

March 4, 2021

The Honorable Dick Durbin
Chair, Committee on the Judiciary
U.S. Senate

The Honorable Chuck Grassley
Ranking Minority Member, Committee on the Judiciary
U.S. Senate

The Honorable Amy Klobuchar
Chair, Subcommittee on Antitrust, Competition Policy & Consumer Rights
U.S. Senate

The Honorable Michael Lee
Ranking Minority Member, Subcommittee on Antitrust, Competition Policy & Consumer Rights
U.S. Senate

The Honorable Jerrold Nadler
Chair, Committee on the Judiciary
U.S. House of Representatives

The Honorable Jim Jordan
Ranking Minority Member, Committee on the Judiciary
U.S. House of Representatives

The Honorable David Cicilline
Chair, Subcommittee on Antitrust, Commercial, and Administrative Law
U.S. House of Representatives

The Honorable Ken Buck
Ranking Minority Member, Subcommittee on Antitrust, Commercial, and Administrative Law
U.S. House of Representatives

Re: A Positive Legislative Competition Agenda

Dear Senators and Representatives,

As alumni of the Federal Trade Commission and Department of Justice, and as non-profit groups committed to competition in all markets, consumer welfare, and a healthy economy, we believe that Congress should develop and implement a positive legislative agenda with respect to the nation's competition policy. Such an agenda would build upon the bipartisan consensus of the past four decades, which recognizes that the antitrust laws must focus on consumer welfare, rather than diffuse and amorphous social goals, and that enforcement actions must rest upon empirical evidence, rather than only theoretical speculation. As such, this agenda incorporates ideas from experts across the ideological spectrum, all of whom agree on the importance of focusing antitrust law to protect consumers.

With these principles in mind, we respectfully submit the ideas below with the hope that Congress will consider them as it moves into the legislative session.¹ These ideas represent a way to build upon and improve existing competition policy, which we urge as an alternative to more aggressive proposals that would steer the nation’s economy into uncharted waters.

Overview

Most antitrust scholars and practitioners support the existing antitrust laws and oppose substantial changes to them. In 2007, after three years of study, the bipartisan Antitrust Modernization Commission (AMC) endorsed the nation’s existing antitrust laws.² According to the AMC’s chairwoman, Deborah Garza, “there was broad consensus that the economic principles on which antitrust is based do not require revision,” and that, “[n]o substantial changes to merger enforcement policy are necessary to account for industries in which innovation, intellectual property, and technological change are central features.”³

This remains the prevailing view. Last summer, in conjunction with a series of hearings about digital markets, the House Judiciary Committee’s Antitrust Subcommittee surveyed dozens of antitrust experts about the state of the law.⁴ The majority opposed substantial statutory changes. According to them, the antitrust laws adequately protect consumers and can adapt to combat evolving anticompetitive practices in any industry. Those experts, both Republicans and Democrats, explained that there has been a bipartisan consensus for four decades on antitrust law. That consensus is embodied in decades of court decisions applying the consumer welfare standard through rigorous economic analysis.

Many economists agree with this approach. The Council of Economic Advisors (CEA) recently agreed that “the best available evidence shows that there is no need to hastily rewrite the Federal Government’s antitrust rules,” in part because “Federal enforcement agencies, which are already empowered with a flexible legal framework, have the tools they need to promote economic dynamism.”⁵ The CEA explained that “the argument that the U.S. economy is suffering from insufficient competition is built on a weak empirical foundation and questionable assumptions,” and that “antitrust law has consistently proven flexible to the evolving market conditions presented by new industries and business models in the ever-changing American economy.”⁶

¹ Not every signatory necessarily agrees with every nuance expressed in this letter, and many signatories may have other ideas, not expressed in this letter, for improving the nation’s competition laws. For example, some signatories have concerns about removing certain exemptions from the antitrust laws given the existence of other regulatory schemes. Moreover, not all signatories agree that any legislative “fixes” to the antitrust laws are even necessary.

² DEBORAH A. GARZA ET AL., ANTITRUST MODERNIZATION COMM’N, REPORT AND RECOMMENDATIONS (2007), https://govinfo.library.unt.edu/amc/report_recommendation/amc_final_report.pdf [hereinafter AMC REPORT].

³ Submission from Deborah H. Garza, Partner, Covington & Burling LLP, to Subcomm. on Antitrust, Commercial, & Admin. Law of the H. Comm. on the Judiciary the Subcomm. on Antitrust, Commercial, & Admin. Law of the H. Comm. on the Judiciary, 116th Cong. 9 (April 20, 2020) (emphasis added), https://judiciary.house.gov/uploadedfiles/submission_from_deborah_garza.pdf [hereinafter Garza Comments].

⁴ See MAJORITY STAFF OF SUBCOMM. ON ANTITRUST, COMMERCIAL, & ADMIN. LAW OF THE H. COMM. ON THE JUDICIARY, 116TH CONG., REP. ON INVESTIGATION OF COMPETITION IN DIGITAL MARKETS 8 (2020), https://judiciary.house.gov/uploadedfiles/competition_in_digital_markets.pdf [hereinafter MAJORITY STAFF REPORT].

⁵ COUNCIL OF ECON. ADVISERS, ECONOMIC REPORT OF THE PRESIDENT 200 (Feb. 2020), <https://www.govinfo.gov/content/pkg/ERP-2020/pdf/ERP-2020.pdf>.

⁶ *Id.* at 217.

Finally, the Third Way Report, signed by Rep. Ken Buck (R-CO) and three other lawmakers, echoed this sentiment: “Harming consumers through a well-intentioned rewrite of the law is the last thing Congress should do with this opportunity for bipartisan agreement,” and “sweeping changes could lead to overregulation and carry unintended consequences for the entire economy.”⁷

I. Enhance Merger Review with Additional Resources and Process Reforms

With these principles in mind, the antitrust authorities must have the necessary resources to identify, investigate, and, as appropriate, challenge mergers that raise genuine competitive concerns. As the economy has grown over time, M&A activity has increased, while resources available to the Department of Justice’s Antitrust Division (DOJ) and the Federal Trade Commission (FTC) have not kept pace. The Majority Staff Report, the Third Way Report, and many outside observers have called for more resources for the antitrust agencies. We agree. Some of these additional resources could come from higher filing fees for merger reviews required under the Hart-Scott-Rodino Act (HSR) of 1976, especially for larger mergers.

Significant increases in the agencies’ funding should tie to another principle on which we agree with the Majority Staff Report: the agencies must enhance public transparency and accountability. Among other items, the agencies should explain in writing the bases for their enforcement and non-enforcement decisions (or explain why such a statement might be unnecessary in a particular instance),⁸ and more regularly conduct and publicize retrospective analyses on significant transactions.

Similarly, the FTC should identify the exigent circumstances that underlay its decision to cancel early termination notices of HSR waiting periods, which allow mergers that raise no competitive concerns to move forward more quickly, and explain how long it expects those exigent circumstances to continue. These actions would provide Congress and the public with a basis for evaluating the ongoing effectiveness of the antitrust laws.

Beyond these changes, certain process adjustments would improve the efficiency with which the two federal antitrust agencies use their existing resources. The Standard Merger and Acquisition Reviews Through Equal Rules Act (“SMARTER Act”) would standardize processes and standards used at both the DOJ and the FTC.⁹ Moreover, we urge Congress to prompt the agencies to update the 2007 agreement delineating which agency will take primary responsibility for which industries.¹⁰ The American Bar Association recently endorsed such an

⁷ REP. KEN BUCK, SUBCOMM. ON ANTITRUST, COMMERCIAL, AND ADMIN. LAW OF THE H. COMM. ON THE JUDICIARY, 116TH CONG., THE THIRD WAY REP. 6, 13 (2020), https://buck.house.gov/sites/buck.house.gov/files/wysiwyg_uploaded/Buck%20Report.pdf.

⁸ The Commission also should consider increasing transparency in its decisions to issue second requests.

⁹ See Press Release, Sen. Mike Lee, Sens. Lee, Hatch, Tillis, and Grassley Introduce SMARTER Act (May 15, 2018), <https://www.lee.senate.gov/public/index.cfm/2018/5/sens-lee-hatch-tillis-and-grassley-introduce-smarter-act>.

¹⁰ See Memorandum of Agreement Between the Fed. Trade Comm’n and the Antitrust Div. of the Dept. of Justice Concerning Clearance Procedures for Investigations (2007), <https://www.justice.gov/sites/default/files/atr/legacy/2007/07/17/10170.pdf>.

update.¹¹ Jurisdictional clarity would allow the agencies to use their existing resources more efficiently and would provide regulated industries with more transparency.¹²

Furthermore, we support changes to modernize the HSR Act to adjust to today's economy. Specifically, we would place non-manufacturing firms under the same jurisdictional thresholds as manufacturing firms, and change the Act's implementing rules to provide equal notification requirements for acquisitions of non-U.S. entities, regardless of whether such acquisitions are by U.S. or non-U.S. entities. These two changes would correct historical anomalies in the original Act which are no longer justified.

In terms of other potential amendments to the HSR Act, we will closely monitor the FTC's 6(b) study regarding Non-Reportable Hart-Scott-Rodino Act Filings, which may recommend changes to the dollar thresholds at which proposed acquisitions must be reported to the agencies.¹³ Depending on the FTC's recommendations and rationale, it may make sense for Congress to act in the future, keeping in mind that any such changes would add costs that would be borne in part by smaller companies.

II. Reassess Exemptions to Antitrust Law

Because we believe that antitrust law protects competition and consumers, we urge Congress to expand antitrust protections to more of the economy. Most importantly, we recommend that Congress eliminate provisions of the FTC Act that exempts certain industries, particularly telecommunications common carriers and nonprofit entities.¹⁴ There has long been a bipartisan consensus in favor of ending both exemptions.¹⁵

The nonprofit exemption prevents the agency from examining the conduct of nonprofit hospitals, even when they raise healthcare costs for consumers. Beyond antitrust, the exemption prevents the agency from applying its consumer protection powers, such as in privacy and data security, to nonprofits.

Similarly, as then-Chairman Tim Muris said in 2003, the common carrier "exemption dates from a period when telecommunications services were provided by government authorized, highly regulated monopolies. The exemption is now outdated. In the current world, firms are expected

¹¹ AM. BAR ASS'N, ANTITRUST LAW SECTION, PRESIDENTIAL TRANSITION REPORT, THE STATE OF ANTITRUST ENFORCEMENT (Feb. 2021), https://www.americanbar.org/content/dam/aba/administrative/antitrust_law/lp-files/presidential-transition-report.pdf [hereinafter ABA REPORT].

¹² As an alternate approach, Sen. Lee has introduced the "One Agency Act" to streamline enforcement. *See* Press Release, Sen. Mike Lee, Sen. Lee Introduces One Agency Act to Streamline Antitrust Enforcement (Nov. 19, 2020), <https://www.lee.senate.gov/public/index.cfm/2020/11/sen-lee-introduces-one-agency-act-to-streamline-antitrust-enforcement>.

¹³ Comm'r Christine S. Wilson & Comm'r Rohit Chopra, Statement Concerning Non-Reportable Hart-Scott-Rodino Act Filing 6(b) Orders (Feb. 11, 2020), <https://www.ftc.gov/public-statements/2020/02/statement-commissioner-christine-s-wilson-joined-commissioner-rohit-chopra>.

¹⁴ *See* AMC REPORT, *supra* note 2, at 347 (advocating for limits to statutory exemptions to the antitrust laws).

¹⁵ *See* Comm'r Thomas B. Leary, Statement Before the Subcomm. on Commerce, Trade & Consumer Protection of the H. Comm. on Energy & Commerce, https://www.ftc.gov/sites/default/files/documents/public_statements/prepared-statement-federal-trade-commission-reauthorization/030611learyhr.pdf (discussing "our unanimous recommendation that the Federal Trade Commission Act be amended to eliminate the special exemption for telecommunications common carriers.").

to compete in providing telecommunications services.”¹⁶ Although recent court decisions have confirmed the FTC’s view that the exemption applies only to common carrier services, not to all services offered by a company that offers any common carrier service, there is little reason to regulate these companies differently.¹⁷ Moreover, a repeal would not create a new layer of antitrust oversight, as the DOJ’s Antitrust Division already has statutory authority to investigate telecommunications common carriers, but a repeal would improve the efficiency of antitrust enforcement by allowing the FTC to review this industry in appropriate cases. Congress should harmonize the jurisdictional boundaries between the FTC and the Federal Communications Commission to ensure that carriers are not subjected to multiple, and possibly inconsistent, layers of regulation and enforcement, especially in areas such as privacy and data security. Congress adopted such an approach in the 1996 Telecommunications Act, and Senator Wicker has introduced a privacy bill that also addresses this issue.

In the same vein, Congress should allow more aggrieved consumers to recover antitrust damages by legislatively overturning the Supreme Court’s decision in *Illinois Brick*. In an earlier case, *Hanover Shoe*, the Court held that an antitrust plaintiff could recover damages for overcharges, even if the plaintiff passed on those overcharges to its customers.¹⁸ In *Illinois Brick*, the Court held that only “direct purchasers” could recover damages from an antitrust defendant, whereas “indirect purchasers” — downstream consumers who may have purchased goods or services at inflated prices — had no remedy.¹⁹ By overturning *Illinois Brick* and *Hanover Shoe*, Congress would allow more victims to recover damages for anticompetitive conduct that they actually suffered (while still barring double-recoveries), including end consumers of all income levels, consistent with the underlying purposes of the antitrust laws. The American Bar Association’s Antitrust Section also supports this approach.²⁰

III. Promote Private Sector Efforts Regarding Data Portability and Interoperability

Data portability and interoperability benefit consumers by giving them more control over their data and allowing them to move more easily among competitors (or to “multi-home” by using more than one competitor simultaneously).²¹ In many industries that involve consumer data, including social media platforms, financial services, and even health care, data portability and interoperability may lower barriers to new entrants. Both the Majority Staff Report and the Third Way Report endorse these concepts. We do, too.

For now, Congress should monitor and encourage private sector efforts to expand data portability and interoperability. In response to consumer demand, many companies have already committed to enhancing data portability and interoperability. Accordingly, legislation may be premature and

¹⁶ *The Reauthorization of the Federal Trade Commission: Positioning the Commission for the Twenty-First Century: Hearing Before the Subcomm. on Commerce, Trade, & Consumer Protection of the H. Comm. on Energy & Commerce* (June 11, 2003) (statement of Timothy J. Muris, Chairman, Federal Trade Commission), <https://web.archive.org/web/20030709042356/http://energycommerce.house.gov/108/Hearings/06112003hearing966/Muris1538.htm>.

¹⁷ See Lesley Fair, *En banc Court of Appeals rules in FTC’s favor on common carrier issue*, FED. TRADE COMM’N (Feb. 28, 2018), <https://www.ftc.gov/news-events/blogs/business-blog/2018/02/en-banc-court-appeals-rules-ftcs-favor-common-carrier-issue>.

¹⁸ See *Hanover Shoe, Inc. v. United Shoe Mach. Corp.*, 392 U.S. 481 (1968).

¹⁹ See *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977).

²⁰ ABA REPORT, *supra* note 11, at 23.

²¹ See *Data To Go: An FTC Workshop on Data Portability*, FED. TRADE COMM’N (Sept. 22, 2020), <https://www.ftc.gov/news-events/events-calendar/data-go-ftc-workshop-data-portability>.

perhaps even counterproductive to the extent that federal standards prove unwieldy or unattainable across industries. Indeed, mandating data portability for all companies actually could hurt smaller actors by making it difficult for them to retain customers against their better-established rivals, or to protect their intellectual property. Data portability may also create real privacy and data security risks. Nevertheless, through its oversight function, Congress should encourage the antitrust agencies to develop guidance on safe harbors that will facilitate the private sector's work in enhancing data portability and interoperability on an expeditious basis.

IV. Focus Antitrust Resources to Reduce Racial Disparities and Enhance Labor Mobility

Antitrust law, of course, protects all consumers. Regardless of their race, color, or creed, all individuals are consumers, and all consumers benefit from low prices and quality products. Indeed, lower income individuals benefit the most from low prices. Nevertheless, antitrust law may play an additional, positive role in combating racial disparities and enhancing labor mobility.

Through its oversight function and funding decisions, Congress should insist that the antitrust agencies dedicate resources to examining non-compete clauses and occupational licensing requirements that may be overly aggressive in restricting competition – and that the agencies measure and report their results. Non-compete clauses are covenants in employment contracts that limit the ability of an employee to join or start a competing firm after a job separation.²² In the recent past, some companies have asked low-wage employees, including janitors, landscapers, entry-level health care workers, and fast food employees to sign agreements that limit their ability to seek other opportunities that pay higher wages.²³ Similarly, occupational licensing laws, which are primarily creatures of state law, raise barriers to individuals who want to provide lawful services to consumers.²⁴ For instance, certain laws require hair braiders to obtain an expensive license to service customers, even though the hair braiders use no chemicals that would raise any safety concerns.²⁵ Both types of restrictions can, of course, promote competition in appropriate situations, but they also can limit opportunities for individuals who are trying to climb the economic ladder. Both DOJ and the FTC already have substantial experience in reviewing, commenting upon, and occasionally challenging such restrictions. Congress should insist that the agencies continue and expand their efforts.

Finally, as noted previously, Congress could help consumers of all income levels by repealing *Illinois Brick*. A repeal would allow indirect purchasers, and therefore end consumers, to recover damages more easily for antitrust violations, including egregious violations such as price fixing.

V. Increase Protection for Consumers from Fraud

²² See DEPT. OF JUSTICE & FED. TRADE COMM'N, ANTITRUST GUIDANCE FOR HUMAN RESOURCE PROFESSIONALS (Oct. 2016), <https://www.justice.gov/atr/file/903511/download>.

²³ Sophie Quinton, *Why Janitors Get Noncompete Agreements, Too*, PEW (May 17, 2017), <https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2017/05/17/why-janitors-get-noncompete-agreements->

[too#:~:text=Jimmy%20John's%20agreed%20to%20stop,York%20and%20Illinois%20last%20year.&text=Employer%20say%20the%20agreements%20help,secret%20formulas%20to%20client%20lists.](https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2017/05/17/why-janitors-get-noncompete-agreements-)

²⁴ *FTC Staff Report Examines Ways to Improve Occupational License Portability Across State Lines*, FED. TRADE COMM'N (Sept. 24, 2018), <https://www.ftc.gov/news-events/press-releases/2018/09/ftc-staff-report-examines-ways-improve-occupational-license>.

²⁵ See INST. FOR JUSTICE: HAIR BRAIDING, <https://ij.org/pillar/hairbraiding/>.

Although not an antitrust issue, Congress should move to protect consumers in another manner. In particular, Congress should ensure that the FTC Act gives the Commission a viable way to recoup money for victims of consumer fraud in federal court. In *AMG Capital Management v. FTC*, the Supreme Court is considering whether the FTC Act confers remedial power for the FTC to obtain monetary relief for consumers in federal court, without having to jump through certain internal procedural hoops that can make recovery impractical.²⁶ Depending on the Court's decision, Congress should clarify the contours of the FTC Act: simply put, the FTC should have an expeditious way to obtain monetary relief for victims of consumer fraud.²⁷ As part of this review, and to guarantee due process for defendants, Congress should address longstanding concerns about the FTC's investigative and enforcement processes to ensure greater transparency, fairness, and predictability in the agency's operations.

By pursuing this agenda, Congress would enhance protections for consumers by building upon the bipartisan consensus of the past four decades. We would be happy to assist in developing these ideas and thank you for your attention to these important issues.

Sincerely,

Asheesh Agarwal
Deputy General Counsel, TechFreedom
Former Assistant Director, FTC's Office of Policy Planning

Bial Sayyed
Senior Adjunct, TechFreedom
Former Director, FTC's Office of Policy Planning

Ashley Baker
Director of Public Policy
The Committee for Justice

Dan Caprio
The Lares Institute
Former Senior Advisor to former FTC Commissioner Orson Swindle

Theodore A. Gebhard
Former FTC Senior Attorney and DOJ Senior Antitrust Economist

Brent Wm. Gardner
Chief Government Affairs Officer
Americans for Prosperity

²⁶ *AMG Capital Mgmt. v. Fed. Trade Comm'n*, No. 19-508 (U.S. argued Jan. 13, 2021).

²⁷ See Brief for TechFreedom as Amicus Curiae Supporting Petitioners, *AMG Capital Mgmt. v. FTC* (Oct. 2, 2020) (No. 19-508) and Supporting Respondents, *FTC v. Credit Bureau Ctr, LLC* (Oct. 2, 2020) (No. 19-825), available at <https://techfreedom.org/wp-content/uploads/2020/10/tsac-TechFreedom-No.-19-508-19-825.pdf>.

