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Federal Trade Commission**

“Interview with Commissioner Wilson and Barry Nigro on the House Judiciary Report”

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I. Introduction.

Many thanks to Jim Rill and Pauline Tang for having me here today. I greatly appreciate the opportunity to give my thoughts on the Majority Staff Report issued by the House Antitrust Subcommittee last month.¹

There are some themes in the Majority Staff Report that we can all embrace. First, the push for greater agency transparency is a good thing. When agencies engage in enforcement action, their complaints and related materials typically provide detailed insights into their analysis and rationales for acting. But when Tim Muris was Chairman of the Federal Trade Commission, he sought to go farther by issuing statements even in investigations that were closed, as in the *Cruise Lines* merger.² A second set of suggestions in the Majority Staff Report pertains to merger retrospectives. I agree that we should check our homework more frequently, and have long been an ardent advocate for more merger retrospectives.³ The FTC recently launched a new webpage to formalize our merger retrospectives program, and I hope to see our merger retrospectives program grow.⁴ I would also support increases in the budget for the FTC and the Antitrust Division of the Department of Justice, as the Majority Staff Report urges.

I appreciate the desire of the House Judiciary Committee to see competition flourish. And there are good examples of Congressional intervention to stimulate competition, including the Hatch-Waxman Act and the more recently-enacted law against REMS abuse.⁵ But I am deeply concerned about many of the proposals contained in the Majority Staff Report, including its plan to overhaul what the antitrust laws are meant to do.⁶ Several suggestions emphasize the static

¹ See H. COMM. ON THE JUDICIARY, SUBCOMM. ON ANTITRUST, COMMERCIAL, & ADMINISTRATIVE LAW, , Investigation of Competition in Digital Markets: MAJORITY STAFF REP. AND RECOMMENDATIONS, (2020), https://judiciary.house.gov/uploadedfiles/competition_in_digital_markets.pdf [hereinafter “MAJORITY STAFF REPORT”].

² Statement of the Federal Trade Commission Concerning Royal Caribbean Cruises, Ltd./P&O Princess Cruises plc and Carnival Corporation/P&O Princess Cruises plc, FTC File No. 021-0041 (Oct. 4, 2002), <https://www.ftc.gov/sites/default/files/documents/cases/2002/10/cruisestatement.htm>.

³ See, e.g., Submission of the Business and Industry Advisory Committee, in DYNAMIC EFFICIENCIES IN MERGER ANALYSIS 248, 260 (presented by Christine S. Wilson to the OECD Competition Committee) (June 6, 2007) (asserting that “it would be instructive for enforcement agencies to perform retrospective studies of merger enforcement decisions . . . to assess the efficacy of merger policy generally, and would be particularly useful in assessing the impact of dynamic efficiencies, given that benefits from such efficiencies may accrue over extended periods of time”); S. Hearing. 115–761, Nominations to the Federal Trade Commission, Hearing Before the Committee on Commerce, Science, and Transportation, United States Senate, 115th Cong. 67, 115–116, 120 (Feb. 4, 2018), <https://www.govinfo.gov/content/pkg/CHRG-115shrg39877/pdf/CHRG-115shrg39877.pdf>; Statement of Chairman Joseph J. Simons, Commissioner Noah Joshua Phillips, and Commissioner Christine S. Wilson Concerning the Proposed Acquisition of Essendant, Inc. by Staples, Inc., FTC File No. 181-0180, at 6 (Jan. 28, 2019), https://www.ftc.gov/system/files/documents/public_statements/1448328/181_0180_staples_essendant_majority_statement_1-28-19.pdf.

⁴ See Press Release, Fed. Trade Comm’n, FTC’s Bureau of Economics to Expand Merger Retrospective Program (Sept. 17, 2020), <https://www.ftc.gov/news-events/press-releases/2020/09/ftcs-bureau-economics-expand-merger-retrospective-program>.

⁵ 21 U.S.C. § 355–2 (Actions for delays of generic drugs and biosimilar biological products).

⁶ MAJORITY STAFF REPORT, *supra* note 1, at 392 (“[T]he Subcommittee recommends that Congress consider reasserting the original intent and broad goals of the antitrust laws by clarifying that they are designed to protect not

over the dynamic, implicitly (and wrongly) assuming that, absent Congressional intervention, the markets and products of today will be the same tomorrow. The approaches urged by the Report also incentivize rent-seeking over innovation and investment; if adopted, these approaches would suppress competition and inhibit economic growth.

My disagreements with the report's underlying premises and recommendations would occupy more time than we have today, so I will focus on just a few points. The Majority Staff Report criticizes the "promotion of consumer welfare" as a policy goal, without offering a clear alternative metric for competition. In the absence of a consumer welfare standard, the report suggests various changes to antitrust law to help businesses instead. These include prohibiting design changes that benefit consumers, if those changes exclude competitors; imposing duties to deal with rivals; and barring below-cost prices even when there is no reasonable likelihood of recouping losses through higher prices.

I am open to legislative reforms to increase competition. Many markets, particularly those where regulation distorts incentives or limits new entry, are not working well for Americans.⁷ But I caution against changing antitrust law for the benefit of competitors rather than consumers.

II. Overarching Concerns.

The goal of the antitrust laws is to protect competition. Conduct that is well-established as anticompetitive, like horizontal price-fixing, is *per se* illegal. Antitrust agencies have made clear that this standard also applies to buyers, whether of products, services, or labor. Buyer cartels have long been established as criminally prosecutable. In 2016, the DOJ said that it "intends to proceed criminally against naked wage-fixing or no-poaching agreements."⁸ In other words, the existing antitrust standard already protects employees.

When there is uncertainty about whether particular conduct – like resale price maintenance, which the Majority Staff Report did not criticize – is anticompetitive, enforcers and judges must come up with a metric for determining whether the conduct is unlawful, given a particular set of facts. We need a standard for gauging whether conduct is lawful – a standard that is predictable, administrable, and credible. The consumer welfare standard meets these criteria; other standards that have been proposed do not.⁹

In the absence of a single clear standard, enforcers and judges will be left at sea. If the antitrust laws are to be applied in a way that protects workers, entrepreneurs, and independent

just consumers, but also workers, entrepreneurs, independent businesses, open markets, a fair economy, and democratic ideals.").

⁷ Christine S. Wilson & David A. Hyman, *Pharma pricing is a problem, but antitrust isn't the (only) solution*, THE HILL (July 10, 2020, 1:00 PM), <https://thehill.com/blogs/congress-blog/healthcare/506763-pharma-pricing-is-a-problem-but-antitrust-isnt-the-only>.

⁸ U.S. DEP'T OF JUST. ANTITRUST DIV. & U.S. FED. TRADE COMM'N, ANTITRUST GUIDANCE FOR HUMAN RESOURCE PROFESSIONALS (2016), <https://www.justice.gov/atr/file/903511/download>.

⁹ See generally Christine S. Wilson, Thomas J. Klotz & Jeremy A. Sandford, *Recalibrating the Dialogue on Welfare Standards: Reinserting the Total Welfare Standard into the Debate*, 26 GEO. MASON L. REV. 1435 (2019) (discussing critiques of the consumer welfare standard and addressing alternatives, such as the total welfare standard).

businesses,¹⁰ then is it OK for those market players to form horizontal agreements to restrain trade that harm consumers? The Majority Staff Report criticized the FTC’s enforcement against agreements like that, including by ice skating teachers and organists.¹¹ The report cites an article by the legal director of the Open Markets Institute that chides the DOJ for criminally prosecuting “small-time price fixers.”¹² And the Open Markets policy director has advocated that the FTC allow horizontal collusion among competitors so long as they are “small proprietors and professionals.”¹³ Whether other factors were even the original intent of the Sherman Act is highly contested among scholars.¹⁴ But concern about “arrangements, trusts, or combinations... made with a view or which tend to advance the cost to the consumer of any such articles” was stated repeatedly and at one point was proposed to be part of the language of the statute.¹⁵

Only government can truly close a market. For example, federal law gives the U.S. Postal Service a monopoly over first-class mail – the non-express delivery of a letter – and over the use of mailboxes.¹⁶ There is no such restriction on the market for delivering packages, so the Post Office faces competition from UPS, DHL, FedEx, and in-house delivery operations like Amazon’s. If you’re really trying to “open” a market, you should begin by looking at the legal hurdles to entry. States have the right to erect barriers to entry, and monopolies and cartels that have been explicitly blessed by the state are immune from antitrust law. The FTC has done its best to limit the reach of state action immunity – even when limiting state action immunity has incurred criticism from those claiming to advocate for open markets.¹⁷

The Majority Staff Report calls for “[c]larifying that ‘false positives’—or erroneous enforcement—are not more costly than ‘false negatives’—or erroneous non-enforcement—and that, in relation to conduct or mergers involving dominant firms, ‘false negatives’ are costlier.”¹⁸ But erroneous enforcement, and especially erroneous imposition of per se illegality, *are* costlier than the failure to enforce. While major shifts in a market can render formerly-dominant firms obsolete, they cannot undo regulation or enforcement that blocks entry or innovation from happening at all.

III. Design changes.

The Majority Staff Report “recommends that Congress consider whether making a design change that excludes competitors or otherwise undermines competition should be a violation of

¹⁰ MAJORITY STAFF REPORT, *supra* note 6.

¹¹ *Id.* at 402.

¹² *Id.* (citing Sandeep Vaheesan, *Accommodating Capital and Policing Labor: Antitrust in the Two Gilded Ages*, 78 MD. L. REV. 766, 807 (2019)).

¹³ Phillip Longman, *The Case for Small-Business Cooperation*, WASH. MONTHLY (Nov./Dec. 2018).

¹⁴ However, concerns about “arrangements, trusts, or combinations... made with a view or which tend to advance the cost to the consumer of any such articles” were stated repeatedly and at one point were proposed to be part of the language of the statute. *See* 21 Cong. Rec. 2455 (Mar. 21, 1890).

¹⁵ *See id.*

¹⁶ *See, e.g.*, 18 U.S.C. § 1693–99 & 39 U.S.C. § 601–06 (giving the U.S. Postal Service a monopoly over first-class mail – the non-express delivery of a letter).

¹⁷ *See* MAJORITY STAFF REPORT, *supra* note 1, at 402 (citing Brief for the United States and the Fed. Trade Comm’n as Amicus Curiae in Support of Appellant and in Favor of Reversal, Chamber of Commerce of the United States of America and Rasier, LLC, v. City of Seattle, 890 F.3d 769 (9th Cir. 2018)).

¹⁸ MAJORITY STAFF REPORT, *supra* note 1, at 399.

Section 2, regardless of whether the design change can be justified as an improvement for consumers.”¹⁹ This recommendation is a continuation of the Report’s abandoning the consumer welfare standard as a metric for competition, and shifting the focus of antitrust from benefits to consumers to benefits to competitors. The recommendation explicitly calls for ignoring benefits to consumers entirely, and instead focuses on whether competitors might have to work harder to compete. But the beauty of competition is that innovations by one company spur product improvements by its rivals. Banning product improvements is a surefire way to chill innovation and deprive consumers of technological advances.

The recommended changes may outlaw a platform’s product improvements that benefit consumers if those improvements have any potential detrimental impact on rivals. So, for example, if a platform integrates an improvement that previously had been available only for purchase through a third party, and the third party then doesn’t sell as much of its product or service, that improvement would now be illegal. This proposal seems as likely to be popular with voters as Herbert Hovenkamp predicted an honest statement of the neo-Brandeisians’ goals regarding prices would be.²⁰

The courts, in cases like *United States v. Microsoft Corp.*, already have said that design changes that constitute exclusionary conduct can violate Section 2.²¹ Those changes and that conduct are assessed under the rule of reason, using the consumer welfare standard.²² *Microsoft* says: “As a general rule, courts are properly very skeptical about claims that competition has been harmed by a dominant firm’s product design changes.”²³ Notably, though, the court did not rule that a monopolist’s product decisions are *per se* legal; sometimes the design changes may not withstand antitrust scrutiny.²⁴

Following *Microsoft*, courts and the FTC have considered product-hopping a potential violation of Section 2 when the rationale for the alleged product improvement is pretextual.²⁵ Pharmaceutical companies may introduce a change to a drug, like making an extended-release version, that means prescriptions for it no longer can be filled by a generic of the prior version. The question arises: are the pharmaceutical manufacturers engaging in those refinements for the

¹⁹ MAJORITY STAFF REPORT, *supra* note 1, at 398.

²⁰ Herbert Hovenkamp, *Is Antitrust's Consumer Welfare Principle Imperiled?* 45 J. CORP. L. 101, 130 (2019) (“The neo-Brandeisian attack on low prices as a central antitrust goal is going to hurt consumers, but it is going to hurt vulnerable consumers the most . . . As a result, to the extent that it is communicated in advance, it could spell political suicide. Setting aside economic markets, a neo-Brandeis approach whose goals were honestly communicated could never win in an electoral market, just as it has never won in traditional markets.”).

²¹ See 253 F.3d 34, 66 (D.C. Cir. 2001).

²² *Id.* at 59.

²³ *Id.* at 65.

²⁴ *Id.* (“Judicial deference to product innovation, however, does not mean that a monopolist’s product design decisions are *per se* lawful.”).

²⁵ See Brief for Amicus Curiae Federal Trade Commission in Support of Plaintiff-Appellant Mylan Pharmaceuticals Inc.’s Petition for Rehearing and Rehearing *En Banc* at 6–7, *Mylan Pharms., Inc. v. Warner Chilcott Pub. Ltd. Co.*, 838 F.3d 421, 438 (3d. Cir. 2016); Press Release, Fed. Trade Comm’n, Reckitt Benckiser Group plc to Pay \$50 Million to Consumers, Settling FTC Charges that the Company Illegally Maintained a Monopoly over the Opioid Addiction Treatment Suboxone (Wilson recused) (summarizing settlement agreement in which Reckitt agreed to pay the FTC when Reckitt had engaged in “product hopping” scheme where it misrepresented that its new product was safer than its old product, thus encouraging consumers to switch); see also *New York ex rel. Schneiderman v. Actavis PLC*, 787 F.3d 638, 658 (2d. Cir. 2015).

purpose of creating benefits to consumers, or are they doing it because they want to disadvantage generics that would otherwise enter the market? The FTC has long been cautious about bringing a suit based on a product-hopping theory, given its reluctance under the consumer welfare standard to engage in enforcement actions that will chill innovation.²⁶ But product hopping takes place in the heavily regulated context of prescription drugs, which distorts normal market processes in various ways.²⁷ As the FTC noted in an amicus brief, “the success of a product switching scheme does not depend on whether consumers prefer the reformulated version of the product over the original, or whether the reformulated version provides any medical benefit.”²⁸

At bottom, my concern is that prohibiting quality improvements and innovation if they might pose difficulty for rivals is inconsistent with our focus on consumers rather than competitors. It is also inconsistent with demands from some anti-monopoly advocates that antitrust not be limited to a focus on prices. Of course, those of us who practice antitrust law know that we routinely focus on quality, innovation, and choice as well. How can companies compete on non-price aspects of competition like innovation, if they fear that design changes will incur antitrust liability under this proposal?

IV. Duties to deal.

The Majority Staff Report also calls for Congress to “revitalize” the essential facilities doctrine.²⁹ I have expressed concerns in the past about the revitalization of *Aspen Skiing* and a greater emphasis on the essential facilities doctrine.³⁰ Note that the history of the courts’ generally rejecting a duty to deal does not begin with 21st century cases like *Trinko* and *LinkLine*. It goes back at least to the Supreme Court’s 1919 ruling in *United States v. Colgate*, which said: “In the absence of any purpose to create or maintain a monopoly, the [Sherman Act] does not restrict the long recognized right of trader or manufacturer engaged in an entirely private business, freely to exercise his own independent discretion as to parties with whom he will deal.”³¹ I think that is the right approach.

²⁶ See, e.g., Joshua D. Wright, *The Antitrust/Consumer Protection Paradox: Two Policies at War with Each Other*, 121 YALE L.J. 2216, 2244 (2012) (“[T]his deferential treatment of new product entry derives from the link between revealed preference and consumer welfare.”).

²⁷ Federal Trade Commission’s Brief as Amicus Curiae at 12, *Mylan Pharms., Inc., v. Warner Chilcott Pub. Ltd. Co.*, No. 12-cv-3824, 2015 WL 1736957 (E.D. Pa. Apr. 16, 2015), *aff’d*, 838 F.3d 421 (3d Cir. 2016) (“The potential for anticompetitive product redesign is particularly acute in the pharmaceutical industry. In most other industries, the success of a new product in the marketplace reflects consumer choice. Courts are properly reluctant to question the innovative value of a new product in those circumstances. In the pharmaceutical industry, however, the success of a product switching scheme does not depend on whether consumers prefer the reformulated version of the product over the original, or whether the reformulated version provides any medical benefit.”) (citation omitted).

²⁸ *Id.*

²⁹ MAJORITY STAFF REPORT, *supra* note 1, at 397–98 (“[T]he Subcommittee recommends that Congress consider revitalizing the ‘essential facilities’ doctrine, the legal requirement that dominant firms provide access to their infrastructural services or facilities on a nondiscriminatory basis. To clarify the law, Congress should consider overriding judicial decisions that have treated unfavorably essential facilities- and refusal to deal-based theories of harm.”) (citing *Verizon Commc’ns Inc. v. Law Offices of Curtis v. Trinko, LLP*, 540 U.S. 398 (2004); *Pacific Bell Telephone Co. v. LinkLine Commc’ns, Inc.*, 555 U.S. 438 (2009)).

³⁰ Christine S. Wilson, *Antitrust and Innovation: Still Not A Dynamic Duo? Remarks at the Standard Essential Patents Symposium* (Sept. 10, 2019), https://www.ftc.gov/system/files/documents/public_statements/1544179/wilson_-_remarks_seps_9-10-19.pdf.

³¹ 250 U.S. 300, 307 (1919).

The essential facilities doctrine is static, not dynamic. It sees that the facility exists today, and that it would be useful to others. It does not consider how the existence of a mandate to make facilities available to others affects the incentive to construct those facilities in the first place. Many popular criticisms of antitrust claim that the agencies are looking at a snapshot in time and not thinking about dynamic competition and innovation. In fact, that criticism should be levied not at the way antitrust is actually applied, but to this kind of suggestion that takes a static view. Critics of antitrust should consider the incentives that will be created if we change our approach to essential facilities.

For example, consider a company that begins as a retailer. Later, it evaluates whether to open the platform it has created to allow others to sell their wares. It may be deterred from expanding in this way if it fears that this move will undercut its own retail business; or that it will not be able to control the quality or other aspects of products and services that third parties offer through that platform, and that will harm the company's own reputation.

The extension of a legal obligation to help competitors was a major part of my concern about the district court's ruling in *FTC v. Qualcomm*.³² In *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, the justices decided that antitrust law may require a company to aid a competitor if it unilaterally terminates a pre-existing, voluntary, and profitable course of dealing to acquire or maintain monopoly power.³³ Even within these narrow parameters, courts rightly had long disfavored this "duty to deal," and the Supreme Court has since said that *Aspen Skiing* is "at or near the outer boundary" of U.S. antitrust law.³⁴ But the district court in *Qualcomm* expanded the scope of *Aspen Skiing* by holding that because Qualcomm had once licensed some patents to some rival chip makers, it had a duty to license other patents to other competitors today.³⁵ By this logic, *Aspen Skiing* would mean that if a company ever sells any product to any competitor, it would have a perpetual antitrust obligation to sell every product to every competitor.

The proposed approach would create a significant disincentive to innovate, to invest, to create your own secret sauce and try to out-compete your rivals. For this reason, I was alarmed by the district court opinion in *Qualcomm*, and have deep concerns about recommendations in the Majority Staff Report to impose duties to deal.

V. Predatory Pricing.

In yet another example of moving away from a focus on what will benefit consumers and instead focusing on the impact on rivals, the Majority Staff Report recommends "clarifying" that

³² Christine Wilson, Opinion, *A Court's Dangerous Antitrust Overreach*, WALL ST. J. (May 28, 2019, 7:10 PM), <https://www.wsj.com/articles/a-courts-dangerous-antitrust-overreach-11559085055>.

³³ 472 U.S. 585, 601–11 (1985) ("The high value that we have placed on the right to refuse to deal with other firms does not mean that the right is unqualified [T]he evidence supports an inference that Ski Co. was not motivated by efficiency concerns and that it was willing to sacrifice short-run benefits and consumer goodwill in exchange for a perceived long-run impact on its smaller rival.").

³⁴ *Trinko*, 540 U.S. at 409.

³⁵ *FTC v. Qualcomm Inc.*, 411 F. Supp. 3d 658 (N.D. Cal. 2019), *rev'd*, 969 F.3d 974 (9th Cir. 2020).

recoupment is not necessary to prove predatory pricing.³⁶ To be clear, current antitrust law does not require proof of recoupment. It requires:

[A] demonstration that the competitor had a reasonable prospect, or, under §2 of the Sherman Act, a dangerous probability, of recouping its investment in below-cost prices Determining whether recoupment of predatory losses is likely requires an estimate of the cost of the alleged predation and a close analysis of both the scheme alleged by the plaintiff and the structure and conditions of the relevant market.³⁷

Current law on predatory pricing reflects the consumer welfare standard by treating low prices as procompetitive and beneficial. We all like low prices. The recoupment requirement distinguishes between low prices that will be followed by higher prices, which of course harm consumers, and low prices that are introductory or due to greater efficiency. By overriding *Brooke Group*, *Matsushita*, and *Weyerhaeuser*, the report would leave enforcers and courts at sea, once again taking away what we have now: a readily administrable standard that permits for discounting and other offers that benefit consumers.³⁸

The Subcommittee says, “In this Report, the term ‘predatory pricing’ should be understood in its broadest sense to refer to any situation where a dominant firm prices a good or service below cost in a way that is harmful to competition.”³⁹ Yet the report refers to Amazon as having “adopted a predatory-pricing strategy across multiple business lines at various stages in the company’s history,” including at the earliest stages before Amazon turned a profit.⁴⁰ How does any new entrant – particularly one with a new business model – convince people to take a chance on it? It has to offer something better than the incumbents. In Amazon’s case, in the various products markets that it entered, that “something” was often low prices and convenience, especially in the form of low-cost or free rapid delivery.

Let’s go back to 1979, before any of the Supreme Court rulings that the Majority Staff Report wants to override. The Second Circuit overturned a district court ruling for the *Buffalo Courier-Express*, which had sued the *Buffalo Evening News* because the *News* started publishing a competing Sunday paper after previously publishing only on Monday through Saturday. The Second Circuit said, “There was no evidence to support the finding that this [offer of five weeks of a free Sunday paper] was predatory In an attempt to monopolize case, courts should exhibit restraint in imposing on the market their own notion of what constitutes improper competitive behavior.”⁴¹

The current law on predatory pricing reflects the consumer welfare standard appropriately by treating low prices as procompetitive. We want consumers to enjoy the benefit of low prices, and seek to discourage companies from charging low prices only if there is an

³⁶ MAJORITY STAFF REPORT, *supra* note 1, at 397.

³⁷ *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 224 (1993) (citations omitted).

³⁸ *Id.*; *Matsushita v. Zenith Radio Corp.*, 475 U.S. 574 (1986); *Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co.*, 549 U.S. 312 (2007).

³⁹ MAJORITY STAFF REPORT, *supra* note 1, at 297 n.1845.

⁴⁰ *Id.* at 297.

⁴¹ *Buffalo Courier-Exp. v. Buffalo Evening News*, 601 F.2d 48, 55 (2d Cir. 1979).

opportunity for recoupment later. The standard we have is the right standard, and I would be concerned about any attempt to change that standard.

We are at a crossroads. We need to ask ourselves what interests we want to focus on in the application of antitrust law. I believe that we should focus on the consumer, but we need to remember that consumers wear different hats. Consumers can be employees, entrepreneurs, and stockholders.⁴² Focusing on consumers does not mean that all other interests are harmed. We also need to ask ourselves what kind of incentives we want to create with our system of antitrust law. Do we want to create incentives to compete hard, to introduce new products, to innovate? Or do we want to create incentives to engage in regulatory gamesmanship and rent seeking? I vote for the former, not the latter.

⁴² According to Gallup polls, more than half of Americans own stock. Lydia Saad, *What Percentage of Americans Owns Stock?* GALLUP (June 4, 2020), <https://news.gallup.com/poll/266807/percentage-americans-owns-stock.aspx>.