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Prepared Remarks of Chairman Joe Simons
Hearings on Competition and Consumer Protection in the 21st Century

September 13, 2018

Good morning and welcome. On behalf of all of us at the Federal Trade Commission, I want to thank you for coming to the opening of our Hearings on Competition and Consumer Protection in the 21st Century. Our goal is to make these hearings as informative, insightful, and consequential as possible, covering some of the most important competition and consumer protection policy and enforcement issues of the day. We believe we are situated to do just that.

These hearings are modeled after the ones held by the FTC back in 1995 by then-Chairman Robert Pitofsky, who in his opening remarks said at the time, "these hearings are designed to restore the tradition of linking law enforcement with a continuing review of economic conditions to ensure that the laws make sense in light of contemporary competitive conditions." We intend to continue that same tradition.

We are very fortunate to have a large group of highly respected participants representing a diverse range of views – including academics, practitioners, enforcement officials, and representatives from public interest groups. And I am proud that we are opening the hearings at the Georgetown University Law Center, where Chairman Pitofsky spent much of his career when he was not otherwise at the FTC, and where I received my initial antitrust education – to a significant extent, from Professor Pitofsky.

Today, I want to talk about why the Commission is holding these hearings. Almost 30 years ago, I came to the FTC – the first of my three times here – at the tail end of the Commission's adoption of a significantly revised approach to antitrust enforcement. This change, which began in 1981, reflected new learning that had begun to influence Supreme Court antitrust doctrine. It was primarily driven by the scholarship of academics; the most prominent – Phil Areeda, Don Turner, Frank Easterbrook, Richard Posner, and Robert Bork – were associated with either Harvard University or the University of Chicago. They applied microeconomic principles to antitrust questions and paid attention to empirical work, which led them to conclude that a lot of pre-1970s antitrust case law seemed inconsistent with rational, procompetitive, and economically beneficial behavior.

By the time I left the agency for the first time in 1989, application of microeconomic principles and simple economic models was routine and encouraged. Notwithstanding some initial criticism, the Clinton Administration's antitrust leadership – Bob Pitofsky, Anne Bingaman, and Joel Klein – largely adhered to the same principles. So, when I returned to the Commission as Director of the Bureau of Competition in 2001, there was substantial support for, and acceptance of, the antitrust reforms that had been initiated twenty or so years prior. In other words, there was a general consensus on how we ought to think about antitrust enforcement and policy.

But now, at the beginning of my third stint at the Commission, things have shifted. The broad antitrust consensus that has existed within the antitrust community, in relatively stable form for the last twenty-five years, is being challenged in at least two ways.

First, some recent economic literature concludes that the U.S. economy has grown more concentrated and less competitive over the last 20-30 years, which happens to correlate with the

timing of the change to a less enforcement-oriented antitrust policy beginning in the early 1980s. These concerns merit serious attention, and they will be part of today's discussion.

Second, some are debating the very nature of antitrust itself, calling for antitrust enforcers to take account of policy goals beyond consumer welfare. Inequality, labor issues, and excessive political power are perhaps the main examples. We will discuss some of these suggestions at future sessions. These concerns pose a challenge for antitrust agency leadership, the courts, and legislators: to think hard about whether significant adjustments to antitrust doctrine, enforcement decisions, and law would be beneficial to our country, in order to accommodate these concerns.

As I noted in announcing these hearings, it is important that the antitrust enforcement agencies be at the forefront in thinking about these issues, not bystanders to this debate. To that end, for today's and future panels (continuing through the fall and early winter), we have invited interested parties to discuss these issues, both through public comment and public sessions, with us and each other. We do this with the goal of understanding whether our current enforcement and policies are on the right track, or on the wrong track – and, if they are on the wrong track, what we should do to improve them.

I approach all of these issues with a very open mind, and I am very much willing to be influenced by what we hear throughout this process. I am old enough to have witnessed dramatic changes in antitrust policy and enforcement during my own career. These changes have largely been driven by developments within the economic community, which were then adopted by the legal community.

The movement by the economists, however, has not always been in the same direction. In the 1950s and 1960s, a substantial body of empirical economic work purported to show significant anticompetitive effects at relatively low levels of concentration. In 1968, the DOJ issued merger guidelines based on these studies. But just about the time the guidelines were

issued, the economic studies on which they were based were being substantially discredited. As a result, the enforcement agencies over time raised the concentration levels at which mergers were seen as problematic.

A more recent example where developments in economics *increased* the level of successful merger enforcement involves hospitals. In the 1990s, the government lost a large number of hospital merger cases in a row, and the agencies considered whether to give up on hospital merger enforcement. Fortunately, we did not. Instead, we engaged in empirical economic studies that demonstrated the anticompetitive effects of hospital mergers, and we revitalized our hospital merger enforcement program.

So developments in economics can suggest, depending on the circumstances, that our enforcement has been either too aggressive or too lax. This episode involving hospital merger enforcement really drove this point home for me, personally: the use of economics should not be thought of as a one-way ratchet, only driving down the level of antitrust enforcement. Good economics might point us toward more or less enforcement, depending on the facts and analysis in front of us.

In my view, basing antitrust policy and enforcement decisions on an ideological viewpoint (from either the left or the right) is a mistake. Whether or not we expand antitrust beyond the consumer welfare standard, I would rather make policy and enforcement decisions based on the best evidence and analysis –including in particular, empirically grounded economic analysis that enables the analyst to weigh the costs and benefits (broadly defined) to help determine the best approach. My hope is that these hearings will significantly improve our ability to do so, and help to bring about a new and improved consensus among our antitrust stakeholders.

But we are not focused solely on competition issues, either today or throughout the hearings. The strength and direction of the agency's consumer protection mission is also something we are going to explore at some length at these hearings. Today, our most significant and difficult consumer protection issues often revolve around the use (and abuse) of technological capabilities not likely imaged during Bob Pitofsky's chairmanship. As a result, we will be having multiple sessions on data security issues. In addition, our upcoming hearings on platforms, big data, and artificial intelligence will address consumer protection issues (including privacy) as well as competition issues.

Before closing, I want to thank not only the participants in these sessions, but the many groups and individuals who have filed comments in response to our initial hearings notice. We have received over 500 non-duplicative comments, many of substantial length and thoughtfulness. We are reading them and considering them carefully. We expect more comments as we proceed, and I encourage interested persons to comment on what you hear today and throughout the hearings.

I want to thank our co-sponsor and host, the team at the Georgetown Law Center, for helping us pull this initial effort together. I also want to recognize the staff of the FTC for their efforts in both preparing for the substance of this event, and undertaking all the logistics efforts to bring us together. It is a significant effort, undertaken at a large scale and under tight timelines. I, and all the Commissioners, are grateful for the work of so many people within the FTC and outside the FTC, who are engaged in making this effort a success.

Thank you for attending, and I hope you enjoy the hearings.