concentration in America that harms consumers and our democracy.

Public Citizen has worked for decades to protect consumers from predatory corporate behavior and to resist anti-competitive practices that injure consumers, cheat workers and stifle our economy. Unfortunately, given the current lax state of campaign finance law and a permissive political climate, market power goes hand-in-hand with political clout. Americans' right to enjoy the benefits of the democracy our founders built is being threatened by companies willing to use their political power to directly stymie competition and harm consumers, in order to inflate their profit margins. Reform of our antitrust laws and practices, and developing a new pro-

competition, pro-consumer approach to an economy governed by new technologies and new corporate structures is an important step in returning government power to the hands of citizens, where it belongs.

As the Federal Trade Commission (FTC or Commission) investigates ways to improve competition and consumer protection—the first such comprehensive call for comments for two decades—we encourage you to consider both new theories and approaches for the agency, and to identify issues that should be addressed through legislation.

Given the breadth of your hearings, the topics you might appropriately consider are almost infinite. As a prefatory note, we point out the risk that the hearing process will be used to pull back antitrust and consumer protection enforcement, or to divert attention from actual enforcement activity, and strongly encourage you to prevent either of these outcomes. Here we highlight a few priority areas:

- Mergers and anti-competitive activity should be judged on more than just a narrow and misnamed “consumer welfare standard” that treats human beings as nothing more than passive purchasers of goods and services, concerned only with price. Consumer interests are broader, inclusive, for example, of privacy and innovation effects. And citizen interests are broader still, including impacts on jobs and wages, and political power. The FTC must find a way to reinfuse these broader considerations into enforcement.
- In the advertising media/social network space, marketing is increasingly driven by covert strategies that are fundamentally deceptive--that is, actions in which consumers are unaware that they are being advertised to. This phenomenon is long familiar to the Commission, of course, but takes on a new pervasiveness with influencers, native advertising, inadequately labeled advertisements on search platforms, and much more. The Commission has investigated this problem, but its enforcement actions have been paltry. The hearings should helpfully investigate both the problems and the Commission’s enforcement actions or lack thereof.
- The Cambridge Analytica and Equifax scandals have crystalized for the public how serious threats to online privacy are for every person. Of course, the threats come not just from hacking, but from intentional practices of some of the world’s largest corporations. The Commission should explore further how corporate concentration in the online space puts privacy at risk. It should critically examine how and to what extent its own enforcement actions have addressed and curbed abuses; and how the agency can catch up to the evolving practices of the largest platforms and design systems so that it is not regulating to solve only legacy problems rather than emerging privacy threats. We believe this latter inquiry will direct attention not only to the need for robust regulation and enforcement, but to the need to break up the largest platforms because of the inherent risks they pose, and the inherent challenges to regulating them as quickly as their business models evolve.
- It is evident that while Big Data offers some major social benefits, intentional and especially unintentional effects may be to entrench racial and other discriminatory practices. There is almost no chance of corporations policing themselves in this regard,

and our citizens should not be left to the vagaries of private enforcement. The FTC should proactively provide guidance to companies about implicated issues, and delineate a nonexclusive set of practices and outcomes that will presumptively be considered discriminatory.

- In the energy space, the Commission should, among other issues, examine the degree to which private equity firms are gaining improper influence over energy commodities markets, and improperly affecting markets to the detriment of consumers.
- As the Commission explores intellectual property and competition, the Commission should again turn its attention to the pharmaceutical industry, which is defined in large part by government-granted monopolies and where anti-competitive practices are rife. Among the many topics to be explored in this space are: the practice of paying to delay the entry of new or generic drugs into the market; "product hopping" and "evergreening"; anti-competitive joint ventures and cross-licensing arrangements; anti-competitive practices surrounding combination products and refusals to license to competitors; illegal obstacles to the launch of biosimilars; anti-competitive and other abuses by pharmacy benefit managers, including failure to pass on cost savings and discounts to employers and patients. All of these are abuses that stem directly from the grant of monopoly power. The Commission might usefully focus attention on the practice of patent-protected medicines raising their price year after year, far beyond the level of general or health care inflation (and in spite of the fact that company costs almost surely fall over time) and whether such practices should be considered per se anti-competitive. The Commission should also consider the appropriate role for the federal government in authorizing competition for on-patent products that are not made available at a reasonable price, either through existing authorities (for government-funded inventions or for government use) or pursuant to new legislation.
- The Commission should consider a retrospective review of the impact of approved mergers and acquisitions and imposed remedies and consider the answer to some unanswered questions:
 - Did promised synergies and consumer welfare benefits materialize?
 - Were promising alternative technologies or competitive innovations dismantled?
 - Did the conduct or structural remedies appear to address the ex ante concerns?
 - What were the impacts on workers, both in terms of jobs and wages?
 - Did the combined entities exercise market power or engage in anti-competitive practices?
 - What do the successes and failures of antitrust enforcement from the past signal about what should be done in the future?

FTC antitrust decisions tend to be based on data-intensive technocratic debate reserved for those with high-level economic training and access to statistical data, not based on the needs of consumers navigating our marketplaces. However, only relying on those voices leaves out vital evidence about the way our economy is working on the ground. We applaud the Commission for entering into this public comment and hearing project with the goal of gaining a more diverse and inclusive set of opinions offered by voices beyond the worlds of academia and industry.

We look forward to working with the FTC on addressing solutions to its current enforcement hurdles and respectfully request the opportunity to testify at public hearings on the matter.

Sincerely,

—

Robert Weissman
President