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Hon. David N. Cicilline
Chairman
Subcommittee on Antitrust,
Commercial, and Administrative Law
Committee on the Judiciary
U.S. House of Representatives

Hon. F. James Sensenbrenner, Jr.
Ranking Member
Subcommittee on Antitrust,
Commercial, and Administrative Law
Committee on the Judiciary
U.S. House of Representatives

Dear Chairman Cicilline and Ranking Member Sensenbrenner:

This letter is provided in response to your letter of invitation, dated March 13, 2020, requesting my views (and any recommended reforms or other relevant information) on several basic issues regarding competition in the digital marketplace. I am grateful for the opportunity to assist the Judiciary Committee in this significant work. The following presents my own views and is not submitted on behalf of any other individual or organization. I would be pleased to provide any follow-up information or answer other questions related to the Committee's work, as you may deem appropriate.

Regarding Items 1. and 2. of your March 13, 2020 letter, the federal antitrust laws are fully adequate to address any anticompetitive conduct – both in general and more specifically with regard to the conduct of participants in markets employing digital technology. Regarding Item 3. of that letter, the present institutional structure of antitrust in the United States is more than adequate to assure robust enforcement of U.S. antitrust law. I take no specific position on the adequacy of current levels of appropriations to the federal antitrust agencies, although I am unaware of any indication that such appropriation levels are seriously out of line with current agency responsibilities and workload.

I also offer the following two proposals for reform of the institutional structure of antitrust enforcement. These reforms are appropriate not only with respect to antitrust enforcement in the digital marketplace, but more generally as well, as explained below.

> The U.S. has a longstanding and increasingly urgent need to create a new Executive-Branch capability to spearhead an effort to reduce and ultimately to eliminate current and future threats to US innovation and competitiveness attributable to certain harmful foreign antitrust-

law enforcement rules and practices. Such foreign antitrust activities include those (1) that involve elements of protectionism or other policy objectives (both overt and hidden) that conflict with the goal of increasing economic well-being through dynamic free-market competition, and (2) that unduly limit the rights of defense for those accused of antitrust violations or that otherwise fail to provide accurate, efficient and impartial decision making in antitrust proceedings. This new Executive-Branch capability would require the addition of resources to one or more existing agencies, or creation of a new agency with lead responsibility to ensure that these problems will be remedied.

I also recommend certain U.S. procedural reforms in order to strengthen the institutional credibility of FTC antitrust proceedings. Specifically, I recommend that the position of Director of the Bureau of Competition be filled through Executive-Branch appointment, and that the Director be granted authority similar to that of the senior leadership of the Antitrust Division of the U.S. Department of Justice. This would include the authority, subject to that of the Attorney General and the President, to initiate and supervise the conduct of investigations, authorize complaints, supervise litigation of Bureau of Competition cases (at trial and – subject to the authority of the Solicitor General – on appeal), and to settle such cases by consent.

The remainder of this letter explains the basis for the foregoing views.

The substantive provisions of the main federal antitrust statutes – the Sherman Act and the Clayton Act – are all properly targeted on conduct that restricts competition. This consistent focus on safeguarding competition from anticompetitive conduct provides the enforcement agencies (both federal and state, as well as private plaintiffs) with appropriate flexibility to challenge anticompetitive conduct, regardless of its specific form or the particular economic sector affected. The statutes encompass anticompetitive conduct in any market circumstances, regardless of whether such conduct or circumstances were or could have been perceived in detail at the time these statutes were enacted. Because of this broad flexibility and generality, when new industries, business practices and patterns of competition emerge, the existing substantive antitrust provisions are fully capable of applying to anticompetitive conduct without any further action by Congress.

The main federal antitrust statutes are also comprehensive in scope of application: Sherman Act Section 2, for example, applies to "every person" engaging in monopolizing conduct, or in attempts or conspiracies to monopolize. Clayton Act Section 7 prohibits any acquisition whose "effect . . . may be substantially to lessen competition, or to tend to create a monopoly." Although not specifically mentioned in the March 13 letter, Sherman Act Section 1 similarly applies to "every person" that makes an illegal contract or participates in any conspiracy or other agreement in restraint of trade. Subject to narrow exceptions provided by statute, all individuals and legal persons (including business entities of every description) that can be reached via the jurisdiction of US courts are subject to these broad prohibitions.

The federal antitrust statutes are enforced by numerous government agencies, as well as by private individuals and business organizations. The U.S. Attorney General is authorized to investigate antitrust offenses and pursue violators through both criminal and civil actions. This authority is generally exercised by the Antitrust Division of the Justice Department, often in cooperation with other components of the federal law enforcement community including the US Attorneys, the FBI and the

Criminal Division of the Justice Department, as well as other government entities (e.g., the Department of Defense, the Food and Drug Administration and other agencies as appropriate) and with state Attorneys General. The Antitrust Division employs hundreds of specially skilled attorneys and economists as well as many other professionals and staff in order to carry out these responsibilities.

The Federal Trade Commission is authorized by the Federal Trade Commission Act to prevent, prohibit and/or remedy any "unfair method of competition", which encompasses any conduct that would be considered a violation of the Sherman Act or Clayton Act (subject to certain limited exclusions specified in 15 USC §§21 and 45). Like the Antitrust Division, the FTC also employs hundreds of specially skilled attorneys and economists as well as other professionals and staff in enforcing the antitrust standards contained in Section 5 of the FTC Act, and it also cooperates with other federal agencies as appropriate. Both federal agencies are increasingly involved in various forms of cooperation with antitrust enforcement agencies in over 130 jurisdictions around the world in order to enhance the effectiveness of their efforts to investigate and bring appropriate legal action to prevent or remedy anticompetitive conduct, especially where such conduct has an international dimension.

Additionally, from its first origin in 1890, US antitrust law contained a uniquely expansive "private attorney general" provision, allowing any private party injured by an antitrust violation to recover damages – which are automatically tripled by statute – through a civil action in federal court, and to be reimbursed for its attorney's fees if successful. It is now typical for antitrust violators to be subject to class-action suits by both direct and indirect purchasers who may have been injured by conduct deemed illegal under the antitrust laws, thus dramatically increasing the likelihood that antitrust violations will lead to legal redress including some compensation of victims, even where treble damages would not be sufficient to justify individual suit. States are also authorized to bring suit under the civil provisions of federal antitrust law, including as *parens patriae* on behalf of their residents. Many states have enacted their own antitrust laws, generally aligned with federal antitrust standards, as well as "indirect purchaser" statutes, which have the effect of authorizing federal treble-damage suits by parties injured by antitrust violations, even where such parties might not have a direct-purchaser relationship with a violator – a requirement of federal antitrust standing under *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977). The states and U.S. territories have also formed an effective enforcement cooperation mechanism through the Multistate Antitrust Task Force of the National Association of Attorneys General. Given all of these sources of potential claims, antitrust violators are generally greeted with an avalanche of investigations and lawsuits once the possibility of illegal conduct is recognized.

The federal antitrust remedies are both comprehensive and severe. (Judge Richard Posner once referred to these remedies collectively as a "cluster bomb"—an apt metaphor.) On several occasions the Antitrust Division has obtained injunctive relief including the dissolution of major business enterprises, in some cases involving the largest such enterprises in the world at the time – Standard Oil of New Jersey in 1911 (the Rockefeller oil interests), and the former Bell System in 1982. The federal agencies have also obtained civil injunctive relief requiring profound and diverse limitations on anticompetitive conduct by dominant firms and in specific industries. The monopolization cases against Microsoft (resolved in 1994 and 2001, respectively), an enterprise of significance in many key sectors involving digital technology, stand as leading examples. In addition to all the traditional forms of equitable and injunctive relief available in both government and private civil cases, individuals guilty of criminal offenses may be imprisoned for up to ten years and fined up to $1 million, while corporations

may be fined $100,000,000, or, if sentenced under the Alternative Fine Statute, the greater of twice the gross gain or twice the gross loss resulting from the violation. As a result, it is common for criminal antitrust fines to reach into the hundreds of millions of dollars, and the total amount of such fines has amounted to billions of dollars in recent years. Individuals face increasingly lengthy terms of actual incarceration for criminal antitrust violations. Finally, it is common for civil antitrust damages to reach into the hundreds of millions of dollars, and there have been some multi-billion-dollar awards. Although such large awards are more characteristic of class-action or multi-party litigation, several treble-damage verdicts won by a single plaintiff against a single enterprise have exceeded a billion dollars (ultimately upheld in *Conwood Co. v. United States Tobacco Co.*, 290 F.3d 768 (6th Cir. 2002), but partially reversed on appeal in *MCI Communications Corp. v. AT&T Co.*, 708 F.2d 1081 (7th Cir. 1983)(subsequent history omitted).

Antitrust enforcement directed toward merger and acquisition activity benefits enormously from the specialized requirements of the Hart-Scott-Rodino Act. HSR automatically suspends any notifiable transaction until the federal agencies have had the opportunity to investigate its likely competitive impact, and to challenge any transaction deemed anticompetitive under Clayton Act Section 7. Thousands of transactions are notified under HSR every year, while only a small fraction require any significant investigation, and only a handful result in litigation. Transactions are often abandoned when the parties are confronted with federal agency opposition, or substantially modified according to agency views in order to avoid the substantial expense, delay, uncertainty and disruption that usually result from full investigation or litigation. Even transactions reviewed and "cleared" under HSR may later be challenged by the federal agencies. Moreover, the federal agencies retain full authority to review and challenge any transaction that is not subject to HSR notification requirements, whether or not consummated. Thus, the HSR Act gives the federal agencies tremendous leverage over merging parties to address and remedy any agency concerns about the possible anticompetitive effects of structural transactions.

The ultimate responsibility for construction and application of the federal antitrust statutes resides with the federal judicial branch, with the Supreme Court making final determinations. Our federal judiciary has longstanding and carefully guarded traditions of independence and integrity. These traditions are supported in numerous ways: by the requirement of Presidential appointment of Justices and judges with the advice and consent of the Senate, the guarantee of tenure during good behavior and the prohibition on reduction of compensation. Aside from these constitutional guarantees, the federal judiciary operates pursuant to a highly formalized and rigorously enforced system of published rules governing all aspects of civil and criminal proceedings, including investigation and discovery, trial and appeal, as well as rules of evidence and judicial conduct. Findings of fact, conclusions of law and the other key elements of district-court decisions are required to be explained and appellate proceedings must be based on the record compiled in the lower-court proceedings. *Ex parte* communication is strictly prohibited. As a result of these and other constitutional and statutory requirements and the various rules and other practices governing the federal judicial process, the federal judiciary makes decisions based only on specific evidence that has been well-tested for authenticity, relevance, credibility and weight, and on argumentation contained in written submissions and through in-person presentations of counsel to the deciding Justices or judges. All of these tend to exclude the possibility that untested, partisan or other improper influences or considerations can affect judicial proceedings. As a result of these extensive safeguards, federal judicial decisions, once final, are respected and obeyed, even if such decisions involve issues that are the subject of intense public controversy.

The federal judiciary is accorded a degree of flexibility in antitrust decision making due to the general phrasing of the key substantive provisions of the main antitrust statutes, and the nature of the common-law process by which antitrust cases are litigated and resolved. As indicated above, the consistent focus of the basic antitrust statutes on the protection of competition ensures that new forms of competition can be addressed and new understandings of how competition works can be reflected in the judicial decisions that ultimately govern antitrust enforcement.

The individual and combined benefits of all of these features of the federal antitrust law enforcement system are evident from the substantial evolution of antitrust that has occurred over the 130 years since passage of the Sherman Act. In the first decade after the Sherman Act became law, naked price-fixing and other forms of cartel conduct were condemned as *per se* illegal under the Sherman Act, meaning that as a matter of law they cannot be defended on any basis. Although the *per se* rule was also applied to vertical price agreements in 1911, *Dr. Miles Medical Co. v. John D. Park & Sons Co.*, 220 U.S. 373 (1911), at the same time the Supreme Court determined that other conduct – non-cartel restraints of trade and monopolization – would be judged under the rule of reason, meaning that individuals and firms accused of illegal conduct are permitted to defend their conduct on the basis of facts and circumstances of the specific case (*Standard Oil Co. v. United States*, 221 U.S. 1 (1911); *United States v. American Tobacco Co.*, 221 U.S. 106 (1911)). In cases where the *per se* rule does not apply, the legality of conduct remains subject to the determination of the court in light of all submissions included in the record.

Between 1947 and 1972, however, a powerful trend emerged among the antitrust agencies and the courts to promote the application of *per se* rules and other presumptions against antitrust defendants. The *per se* rule – which deprives defendants of the opportunity to defend their conduct on the basis of the specific facts of the case, to offer exculpatory economic analysis, or to justify their conduct as procompetitive – became widely applied to most forms of marketplace conduct. This included numerous licensing practices involving patents and other forms of intellectual property, all restraints contained in vertical agreements, and many types of joint venture agreements. At the same time, it became virtually impossible for merging parties to prevail against any government challenge. As Justice Stewart proclaimed in dissent in *United States v. Von's Grocery Co.*, 384 U.S. 270 (1966), a government case challenging a merger between grocery store chains with minimal competitive significance, "The sole consistency that I can find is that in litigation under [Clayton Act] § 7, the Government always wins." Id. at 301. Similarly, extremely heavy burdens were placed on firms accused of monopolization. To avoid liability, a firm with monopoly power was required to prove that its success was "thrust upon" it, even if its conduct was "honestly industrial." As a consequence of this approach, even routine and procompetitive business conduct by firms with substantial market power – such as increasing production capacity in order to meet demand – was condemned as illegal. *United States v. Alcoa*, 148 F.2d 416 (2d Cir. 1945).

At the apex of this trend, the Supreme Court openly mocked the idea of using economic analysis to evaluate the competitive effects of business conduct. *United States v. Topco Associates*, 405 U.S. 596, 609-10 n.10 (1972). Various broader economic developments were emerging during this period, however, that led to increasing recognition that denying antitrust defendants the opportunity to explain or justify their conduct on the basis of competitive realities and to apply economic analysis was a mistake. Most significantly, at about the same time as *Topco*, the United States economy ran into powerful economic headwinds, involving severe challenges to its competitive leadership and economic

dynamism. Long-successful US firms in major industrial sectors including motor vehicles, machine tools and consumer electronic products were quickly losing their strong competitive positions to Asian and European firms. The three "Nixon shocks" of 1971 – a wage and price freeze followed by a period of mandatory wage and price controls, assessment of a 10% surcharge on all imports, and the termination of US dollar-gold convertibility – crystallized public recognition of the ongoing decline in US economic performance. These extraordinary economic policy steps also accelerated the decline, and were followed by a period of worsening "stagflation" – high unemployment with high inflation (exacerbated by a series of oil crises). At the time of transition between the Carter and Reagan Administrations in 1981, an unprecedented combination of record high inflation, record high interest rates and levels of unemployment not seen since the Great Depression gripped the US.

Of course, this broad decline in US economic fortunes could not be attributed entirely to antitrust enforcement policy, and in fact the enthusiasm for the *per se* rule was part of a much larger web of regulatory, fiscal and monetary policies that all shared to some extent in the responsibility for the broad-based US economic weakness of that time. The intensifying economic distress, however, led to reassessment of many areas of federal policy, including antitrust. As a part of this process, ongoing efforts of antitrust scholars to provide a better-informed and more thoughtful framework for understanding the real-world nature of competition and the ultimate practical consequences of antitrust enforcement came to increasing attention within the antitrust community.

A persistent and recurring theme of this reexamination was criticism of pervasive application of the *per se* rule and other heavy presumptions excluding or disfavoring fact-based defenses and the application of economic analysis to understand competitive behavior. Of the many critiques of the antitrust rules applicable to particular forms of conduct – agreements, unilateral conduct, and structural transactions – a unifying aspect was a belief in the utility of economic analysis in understanding the nature and consequences of marketplace conduct, and in interpreting or predicting the effects of such conduct. Arguably the most profound innovation resulting from the reassessment of antitrust doctrine that came to prominence in the 1970's was the increasing recognition that sound economic analysis ought to be considered essential to antitrust. In fact, emphasis on economic analysis of competition as the basis for antitrust enforcement was clearly foreshadowed – indeed one could say it was introduced to the enforcement community – during the tenure of Donald F. Turner, who served as President Lyndon Johnson's first Assistant Attorney General for Antitrust from 1965 to 1968. Turner, one of the most preeminent antitrust scholars of his day, held a Ph.D. in economics from Harvard and later earned a Yale law degree. As Assistant Attorney General he was forthright in stating that antitrust enforcement against mergers should be based on economic analysis of competition and should reject the temptation to oppose "bigness" for its own sake or to incorporate other public policies distinct from preservation of competition in the economic sense. Numerous other scholars from a variety of institutions as well as other practitioners and policy experts expressed similar views and became associated with the intensifying critique of the *per se* rules and with advocacy for applying economics to antitrust-law analysis.

The first clear indication that the main themes advocated by this broadening group was receiving notice at the Supreme Court occurred in *United States v. General Dynamics Corp.*, 415 U.S. 486 (1974). There the government challenged a merger between competing coal producers, relying on the presumption established in *United States v. Philadelphia Nat'l Bank*, 374 U.S. 321 (1963) that a merger that substantially increases concentration in a highly concentrated relevant market is anticompetitive

and therefore illegal. The Supreme Court rejected the government's case, however, based on market analysis demonstrating that the government's concentration data – consisting of market shares based on past coal production data – had limited predictive power in assessing future competition. The Court held that market shares based on free coal reserves provided a more reliable indicator of competitive significance for this particular industry. Surprising though it may seem given that this decision was handed down forty-six years ago, General Dynamics remains the most recent plenary decision of the Supreme Court based on the application of the main substantive provision of the Clayton Act to a horizontal merger. The decision is now widely accepted as permitting the application of economic analysis to predictions of competitive effect required by Clayton Act Section 7.

Concern about limiting defense rights and prohibiting economic analysis surfaced even more clearly in another Supreme Court case soon after *General Dynamics*. As previously mentioned, with regard to vertical agreements the *per se* rule had traditionally been applied only to price restraints. In 1961, however, the Justice Department attacked as *per se* illegal a variety of vertical restraints – price and non-price – employed by a supplier of trucks and truck parts. The district court granted summary judgment to the government, finding the supplier liable without permitting any fact-based defense of any of the restraints. On direct appeal regarding only non-price restraints (vertical territorial and customer limitations) the Supreme Court reversed, finding no sufficient basis to presume that such restraints are anticompetitive. *White Motor Co. v. United States*, 372 U.S. 253 (1963). Then, a short time later the Court abruptly reversed course, aligning itself with the *per se* approach that was sweeping the antitrust policy field at that time. Specifically, the Court ruled that all vertical restraints – price and non-price – were henceforward to be treated as *per se* illegal. *United States v. Arnold, Schwinn & Co.*, 388 U.S. 365 (1967). But in 1977, three years after General Dynamics, in a case involving vertical territorial restraints, the Court retreated from blanket application of the *per se* rule prescribed in *Schwinn*, overruling that case and holding that antitrust rules should not be formulated without consideration of their economic impact. *Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36 (1977). Except for price restraints, vertical agreements were replaced into the rule of reason category.

Viewed with the benefit of more than forty years' hindsight, *General Dynamics* and *Sylvania* clearly mark the emergence of a bipartisan consensus including all the main constituents of the antitrust community, accepting the legitimacy of economic analysis in the enforcement of antitrust law, and drawing back from the previous tendency to regard all business conduct as anticompetitive without any need to examine the competitive circumstances of particular cases. This consensus has long supported the major pillars of the Supreme Court's approach to antitrust: maintaining focus on the central policy instrument of antitrust law (protecting competition, even where vigorous competition may challenge the abilities and fortunes of specific competitors), and basing antitrust rules on sound economic analysis. These fundamental themes are evident in a lengthy series of Supreme Court decisions that continues to the present day, including:

> *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477 (1977), holding that antitrust claims may not be based on conduct that enhances competition, even where such conduct is the "but-for" cause of an adverse effect on the business of a particular plaintiff.
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> *Spectrum Sports, Inc. v. McQuillan*, 506 U.S. 447 (1993), holding that liability for attempted monopolization requires proof that defendant's exclusionary conduct presents at least a dangerous probability of success.

Brooke Group v. Brown & Williamson Tobacco Corp., 509 U.S. 209 (1993), holding that claims of oligopolistic disciplinary pricing (and, by implication, other predatory pricing theories) require proof that profits sacrificed by defendant are reasonably likely to be recouped as a result of disciplining or eliminating competition.

NYNEX Corp. v. Discon, Inc., 525 U.S. 128 (1998), rejecting antitrust claims based on a defendant's attempt to defraud regulators, where no adverse effect on competition was shown.

Bell Atlantic Corp. v. Twombly, 550 U.S. 544 (2007), requiring dismissal of complaints lacking factual allegations sufficient to render the claims plausible, rather than merely conceivable, overruling *Conley v. Gibson*, 355 U.S. 41 (1957).

Verizon v. Trinko, 540 U.S. 398 (2004), refusing to recognize an antitrust "duty to deal" based on a regulated monopolist's violation of an administrative mandate to provide service.

These decisions all accept that economic analysis is relevant to the formulation of antitrust rules and an assessment of the competitive impact of business conduct. While the *per se* rule has been consistently reaffirmed in cases of naked cartel conduct – *Palmer v. BRG of Georgia, Inc.*, 498 U.S. 46 (1990) – defendants in cases involving other varieties of alleged antitrust misconduct are allowed to defend their conduct based on the facts and circumstances of the particular case. Forty years after *Sylvania*, vertical price restraints were finally excluded from application of the *per se* rule under federal law. *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*, 551 U.S. 877 (2007). In contrast to *Topco*, parties to joint ventures have also been permitted to defend themselves with case-specific evidence and economic analysis. *NCAA v. Board of Regents*, 468 U.S. 85 (1984) (analyzing and invalidating collective restraints on college football broadcasts under rule of reason). *FTC v. Indiana Federation of Dentists*, 476 U.S. 447 (1986) (rejecting *per se* analysis but confirming cease-and-desist order under rule of reason).

Finally, the Supreme Court has proven adept at understanding the more demanding aspects of competitive analysis characteristic of cases involving businesses in the digital economy. The classic example involves the complex interrelationships among the various parties involved in the provision of financial payment systems. Today's internet businesses often have characteristics associated with so-called multisided markets, in which competing enterprises offer products and services to distinct but interrelated groups of customers and/or suppliers. Television and radio broadcasting are an example: broadcasters provide programming to viewers or listeners (at zero cost, or by paid subscription), financially supported primarily by the sale of advertising to providers of other products and services, whose promotional messages are included in the broadcast program. Broadcasters must balance the effect of programming quality (as determined by programming and advertising) and subscription prices (if any) on viewership with the effect of advertising rates on revenues and profits.

The novel competitive characteristics of two-sided markets were recognized soon after the first modern general-purpose credit card systems emerged in the late 1960's. Professor William F. Baxter, a Stanford Law School antitrust professor who served as President Reagan's first Assistant Attorney General for Antitrust, had co-authored an early study of emerging technology for electronic funds transfer and had become familiar with the special characteristics of four-party payment systems. When asked to analyze the antitrust implications of general-purpose credit card systems, he recognized the

critical relationships among the system participants: card holders and their banks on one side, and merchants and their banks on the other. He published a path-breaking analysis demonstrating the necessity of understanding the credit-card systems in terms of the essential interrelationships among the four distinct participating parties. William F. Baxter, *Bank Interchange of Transactional Paper: Legal and Economic Perspectives*, 26 J.L. & Econ. 541 (1983). He demonstrated clearly that accurate competitive analysis of such systems required consideration of how all the system participants interrelated. Cardholder acceptance and use depends on merchant participation, in addition to the terms and conditions of card use. Merchant participation depends on cardholder acceptance and use, as well as terms and conditions of merchant participation in the system. The competitive consequences of such systems cannot be understood by isolating the focus of analysis on any single type of user or participant. Based on this work Baxter is properly credited with the original recognition of the unique competitive characteristics of multisided markets, and the key insights regarding their consequences for accurate antitrust analysis. Baxter's insights, as later developed by other antitrust scholars with regard to credit cards and a variety of other digital businesses characterized as multisided markets, provide the fundamental basis for the Supreme Court's recent ruling in *Ohio v. American Express Co.*, 585 U.S. ___, 138 S. Ct. 2274 (2018).

Much remains to be resolved concerning the application of antitrust principles to financial transaction systems and to the many other businesses that rely on digital technology. *Ohio v. American Express* dealt with the important but limited question of whether it was analytically sound to begin the competitive analysis of a complex multisided financial-payments system by isolating an individual component of that system and treating it as a distinct relevant market. The key point is that the Supreme Court was alert to the unique character of the system at issue and understood why the isolated-market approach was an incorrect starting point. Undoubtedly further details of the Court's approach will be worked out as may be required in future cases involving similar phenomena arising in distinct industries using various other business models.

This is a major strength of the common-law system of antitrust decision making within the federal judiciary, as established by Congress in 1890. Rather than providing a straight-jacket and attempting to mandate a uniform rule-based approach for all future cases – a task that would unduly overburden the predictive powers of any court or agency, especially in sectors of the economy that are being disrupted by rapidly evolving and diverse technologies – the Court has wisely focused its analysis on the particular characteristics of the business sector and the salient aspects of the challenged behavior in the particular case before it. This is welcome confirmation that the Court is fully capable of vindicating the overriding statutory command to protect competition even where novel and challenging issues and circumstances are presented. It is the latest affirmation of the wisdom of Congress' original judgment in establishing the antitrust enforcement system – including the unwavering emphasis on the preservation of competition in its main statutes and reliance on the common-law processes of the federal judiciary – as it is today. Following the adoption of sound economics as a relevant basis for the interpretation and enforcement of the federal antitrust statutes in the 1970's and subsequently, the U.S. has experienced an economic revitalization resulting in historically unprecedented innovation and economic growth. Although a variety of other policy shifts occurring since the stagflation of the 1970's also deserve credit, the antitrust enforcement system has been the largest single determinant of the limits on private anticompetitive conduct during this entire period, and deserves significant credit for the extraordinary results.

Another key to the success of Congress' original approach is our particular legal culture, in which antitrust standards are interpreted and applied within a system of decision making by a rule-based judiciary with powerful traditions of independence and procedural integrity. These aspects of the federal judiciary have earned great respect and prestige for the federal court system. American experimentation with broad application of the *per se* rule and heavy presumptions against business conduct led to important adverse effects on the competitiveness and productivity of the US economy. Because our basic antitrust statutes focus on the objective of protecting competition and because our judiciary is the ultimate arbiter of statutory construction in the antitrust field, antitrust decisions steadily incorporated critical economic insights about the realities of competition as they were developed and understood. In effect, the mistakes of the *per se* era were appropriately corrected by gradual but ultimately decisive judicial recognition of persuasive critiques of prior precedent. Had our law adopted a more prescriptive approach focusing on prohibition of the specific business practices that were common sources of complaint in the late 19th Century, the antitrust enforcement system might have fallen of its own weight long before the era of digital technology, requiring wholesale reforms by Congress from time to time, as different competitive issues and specific industries rose and fell in visibility. By contrast, Congress' choice of competition as the essential statutory focus and of the judiciary as the ultimate source of interpretation has allowed US antitrust to evolve to become a system in which competition is effectively protected without the need for repeated Congressional intervention in matters of antitrust substance.

This record of successful evolution of antitrust from its founding in 1890 must be contrasted with legislative efforts that attempted to address anticompetitive conduct by creating specific economic regulatory regimes including detailed rules for competitive conduct in individual economic sectors as they arose. Railroad transportation was the most significant new-technology sector that emerged in the U.S. at the start of the Second Industrial Revolution. Faced with numerous and intensifying criticisms of the novel competitive practices of this emerging and critical industry, Congress created the Interstate Commerce Commission to regulate railroads under the Interstate Commerce Act of 1887. In this case Congress adopted a rule-based administrative agency approach to the control of perceived anticompetitive conduct in the emerging industry. This same pattern of prescriptive regulation was consistently extended and the ICC ultimately was given authority over most other forms of surface transportation (common-carrier trucking, bus transportation, inland-waterway transportation, common-carrier petroleum and petroleum-product pipelines) and, for a time, telephone, telegraph and radio communications. Similar approaches were attempted with regard to the commercial air transportation industry (Civil Aeronautics Board), common-carrier ocean shipping (Federal Maritime Board and later the Federal Maritime Commission), major parts of the energy sector (Federal Power Commission and later the Federal Energy Regulatory Commission), and major parts of the communications industry (Federal Radio Commission and later the Federal Communications Commission). Many of these schemes were recognized ultimately as serious policy failures because they perpetuated anticompetitive and inflexible administrative approaches that stifled innovation and allowed agency-sponsored or agency-approved forms of price-fixing and exclusionary conduct, while resisting innovation and other procompetitive changes due to rent-seeking behavior and political entrenchment of anticompetitive patterns of regulation favoring incumbents. As a result of bipartisan legislative efforts beginning in the 1970's, the ICC and the CAB were ultimately abolished, and most of the other sectoral regulatory agencies were restricted to regulations that were more clearly needed in order to remedy objective and serious market failures. In effect, the wisdom of using the antitrust approach – providing generally phrased protections against anticompetitive conduct, administered through an independent judiciary –

clearly won out over the model of prescriptive agency intervention regarding the details of commercial practices thought to be problematic in new economic sectors.

Given the numerous and powerful legal tools available to federal and state enforcement agencies and to private attorneys general under the treble-damage provisions of federal antitrust law, there is never any shortage of imaginative and earnestly advanced theories of antitrust liability. One of the great strengths of our current system is that such theories must be presented persuasively to our federal judiciary in order to win ultimate acceptance. This is what has occurred with regard to a wide variety of proposed liability theories, including theories challenging many types of horizontal and vertical restraints, monopolization and monopolistic conduct, and acquisitions, including vertical acquisitions and acquisitions involving potential competitors. Both federal agencies have announced pending investigations into competitive conduct in the digital technology sector, and both have powerful institutional incentives to identify any illegal conduct, and as described above, both agencies have ample legal authority to seek appropriate remedies for such conduct. Given the many legal tools available to the private attorneys general empowered under 15 USC §25, I would also anticipate that private parties who believe themselves aggrieved by any illegal conduct committed by firms competing in digital markets would also be assessing their options and taking legal action. I have no doubt that our judiciary will be successful in separating wheat from chaff among the many allegations and legal theories that are sure to arise to challenge new forms of business conduct that may evolve within the digital economy. Moreover, I see no other approach or institution that has any remote claim to superiority for this purpose over the basic antitrust system that Congress founded in 1890, as it has evolved over the last 130 years.

Turning to question 3., regarding the adequacy of antitrust enforcement institutions, there is one issue that presents an increasingly urgent and important cause for action. As the Committee is undoubtedly aware, the US record of antitrust enforcement (described in the earlier paragraphs of this letter) is by far the strongest and most extensive of any jurisdiction in the world. As recently as 1990, only a handful of other jurisdictions had antitrust laws on the books, and even among those jurisdictions antitrust enforcement was intermittent and generally inconsequential. Beginning in the mid-1980's, however, a variety of developments caused scores of additional jurisdictions throughout the world to adopt antitrust laws or to strengthen existing laws and institutions. At present more than 130 jurisdictions around the world engage in some meaningful form of antitrust enforcement. With some key exceptions (sectors closely related to national defense and security, heavily regulated sectors, extraction of certain natural resources, trade in certain agricultural products) virtually all global commerce now occurs subject to antitrust rules.

Although there are broad points of similarity among these numerous new antitrust systems – most have some form of prohibition on restrictive agreements, exclusionary monopoly conduct and anticompetitive structural transactions – there are profound differences as well. Many jurisdictions lag the US with regard to their commitment to the protection of vigorous competition, as distinct from other values and objectives that are in tension or even conflict with that basic goal. Protection of national champions, or of local competitors, or appropriation of intellectual property for benefit of local firms often emerge as an important theme in many enforcement regimes. While non-competition themes are explicitly made a part of the competition rules in some foreign jurisdictions, there are also instances in which such themes remain implicit and sometimes unacknowledged. In some cases the local authority will deny that its enforcement actions incorporate non-competition factors. Further

complicating the picture is the fact that very few antitrust systems match the US with regard to the extent and quality of their procedural protections essential to assure accurate, efficient and impartial decision making. In many jurisdictions antitrust enforcement is the province of an administrative agency that initiates and conducts investigations, formulates objections and makes allegations of infringement, conducts the proceedings to collect and assess evidence, renders judgment and then formulates and enforces a remedy. In other words, there is little or no effort made to separate clearly the prosecutorial and decisional functions in the manner that is regarded as so critical to the US system of law enforcement (including antitrust law). Although often subject to the ultimate review of courts, judicial review of unitary decision-making bodies is often very slow, and in many instances reviewing courts are authorized or inclined to provide only very marginal review of the substance of agency decisions. The result is that unlike antitrust decisions in the US, there is very little meaningful judicial control of antitrust proceedings, and the enforcement agency is able to condition the decision-making environment to its own liking. This puts targets of agency complaints at a severe procedural disadvantage, unable to mount an effective defense.

This problem has been evident for many years, although it is has reached increased visibility within the broader antitrust community in recent years. Although US agencies have demonstrated sympathy for these concerns and have expended considerable effort in attempting to address them, there has been very little tangible progress to date. In very isolated and high-visibility cases there has been Executive-Branch intervention to prevent specific abuses. For example, President Clinton successfully intervened when the European Commission attempted to use its merger review authority to prevent the acquisition of McDonnell Douglas Aircraft by Boeing Co. in 1997. Similarly, senior US officials addressed serious procedural shortcomings in the Chinese Antimonopoly Law enforcement system through the U.S.-China Strategic and Economic Dialogue as well as the U.S.-China Joint Commission on Commerce and Trade during meetings of those entities that occurred from 2013-2015. Other similar attempts have not been successful and no subsequent effort has achieved more than isolated and/or limited progress in eliminating foreign agency reliance on non-competition elements in their competition enforcement, or in meaningfully reforming procedural and institutional shortcomings that consistently work against antitrust defendants. The leading international organizations representing the enforcement community (the International Competition Network and the Competition Committee of the OECD) have recently undertaken a variety of projects directed at improving antitrust procedures, but tangible progress to date has been minimal.

This is a widespread problem of increasing urgency that requires a targeted, whole-of-government approach. A report of the International Competition Policy Experts Group issued in March 2017 recommended establishing an ongoing Executive-Branch effort to address these persistent problems. The report was the subject of a hearing before the Subcommittee on Antitrust, Commercial, and Administrative Law on June 29, 2017. To date, however, no specific implementation of this recommendation has been achieved. If there is a single initiative that the Congress could undertake that would improve the quality and beneficial impact of antitrust enforcement in the digital economy, action on this ICPEG recommendation is the obvious candidate.

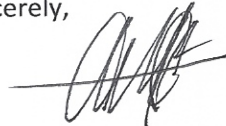
Finally, a distinct but related institutional recommendation concerns the unique structure of FTC antitrust enforcement. This structure is an exception to the fundamental organizational pattern of federal antitrust-law enforcement. The organic statutes governing FTC antitrust proceedings, 15 USC §§21 and 45, empower the Commission to conduct administrative litigation to impose cease and desist

orders. While the FTC is authorized to challenge anticompetitive conduct through federal district court litigation, 15 USC §53(b), in practice this authority is used mainly to obtain preliminary relief against impending acquisitions. Proceeding via administrative litigation means the Commission initiates and conducts investigations, determines the content of any complaint, litigates the complaint as the prosecutor in administrative proceedings (via the Bureau of Competition), assesses the merit of the case following any appeal from an initial decision of its administrative law judge (ALJ), and retains authority to review the case (including remedy) de novo at that stage. Although there are certain "firewalls" put in place between the Bureau of Competition and the Commission once administrative litigation is commenced, it is unavoidable that when the Commission ultimately reviews the ALJ decision, it is judging its own complaint. Thus, in any antitrust case that follows this pattern, the Commission process lacks the scrupulous and universally observed separation between prosecutor and decision maker that is regarded as so essential to all other forms of antitrust enforcement (and, indeed, to all other federal court litigation). Although the Commission's decisions are subject to review by a federal Court of Appeals (applying a substantial-evidence test and subject to various doctrines requiring some degree of deference to the FTC's view of the law), the result of this setup is that the targets of FTC complaints are denied fundamental procedural protections available in other antitrust proceedings. Since the process of administrative litigation and appeal can last years, this places defendants in Commission proceedings at a substantial disadvantage.

Since these procedural limitations are the direct result of provisions in the FTC's organic statute, a legislative remedy is needed. The key requirement is to restore the actual (and perceived) separation between the prosecutor and the decision maker in FTC antitrust proceedings. One option would be to convert the position of Director of the Bureau of Competition – the principal supervisor of all FTC antitrust matters, who is appointed by the FTC Chairman – to a position with attributes similar to those of the Assistant Attorney General of the Antitrust Division. The Director would become an Executive Branch officer and have the authority (subject to that of the Attorney General and the President, like other federal prosecutors) to initiate and supervise investigations, to bring complaints and prosecute them to judgment, to pursue and defend appellate litigation, and to settle such litigation by consent. Although the proposal as described would require clarification of a number of additional aspects of the position, a change of this basic character would remedy the main procedural weakness in the current FTC's structure for antitrust enforcement – the combination of prosecutorial and judicial functions within the Commission.

I hope the Committee will regard this submission as helpful. I would be pleased to assist this important effort as may be deemed appropriate by the Committee.

Sincerely,



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