Via Electronic Submission

Mr. Donald S. Clark
Secretary of the Commission
Federal Trade Commission
600 Pennsylvania Avenue NW
Washington, DC 20580

RE: Competition and Consumer Protection in the 21st Century Hearings, Docket FTC-2018-0055

Dear Mr. Clark and the Commission,

As one of the many architects of the original Pitofsky hearings,[1] I am glad to see the FTC continuing this legacy of meaningful introspection. Consumers are best served when enforcement agencies retain open minds and strive for incremental advancements in antitrust policy to keep pace with evolving markets. The antitrust enforcement agencies have witnessed several major changes in the US economy and have adapted to each major challenge.

I write these general comments to suggest two general policy recommendations for this FTC's agenda:

1. The consumer welfare standard should remain the key lodestar to guide enforcement. While the application of consumer welfare standard can and should be advanced based on modern thinking, it should not -- as some have suggested -- be thrown out entirely.
2. Traditional evidence-based antitrust methodology can rise to the challenges presented by modern industries. Just as scientists can use mathematics to break down impossible questions to solvable equations, the enforcement tools we have developed from over a century of antitrust enforcement allows us to break down and prove theories of harm. These tools should be advanced, but they should not be thrown out.

Additionally, Matthew Lane and I have assisted in the drafting and submission of comments to Topic 8 on behalf of Patients for Affordable Drugs, U.S. PIRG, Consumer Action, Institute for Liberty, America's Health Insurance Plans, Society for Patient Centered Orthopedics, and Coalition to Protect Patients Choice. I fully echo those comments here.

I. The Consumer Welfare Standard Remains the Best Guiding Principle for Antitrust Enforcement

[1] David Balto has over 20 years of government antitrust experience as a trial attorney in the Antitrust Division of the Department of Justice and in several senior level positions at the Federal Trade Commission including the Policy Director of the Bureau of Competition of the Federal Trade Commission (1998-2001) and attorney advisor to Chairman Robert Pitofsky (1995-1997). These comments were prepared with the assistance of Matthew Lane.

The consumer welfare standard is surprisingly simple. Alleged anticompetitive activities are held to one measure: whether they lead to more consumer harm than benefit. These harms can be in the form of higher prices, lower output, reduced quality or lost innovation. Indeed, non-price harms are proscribed by the Horizontal Merger Guidelines under the consumer welfare standard. Both past enforcers like former commissioner Terrell McSweeny[2] and current enforcers like Director of the Bureau of Competition Bruce Hoffman[3] have discussed how non-price harms are enforceable and enforced under the consumer welfare standard.

This is no time to throw out the consumer welfare standard and introduce chaos into our antitrust enforcement regime. That would have the immediate effect of weakening enforcement through the confusion of developing and proving the efficacy of a new standard in courts. This would strain the resources of our enforcement agencies, as this monumental task will be additional to the already daunting task of bringing and winning important enforcement cases to protect consumers. There is no consensus on how a new standard would work in courts, and the impacts of such a dramatic change in enforcement could ripple out for decades.

Such a change is unnecessary when modern antitrust law has thrived under the consumer welfare standard, where plaintiffs can demonstrate to a judge or jury how bad conduct has led to provable harm. The consumer welfare standard has provided us with the tools to build winning cases. These tools are not static, and can be adapted and advanced incrementally to keep up with modern developments in both industry and economic thinking. We already have the right tools to protect competition, we just need to make better use of them.

II. Meet the New Antitrust, Same as the Old Antitrust

Technological advancements have given rise to entirely new industries. Sometimes it appears that these new industries present enforcement questions of first impression. But our current enforcement tools developed over decades, perhaps with some updating, stand ready to assess these competition questions.

Here are three examples:

- **Market Definition:** It can be easy to lump together major technology companies. We see references to FAANG stocks regularly in the business press. These companies all rose to prominence around the same time and have popularized new terms, like platforms, to describe them. It can also be easy to think of each as an island. After all, each initially became popular by doing one thing especially well: Google -- search, Apple -- smartphones, Amazon -- online retail. While each approach is attractive, neither is

[2] Terrell McSweeny & Brian O'Dea, Data, Innovation, and Potential Competition in Digital Markets -- Looking Beyond Short-Term Effects in Merger Analysis, https://www.ftc.gov/system/files/documents/public_statements/1321373/cpi-mcsweeny-odea.pdf.
[3] Speech by Bruce Hoffman, Competition Policy and the Tech Industry – What's at stake? (April 12, 2018), *available at* https://www.ftc.gov/system/files/documents/public_statements/1375444/ccia_speech_final_april30.pdf.

particularly helpful for antitrust analysis. The fact is we have a robust intellectual framework and set of tools to describe product and geographic markets using evidence. This is classic "nose to the grindstone" antitrust law. Performing this analysis, we can determine a market that accurately describes which companies competitively constrain anticompetitive practices. Sometimes we will find that the major tech companies directly compete with each other, like in certain search and advertising markets. Other times we will find that tech companies fiercely compete with more conventional industries, like when online retail competes with brick-and-mortar retail.

- **Big Data:** Big data is another area where conventional antitrust tools can be used to analyze potential competitive problems and abuses. Sometimes data is a competitively important asset.[4] Indeed, the enforcement agencies have taken action against mergers that would create competitive problems due to data assets. However, sometimes evidence shows that data is not competitively important. For example, when it is ubiquitous, publicly available, or available for sale through third party data brokers.[5] Other times any competitive advantages comes not from the data but from the proprietary processing of that data.[6]

  Big data does, however, present novel policy issues due to the interaction between privacy and competition concerns. This can effect enforcement, as overzealous privacy enforcement can negatively impact competition. For example, locking down the use of APIs to exchange information between different programs could deprive today's small third-party developers from the access to consumers they need to grow into tomorrow's big challengers. These policy concerns can also impact remedies. For example, requiring the divestiture of data assets can be a breach of trust to the consumers that only agreed to divulge their data to the original company. Extreme remedies, like break ups, also implicate privacy concerns. Instead of one company with your data, there are now many. If any of these new companies come under hard times or decide to seek new revenue streams, there could be monetization of data that would not have occurred without a breakup.

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[4] *E.g.*, Analysis of Agreement Containing Consent Order to Aid Public Comment, *In the Matter of The Dun & Bradstreet Corporation*, Dkt. No. 9342, at 1 (Sept. 10, 2010), https://www.ftc.gov/sites/default/fles/documents/cases/2010/09/100910dunbradstreetanal.pdf; Analysis of Agreement Containing Consent Order to Aid Public Comment, *In the Matter of Reed Elsevier and ChoicePoint*, File No. 081-0133 (Sept. 16, 2008), https://www.ftc.gov/sites/default/fles/documents/cases/2008/09/080916reedelseviercpanal.pdf; and Analysis of Agreement Containing Consent Order to Aid Public Comment, *In the Matter of Nielsen Holdings N.V. and Arbitron Inc.*, File No. 131-0058 (Sept. 20, 2013) at 3, https://www.ftc.gov/sites/default/fles/documents/cases/2013/09/130920nielsenarbitronanalysis.pdf.

[5] For a more detailed analysis, see my paper: Balto, David A. and Lane, Matthew, Monopolizing Water in a Tsunami: Finding Sensible Antitrust Rules for Big Data (March 22, 2016). Available at SSRN: https://ssrn.com/abstract=2753249 or http://dx.doi.org/10.2139/ssrn.2753249.

[6] *See*, Will Rinehart, Why A Data Portability Act Might Not Be An Effective Policy Path, American Action Forum (Feb. 6, 2018), https://www.americanactionforum.org/insight/data-portability-act-might-not-effective-policy-path/.

- **Network Effects:** Network effects have gotten a bad wrap lately, but the mere presence of network effects on a platform, product, or service does not make it anticompetitive. Indeed, network effects often describe benefits to consumers. For example, consumers receive the benefits of network effects when third party software developers invest in making high quality products for their devices. These software developers are likely attracted to making such an investment because there is a large network of potential customers. Consumers also benefit when they can enjoy networked products like certain video games or social applications with their friends and family.

  Network effects can also have a negative impact on competition by raising barriers to new entry. But network effects are not new, and their competitive impact is not certain. Large networks can and have been replaced by new networks. This can happen when a new product is more desirable to consumers, like when Facebook replaced MySpace, or when a superior technology comes to market, like when emails replaced fax machines.

  Barriers to entry due to network effects can also be eased through the creation of platform agnostic products or other forms of multi-homing. A good example of this is the Sonos speaker system, which can connect to a number of music services. The CEO has also stated that it will soon be able to offer integration with Google Assistant along with its current Amazon Alexa integration.[7] These products allow platforms to compete without forcing consumers to make a new investment to use a different platform. When a specific product is not necessary to connect to a platform, then consumers can multi-home themselves by using multiple platforms. For example, a music fan can subscribe to Spotify and TIDAL, or an online shopper can order from Amazon and Walmart.com. These platform industries can be highly competitive and not characterized by winner-take-most dynamics.

  The positive and negative impacts of network effects can vary wildly platform to platform. Because of this, the impact of network effects on competition should be measured and tested using available empirical enforcement tools to determine what, if any, impact they have on enforcement.

These questions found in modern antitrust enforcement all have solutions found in traditional antitrust enforcement tools, which include econometric analysis and fact finding. While these tools always need improvement, they should not be thrown out.

Signed,

David Balto

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[7] Shannon Liao, *Sonos CEO hints Google Assistant will arrive on speakers in time for holiday shopping*, The Verge (Aug 2, 2018), https://www.theverge.com/2018/8/2/17644386/sonos-nasdaq-ipo-google-assistant-speakers-holiday-shopping.