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Federal Trade Commission
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**Prepared Remarks of
Federal Trade Commissioner
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**Forum on Small Business Financing
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Good morning and thank you for joining the Federal Trade Commission's forum on small business financing, where we will examine the regulatory landscape and concerning practices that entrepreneurs and small businesses face.

Before we begin, I want to share some broader concerns about the state of entrepreneurship and small businesses in America, their lack of freedom in negotiating contracts, and the FTC's role in policing unfair contracts. I'll leave you with several questions that we will need to answer as part of this inquiry.

Being an entrepreneur and starting a new business is tough, but it is also what makes an economy thrive. The hard work, independence, and creativity of entrepreneurs and new small businesses helped us grow, innovate, and create wealth in communities across the country. But, today, large firms increasingly dominate more sectors of the economy. Not only can these firms use their market power to block entrepreneurs from challenging them, they can also use their power to influence government to protect their incumbency, often ironically in the name of promoting small business.

It's getting harder and harder for entrepreneurs to launch new businesses. Since the 1980s, new business formation began its steady decline. And a decade ago, births of new firms started to be eclipsed by firm deaths. According to Census Bureau data analyzed by the Kaufman Foundation and the Brookings Institution, the number of new companies as a share of all businesses has declined by 44% from 1978 to 2012. That makes the stairway to success for entrepreneurs and new businesses steep. For minority- and women-owned businesses, the climb can be even steeper.

One of the most powerful weapons wielded by large firms over new ones is the take-it-or-leave-it contract. Entrepreneurs and small businesses cannot negotiate the terms in these contracts, and the terms usually transfer rights and power to the dominant firm on the other side.

* The views expressed below are my own and do not necessarily reflect those of the Commission or of any other Commissioner.

To be clear, a fair and thriving economy and society rest on contracts. Contracts are ways that we put promises on paper. When it comes to commerce, arms-length dealing codified through contracts is a prerequisite for prosperity. But when a market's structure requires small businesses to be dependent on a small set of dominant firms or those that engage in unscrupulous practices, these incumbents can often impose contract terms that cement their dominance, extract rents, and make it harder for new businesses to emerge and thrive.

For example, entrepreneurs who develop mobile applications face a slew of onerous contract terms imposed by the app stores. Sometimes, these contracts allow platforms to hike their fees at any time and impose regulations that limit how businesses communicate with their customers, depriving these developers of the autonomy they need to run their company. Many small businesses are similarly dependent on dominant online marketplaces, which might impose contractual terms that ban merchants from selling their goods elsewhere at a lower price. Small farmers and poultry growers, meanwhile, must agree to terms imposed on them by large agribusinesses that restrict their ability to contest their payments when their food is weighed. It's not just tech, retail, or agriculture. The loss of small business freedom when it comes to contracts is no longer the exception; it's increasingly the norm.

In other contexts, a market's structure allows firms, regardless of their dominance, to exploit their position through other means, sometimes by deceiving customers. The Federal Trade Commission Act prohibits unfair or deceptive practices, as well as unfair methods of competition. The FTC has a long tradition of prohibiting unfair contract terms and requiring fair ones.

Recently, the FTC began to enforce a ban on non-disparagement clauses in contracts that forbid purchasers from posting truthful reviews online about a product or service. There was consensus that these terms harmed consumers and competition, particularly when contracts gave no "meaningful opportunity" to negotiate.

More than a generation ago, the FTC found that many consumers had no ability to bargain around consumer credit contracts, and that this imbalance was resulting in significant harm to consumers. Based in part on those findings, the FTC developed the Holder Rule, which requires lenders to add a notice to contracts preserving borrowers' legal rights even if the creditor sold the loan to Wall Street or another lender. The rule has reshaped consumer credit markets, and has been described as the most important consumer protection action the Commission has ever taken.

And even more relevant to today's discussion is the FTC's Credit Practices Rule, developed 35 years ago, which bans a host of one-sided contract terms that require consumers to waive their rights or assign their wages to lenders. For example, the rule bans confessions of judgment, where a borrower must agree to waive any defenses if they are sued. In issuing the rule, the Commission found that terms like these were the product of an unequal bargain where consumers could not protect their interests.

But the Credit Practices Rule applies only to consumer contracts, and today we are seeing some small business financing products, particularly those offered online, that include some of the

same terms that the FTC barred creditors from imposing on consumers. These terms have led to a flood of questionable legal actions through which creditors seize small business owners' assets.

The FTC is the sole federal regulator and enforcer in the nonbank, small business financing marketplace, so we are accountable for making sure the market is working. We will need to determine whether certain contract terms and business practices constitute a violation of the law. I believe all of us should approach this inquiry with several questions in mind:

- (1) What are the best sources and methods to assemble qualitative and quantitative data on contract terms and business practices in the market? What can we learn from reforms in other jurisdictions around the world when it comes to unfair contract terms for small businesses and consumers, such as those recently pursued by the Australian Competition & Consumer Commission (ACCC)?
- (2) Which contract terms and business practices are likely to be unlawful under the FTC Act? Which practices may be discriminatory under the Equal Credit Opportunity Act?
- (3) If there are unlawful practices that may be prevalent across the market, should the agency seek to deter this misconduct by activating civil penalties through Section 5(m)(1)(b) or through a rulemaking?
- (4) How can the agency support efforts by state legislatures and regulators that are seeking to promote a competitive, dynamic climate for entrepreneurs seeking financing?

I hope that these questions can be tackled during the three panels we will hear from today, which will include an overview of the marketplace for small business financing, potentially problematic products, and other risks.

In conclusion, the Federal Trade Commission will need to play a pivotal role in restoring dynamism and entrepreneurship in our economy to reverse the alarming trends that undermine the values our country stands for. Aggressive enforcement that promotes competition and protects consumers and honest businesses, complemented by rigorous analysis of the marketplace to eradicate unfair contract terms and business practices across sectors of the economy, is essential. We look forward to learning more from all of you today.