NetChoice *Promoting Convenience, Choice, and Commerce on the Net*

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NetChoice Response to FTC Request for Comments on
Evaluating the Competitive Effects of Corporate Acquisitions and Mergers

NetChoice respectfully submits this response regarding the Federal Trade Commission's ("FTC") request for comments on "Evaluating the Competitive Effects of Corporate Acquisitions and Mergers."

NetChoice is a trade association of leading e-commerce and online companies promoting the value, convenience, and choice of internet business models. Our mission is to make the internet safe for free enterprise and for free expression. We work to promote the integrity and availability of the global internet and are significantly engaged in privacy issues in the states, in Washington, and in international internet governance organizations.

85% of Americans with an opinion oppose government preventing successful businesses from acquiring a tech startup.[1]

The FTC enjoys ample tools to review and evaluate and address competition and acquisitions regarding corporate mergers. Moreover, a majority of Americans think that the largest beneficiaries of breaking-up large tech businesses would be traditional competitors and anti-business groups. Likewise, 85% of Americans with an opinion oppose the government preventing successful businesses from acquiring a tech startup.[2]

[1] *See* Zogby Analytics survey of 1222 adults in the United States conducted from August 6, 2018 to August 8, 2018.
[2] *Id.*

Polling Shows that Americans Oppose Government limitations on Successful Businesses from Acquisitions and Americans do not see consumers as the Chief Beneficiaries of Big-Tech Breakups

Polling of Americans conducted this month by Zogby Analytics and commissioned by NetChoice found overwhelming opposition to limitations on acquisitions by large online platforms.[3] Moreover, this polling found overwhelming concern with breaking-up large online platforms.

> Question: *Some groups are calling for the break-up of large tech businesses. Who do you believe would most benefit from a break-up?*
>
> - 28% of those with an opinion said "Consumers" would most benefit.
> - 53% of those with an opinion said "Traditional industries competing with tech businesses" and "Anti-business groups" would most benefit.
>
> Question: *If an online business becomes successful, should the government prevent them from acquiring any tech startups that seek to be acquired?*
>
> - 86% of those with an opinion said "No"

Current systems for identifying market power work – this includes the DOJ-FTC Horizontal Merger Guidelines and the Consumer Welfare Standard

Today the FTC has several tools to address and analyze mergers and market competition. The FTC has its antitrust power under:

- Section 2 of the Sherman Act makes it illegal for a company to "monopolize, or attempt to monopolize," a market.[4]
- Section 7 of the Clayton Act stops mergers and acquisitions which "may be substantially to lessen competition, or to tend to create a monopoly."[5]
- The DOJ-FTC Horizontal Merger Guidelines provide rules and policies when reviewing a potential merger.[6] Note that this was updated in 2010.
- Section 5 of the FTC Act[7] empowers the FTC to take actions against unfair or deceptive trade practices which could also be used to protect against consumer-harming business practices.

There is a panoply of tools the FTC can wield regarding competition and maintaining a competitive market. There has been little showing that these tools are inadequate – and

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[3] *Id.*

[4] Sherman Act, 26 Stat. 209, 15 U.S.C. §§ 1–7.

[5] 15 U.S.C. §§ 12–27, 29 U.S.C. §§ 52–53.

[6] U.S. Department of Justice & FTC, Horizontal Merger Guidelines (2010).

[7] 15 U.S. Code § 45.

lacking overwhelming evidence to show such inadequacy, the FTC should not seek additional tools.

At the same time, a core tenet of antitrust law and enforcement is to protect "consumer welfare." This more than capable standard enabled the FTC and Department of Justice (DOJ) to take actions against businesses for merger concerns, price fixing, consolidation of markets, raising barriers to entry, and several other threats to competitive markets.

We have seen no sufficient justification for abandoning the consumer welfare standard, and the rationale given amounts to little more than emotional aspirations. While railing about large businesses, critics of the consumer welfare standard fail to present evidence that the standard has actually failed.[8]

Take the issue of collusion and price-fixing, where the FTC has recently brought dozens of actions against bad actors, such as: Drug Testing Compliance Group, LLC;[9] Bosch (Robert Bosch GmbH);[10] and U-Haul International and AMERCO.[11] Each of these actions were taken well into the FTC's consumer welfare era.

Likewise, the FTC blocked the merger of Drew Marine and Wilhelm Wilhelmsen,[12] challenged the merger of Tronox and Cristal,[13] forced disbursement of Red Ventures and Bankrate.[14] In 2017, the FTC blocked mergers of several businesses such as Sanford Health, Sanford Bismarck, and Mid Dakota Clinic,[15] and DraftKings and FanDuel[16] and the FTC forced breakup of Mars and VCA,[17] Sherwin-Williams Company and Valspar Corporation.[18]

We recognize that businesses always face problems from competition and competitors. Some business models succeed while others fail. This is the nature of the market. However, it is not

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[8] *See, e.g.* complaints about Amazon in Lina M. Khan, *Amazon's Antitrust Paradox,* Yale L.J. (Jan. 2017). Here Ms. Khan argues that Amazon's willingness to forgo profits in the name of growth is bad. However, most businesses in their early years are willing to forgo profits to grow. These businesses often face large fixed-cost investments and customer acquisition costs. Moreover, in the case of Amazon, it often reinvested profits back into the company to assist with its grown. Finally, Ms. Khan's paper fails to mention that Amazon is now showing profits.

[9] *In re Drug Testing Compliance Group, LLC,* FTC Administrative Action (Ja. 29, 2016).

[10] *In re Bosch (Robert Bosch GmbH)*, FTC Administrative Action (Apr. 24, 2001).

[11] *In re U-Haul International, Inc., and AMERCO*, FTC Administrative Action (Jan. 20, 2010).

[12] *FTC v. Wilhelm Wilhelmsen, et al.*, Case No. 1:18-cv-00414 (U.S. Dist. Ct. DC July 30, 2018).

[13] *FTC v. Tronox Limited, et al.*, Case No. 1:18-cv-01622-TNM (U.S. Dist. Ct. DC July 10, 2018).

[14] *In re Red Ventures Holdco and Bankrate*, Matter No. 1710196 (Apr. 27, 2018).

[15] *In re Sanford Health/Sanford Bismarck/Mid Dakota Clinic*, Matter No. 171 0019 (Dec. 26, 2017).

[16] *In re DraftKings, Inc. / FanDuel Limited*, Matter No. 161 0174 (July 14, 2017).

[17] *In re Mars, Incorporated and VCA Inc.*, Case No. 171 0057 (Dec. 19, 2017).

[18] *In re Sherwin-Williams/Valspar*, Matter No. 161 0116 (July 28, 2017).

the role of the government to protect failing business models. Instead it is the role of government to ensure a fair opportunity for all to succeed. The consumer welfare standard achieves this goal and barring evidence of its failure should be allowed to help grow our economy and competition within.

Disruptive or Generational Changes in Technology, and How Such Technologies Affect Competitive Effects Analysis

With changes in technology, and in particular the growth of online platforms, we've seen a breakdown of barriers for new entrants into established markets. Rapid innovation, combined with low barriers to entry, forces existing businesses to improve as well as providing opportunities for new entrants.

Despite claims by some that "consumers are locked into large platforms and will not leave" public opinion shows the opposite. Nationwide polling conducted by Zogby Analytics and commissioned by NetChoice[19] showed consumers can and do leave platforms when better options are available.

> *Question: Do you think that the services offered by online platforms like Apple, Google, Facebook, and Amazon can be replaced if a better competitor comes along?*

- 70% of those with an opinion said "Yes"

Competition is only an innovation away.

Allowing Large Businesses to Vertically Integrate Small Businesses Helps Startups Succeed

Small companies are at high risk for failure. Startups face daunting fixed cost outlays along with high cash burn rates until they reach profitability. It has been shown that 8 out of 10 new businesses fail in the first 18 months,[20] and 82% of businesses who fail do so because of cash flow problems.[21]

Against these odds, it would be disastrous to foreclose the future opportunity of acquisition by a larger business.

To encourage venture capitalists (VCs) to invest in small startups, VCs require a sense of potential returns. Buy denying the possibility of acquisition, VCs would not invest in more risky startups, or might offer less generous terms. Increased risk for VCs means less funding for startups.

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[19] *See* Zogby Analytics survey of 1222 adults in the United States conducted from August 6, 2018 to August 8, 2018.

[20] Eric Wagner, *Five Reasons 8 Out Of 10 Businesses Fail*, Forbes (Sept. 12, 2013).

[21] Lydia Dishman*, This Is The State Of Small Business Failure In The U.S.*, FastCompany (June 30, 2017).

Also, large businesses can help ensure that a small business product or service remains viable for consumers, when they invest in startups with a plan for integration. And efficiency gains from vertically integrating businesses can mean better products and lower prices for consumers.

Abandoning the Consumer Welfare Standard Would Harm Small Businesses

Anti-business advocates claim that "big is bad." But for America's small and mid-size businesses, the bigger the platform the better for trying to reach larger audiences.

Consider the local custom furniture store. Just fifteen years ago businesses like this could barely afford to place an ad in a local newspaper, let alone on TV or radio. But now, thanks to large online platforms, for less than ten dollars a small business can reach thousands of potential customers and target them more accurately than ever.

Large online platforms have given new growth opportunities to a panoply of small businesses. Consider the app stores on the Apple and Android platforms. Developers can reach markets of millions of customers. Fifteen years ago, this was only possible through significant outlays for advertising, distribution, and logistics to move their software to customers.

Or consider the platforms of Etsy and eBay enabling small sellers to find customers across the country and even around the world.

These benefits are the result of allowing online platforms to grow and flourish, because the FTC has relied upon the consumer welfare standard to regulate that growth.

New Developments in Markets and in Business-to-Business and Business-to-Consumer Relationships Enhance the Effectiveness of the Consumer Welfare Standard

Today American consumers have more choices and more information than ever.

Historically, consumers had only a handful of near-by businesses from which to purchase products and services. These businesses could set prices higher than near-by competitors, and customers had a difficult time researching the comparative value and quality of options.

Today, thanks to the internet, consumers have access to a smorgasbord of products, businesses, and information about pricing. Using a couple of clicks customers can find the lowest prices for goods they want. No longer limited to just nearby stores, the internet enables customers to buy from hundreds of thousands of stores across the country.

A cottage industry has evolved to help consumers find the lowest prices for products. Websites such as Slickdeals[22] help consumers find active discounts. Services such as Honey[23] enable real-

[22] Slickdeals.net
[23] JoinHoney.com

time price comparison and coupon testing at checkout. With a couple of clicks, customers can find the products they want at the lowest prices.

For businesses, the internet has reduced barriers to entry and increased their potential marketplace. Now an art student can easily sell her paintings from her garage to anyone around the world, without first gaining access and giving markup to exclusive art galleries. A parent can sell their children's old toys in a large market rather than relying on a one-day neighborhood yard sale. Anyone can compete with any business, big or small.

There is no dearth of competition. The marketplace has never been more competitive.

We thank you for your consideration.

Sincerely,

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