RETAIL INDUSTRY LEADERS ASSOCIATION

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August 20, 2018

Federal Trade Commission
Office of the Secretary
600 Pennsylvania Avenue, NW
Suite CC-5610 (Annex C)
Washington, DC 20580

Re: **Competition and Consumer Protection in the 21st Century Hearings (Project Number P181201)**

RILA applauds the Commission for the initiative it has shown in these hearings and its willingness to scrutinize its existing approach to antitrust enforcement and consumer protection in the rapidly transforming, 21st century economy.

RILA is the trade association of the world's largest and most innovative retail companies. Its more than 200 members include retailers, product manufacturers, and service suppliers that collectively account for more than $1.5 trillion in annual sales, millions of American jobs, and more than 100,000 retail stores, manufacturing facilities, and distribution centers around the world.

Many of the topics the Commission has identified for discussion involve forces that have transformed the retail sector—including "competition and consumer protection issues in communication, information and media technology networks," the proper analysis of "'platform' businesses," and "the intersection between privacy, big data, and competition." RILA thus looks forward to participating actively in these hearings as they develop, and given the breadth of the issues involved, plans to submit more specific, detailed comments in response to the particularized discussions these hearings will no doubt foster. But we believe it is helpful at the outset to identify broad topics that we respectfully submit the Commission should consider and investigate, as well as some of the questions that we think these topics present.

1. How Should Competition And Consumer Protection Law Respond To Concerns About Market Power In The "Information Infrastructure"?

Classic economic theory holds that consumers are driven to purchase products at the lowest available price, and that competition for the largest share of consumer transactions will thus exert downward pressure on market-wide prices. But even this most basic tenet of antitrust law depends on consumers obtaining timely and accurate *information* about prices. Put otherwise, it is the available information about products and prices, not the prices themselves, that drives consumer behavior. At its best, the internet can be a vast source of such information—allowing consumers to identify competing offers and shop for the best one in ways that were never possible before. But the internet's ascension to the center of modern consumer decisionmaking also raises serious potential concerns, because the information infrastructure that allows consumers to use the internet in this way is subject to only limited public regulation, and controlled by a relatively small number of highly influential firms.

The infrastructure we have in mind includes (1) the physical transmission infrastructure (the "pipes"), (2) the webhosting services overwhelmingly provided by a small set of technology firms, and (3) the search engines and social networks on which consumers rely to find the information they are looking for. These are highly concentrated industries, driven towards monopoly or extreme concentration by scale effects, natural monopoly, and/or network effects. And the ways that firms in these industries use their positions atop the information infrastructure to maximize their self-interest are highly opaque to both consumers and sellers who depend on their services. In this context, it is possible that some traditional tools of antitrust analysis will leave anticompetitive or exclusionary conduct undetected or unremedied, leading to inefficient or sub-optimal results.

We think it would be useful for these hearings to consider whether and how the concentration and lack of public regulation in the information infrastructure sphere is harming competition and consumers in both the short and long term. Some of the questions we have in mind are the following:

A) How does the modern information infrastructure parallel the other infrastructure systems in this country, many of which are publicly owned (like the roads) or extensively regulated (like the railroads or public utilities)?

B) Does an infrastructure-like conception of modern information network firms embrace only the owners of physical bottlenecks (like wires and satellites or servers) or does it also embrace dominant search engines and social networks? Why or why not?

C) Do information infrastructure firms have sufficient market power or functional control that they could harm competition by disfavoring or foreclosing current or future competitors? Does that power come from what we traditionally think of as market power (the power to control price and output) or from control over information itself?

D) If such power exists, how is that power currently being used? Are any of those uses likely to seriously harm competition or mislead consumers?

E) Would any problems that may exist in this realm be best addressed by rules that prohibit certain kinds of conduct or by rules that require greater transparency, or both?

2. What Competitive Concerns Are Raised By "Platform" Businesses?

The Commission itself has proposed to consider various issues related to "markets featuring 'platform' businesses," and we believe that is a particularly important object for the Commission's attention. Platform businesses have revolutionized retail, and that disruption stems in no small part from genuine innovation that should be celebrated and incentivized. But platform businesses also can pose competitive concerns that merit close scrutiny and study. Antitrust law is full of examples of innovators subsequently turning into "lazy" monopolists to the detriment of consumers and competition.We hope that these hearings can foster a vibrant discussion about these issues.

RILA encourages the Commission to assess how the existing antitrust laws are applied to internet-based platforms, and the adequacy of current antitrust analysis in this regard. Competitive concerns about platforms are nothing new: They can been seen in the Supreme Court's 1951 holding that a newspaper engaged in attempted monopolization when it prohibited its advertisers from running ads on a competing upstart radio station (*Lorain Journal Co. v. United States*, 342 U.S. 143 (1951); in the D.C. Circuit's analysis of Microsoft's exclusionary conduct surrounding the Windows operating system (*United States v.*

Microsoft Corp., 253 F.3d 34 (D.C. Cir. 2001)); and cases discussing “essential facilities” and “monopoly leveraging” doctrines (*Verizon v. Trinko*, 540 U.S. 398 (2004)). The Commission’s upcoming hearings provide a meaningful opportunity to explore the role these doctrines can and should play in analyzing contemporary platform business models.

RILA also welcomes the Commission's consideration of the extent to which existing Sherman Act precedent should be revisited (with the encouragement of the Commission), and/or whether the FTC Act should play a distinct role, in this policy space. Among other things, platform businesses exhibit strong network effects, and the platform companies themselves appear to understand that their ideal competitive strategy thus involves building out the largest network possible through prolonged periods of unprofitability. Current antitrust thinking views this as mostly unproblematic—a price-war tactic that tends to benefit consumers—because it is believed that it will be hard for these companies to later raise their prices.

But that analysis might well be missing something: Are the dual requirements of showing “below cost” pricing and the ability of a monopolist to recoup its losses as set forth in *Brooke Group v. Ltd. v. Brown & Williamson Tobacco Corp*., 509 U.S. 209 (1993), too rigid for an economic environment increasingly dominated by internet-based platforms? It is worth considering whether this pre-internet economic thinking applies to platform businesses in the way it does to a classic firm that manufactures widgets. Is there an inconsistency or gap in existing Sherman Act precedent that prevents it from reaching firms that forego profits for years on end, driving out or diminishing rivals such that consumers are worse off in terms of choice? Should the FTC Act’s broader prohibition on “unfair or deceptive trade practices” supplement any shortfall in Sherman Act jurisprudence? Has this long-term willingness to accept losses undermined the assumptions of predatory pricing jurisprudence? Are the dominant platforms actually at risk of being toppled by competitor innovations, or are they firmly entrenched?

Platform businesses are also sometimes characterized by a kind of mixed role in the market. A firm might be both a platform for third-party buyers and sellers to find each other, while also being a participant seller or buyer on the platform. That arrangement is not necessarily problematic, but if the platform is powerful enough, and its operation opaque enough, this may allow the platform business to exclude or stymie competitors and entrench or exploit its market power. For example, a platform’s search algorithm could give more favorable treatment for the platform’s product, regardless of whether a competitor’s product might be offered at a lower price. Or consumers might be confused about which company is standing behind a product offered on a platform. This mixed role can also lead to antitrust concerns regarding the improper use of competitively sensitive data.

Meanwhile, the Supreme Court’s recent decision in *American Express* about “two-sided transaction markets” raises questions about how market power should be measured in markets involving platform businesses, and whether the law will miss the vast power that many of these platform businesses in fact possess. There is, at present, little understanding of what makes a business a “platform” and whether every platform business (or *any* platform business apart from “transaction” markets like American Express credit cards) should qualify for the kind of two-sided market definition that the Supreme Court appeared to use in *American Express*. And what about firms that compete in many markets, focus on scale of platform, and operate loss-leading businesses to generate sales for interconnected businesses? Do contemporary analyses of market power capture what actually makes these firms powerful, and the practical influence that they hold over their competitors' and counter-parties' decisionmaking?

In sum, attention to the concept of platform businesses and the competitive concerns they raise seems warranted, but there is a lot that requires study and careful explication. That includes a firm, workable definition of what makes a business a "platform" and what kinds of platform conduct merits competitive concern.

Here are some of the questions we have in mind:

A) What is a platform business? Do most platform businesses occupy "two-sided transaction markets" of the kind at issue in *American Express* or do they instead look like the newspapers for which the Court reaffirmed its one-sided approach to market definition?

B) What is the precise source of competitive concerns from platform businesses? Is it market power associated with strong network effects, the capacity for (perhaps concealed) self-dealing on the platform, or something else? Is it the aggregation and/or misuse of competitively-sensitive data?

C) Should we be concerned about platform firms intentionally maintaining extended periods of unprofitability while they expand their network? If these firms do not believe that winning the competition to become the dominant platform will eventually allow them to profit from supra-competitive prices, why are they willing to tolerate such losses? Even supposing that prices might stay low, are there other ways this race for single-firm dominance might harm consumers?

D) Supposing that platforms pose competitive concerns, are such concerns best addressed by conduct regulations, transparency requirements, or something else? How can we ensure fairness in the use of algorithms that heavily influence consumer decisionmaking and the properly handling of competitively sensitive data by platform businesses?

E) To what extent does existing antitrust jurisprudence reach dominant platforms that seek to maintain their power or extend their reach in ways that did not exist in prior centuries?

F) How should the FTC identify and measure market power and entry barriers in markets featuring platform businesses? How should it evaluate and define collusive, exclusionary, or predatory conduct involving platforms? What conduct violates the consumer protection statutes enforced by the FTC?

3. How Do The Antitrust Laws Apply To Data And What Avenues Exist For Detecting And Remedying Anticompetitive Use Of Data?

The antitrust laws focus primarily on price, output, and quality of goods and services. Accordingly, when analyzing competitive effects, courts and the antitrust agencies traditionally look for increased prices, reduced output, and decreased quality of goods and services, as those are "proof of actual detrimental effects" on competition. *FTC v. Indiana Federation of Dentists*, 476 U. S. 447, 460 (1986). But those are not the only ways that a firm with market power can harm consumers. (For example, in *Conwood Company v. U.S. Tobacco Company*, Conwood obtained an injunction barring its competitor from destroying its sales racks in retail stores.) The FTC should examine the role of an increasingly important competitive factor: data.

Firms are acquiring and collecting data on an unprecedented scale. They use data for many purposes, including targeted advertising, analysis of consumer groups and demographics, benchmarking, and operations management. Data itself is becoming a "product" that firms market and monetize alongside more traditional products and services. RILA believes the FTC should consider the impact of data on competition in digital markets, both in terms of the ability of data to meaningfully impact price, output, and quality of goods and services, as well as the use of data itself as a metric for analyzing market power and competitive effects.

That analysis is particularly warranted because many uses of data are pro-competitive or consumer-welfare enhancing, while some are not. Firms can use data to market offerings to consumers that they might otherwise miss, or to create new technology products. But firms can also use data in ways that raise competitive issues. Companies can create phantom inventory online to mislead consumers or other competitors about product coverage or availability; data can be used to steer customers or otherwise limit their choice; and exchange of data among competitors can (or potentially can) raise concerns about information sharing and coordination. Moreover, firms increasingly need data to compete, and the stockpiling of data can increase barriers to entry, making it difficult for new or entering companies to succeed, even if they offer competitive products and services at below-market prices.

Given the importance of data and the risks of misuse, the FTC should reevaluate the importance of data and data handling practices to antitrust analysis. Here are some related questions we have in mind:

A) How should the FTC identify and measure market power and anticompetitive effects in markets involving the collection of vast amounts of data, such as cloud computing platforms or other digital markets? Should the FTC go beyond the traditional methods of examining anticompetitive effects? Is an exclusive emphasis on price and output missing some of the ways that consumers may be harmed in the short, medium, or long run?

B) What constitutes anticompetitive conduct with respect to data management where that data may enable a firm to harm competition (for example, by providing insight into the dealings of competitors, their business partners, or other market participants)?

C) What types of data are competitively sensitive in this environment, and when does cross-sharing across business units raise competitive issues? What are the "rules of the road" for both the firms that manage big data and the various companies that use their platforms, especially when companies use the platform out of necessity?

D) How should the FTC analyze the effects of integration in markets involving big data? As companies fully integrate across multiple levels of the supply and distribution chain and acquire significant amounts of data, do they pose a larger threat to competition? For example, if a firm holds data not only about its competitors and their customers but also competitors' upstream suppliers, does the threat of foreclosure come more strongly into focus? What if the integrated firm has market power?

4. Has Technological Change Obviated The Justification For Competitor Collaboration?

Antitrust thinkers routinely address the intersection of technology and competitor collaboration issues through the issue of "standard setting." This is an area in which rapid technological progress *creates* a justification for competitor collaboration that otherwise would not be permitted under the antitrust laws. But it is important to recognize that technological progress can also *undermine* the case for competitor collaboration, by potentially making old collaborative arrangements unnecessary. We have in mind two arrangements that have salience in retail, but there may be other good examples as well.

One example is the blanket license product that BMI and ASCAP create for music licensing. Because the consent decrees entered into in the 1960s require these products to be regulated by the "rate court," there is less chance that the market power they create can be exploited. But the important observation here is that the justification for creating BMI and ASCAP stemmed from technological challenges that do not exist today. At present, it is possible to imagine numerous ways in which music users could purchase licenses from or negotiate with individual record companies or artists; certainly, business innovation in this area is stymied by the blanket licensing system that BMI and ASCAP have entrenched. There may be challenges to lifting the consent decrees, but the key point is that arrangements justified by 1960s technology are not necessarily justifiable today.

Another example is credit cards. The Visa and Mastercard networks were likewise justified in the 1960s by the technological challenges associated with closing credit transactions all over the world between myriad merchants and banks. Today, those challenges have been drastically reduced, if not eliminated, and there is no reason why some or all of the banks that participate in Visa and Mastercard could not shoulder those challenges themselves. Such business model innovation is held back, however, by the Visa and Mastercard model and the very high prices that have been generated for banks by the joint fixing of interchange fees that is achieved through Visa and Mastercard. In this instance, moreover, there is no "rate court" to regulate the joint fees that are fixed and to constrain the exercise of market power that Visa and Mastercard wield. There are perhaps reasons why the competitor collaborations that underlie Visa and Mastercard might still be justified. But they should not continue to go unexamined by virtue of a decision approving them in a very different commercial and technological environment.

The overall point is that changing economic and technological conditions in the 21st Century economy may or may not justify changes to how we analyze competition issues, but they almost certainly justify thoughtful and updated examination into whether decisions already made continue to stand up under the analytical rules we already have. Times and conditions have changed. It would be surprising if that did *not* mean that certain long past decisions no longer map onto current times and conditions.

Some questions in this realm include:

A) Are there arrangements that involve competitor collaboration or other conduct that might be anticompetitive that were justified by technological conditions that are no longer present? What about the examples above? Are there others?

B) If there are possible examples, what is the appropriate regulatory response? If there are consent decrees involved, should the agencies attempt to reopen them? What role can private antitrust enforcement play in this effort?

C) Do the courts have adequate tools to recognize these changing conditions and address outdated precedents? Are they likely to do so, even on a convincing showing of changed circumstances, given judicial aversion to overturning previous cases? How might the Commission help to encourage this rethinking?

D) Are there other tools available to the Commission that might allow it to address arrangements that have become anticompetitive but are unlikely to be redressable in the courts because of entrenched precedent?

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Retailers recognize the value of actively contributing to this important effort. We agree with Chairman Simon's assessment that through "serious reflection and evaluation, we are better able to promote competition and innovation, protect consumers, and shape the law, so that free markets continue to thrive." We believe finding the answers to the questions posed above about competition in informational infrastructure, platforms, and technologically unnecessary cooperation arrangements will help the Commission reach its objectives.

RILA stands ready to work with the Commission in this ambitious review through comments, testimony, or providing any other assistance the Commission may deem appropriate and useful. Please direct questions or requests for further information about this comment letter to Nicholas Ahrens, vice president, privacy and cybersecurity, nicholas.ahrens@rila.org or 703-600-2065.

Sincerely,

Sandra Kennedy
President