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

Steve DelBianco, President
Carl Szabo, Vice-President & General Counsel
NetChoice
1401 K St NW, Suite 502
Washington, DC 20005
202-420-7498

www.netchoice.org

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NetChoice Response to FTC Request for Comments on The Identification and Measurement of Market Power and Entry Barriers, and The Evaluation of Collusive, Exclusionary, Or Predatory Conduct or Conduct That Violates the Consumer Protection Statutes Enforced by the FTC, In Markets Featuring "Platform" Businesses

NetChoice submits this response regarding the Federal Trade Commission's ("FTC") request for comments on "The Identification and Measurement of Market Power and Entry Barriers, and The Evaluation of Collusive, Exclusionary, Or Predatory Conduct or Conduct That Violates the Consumer Protection Statutes Enforced by the FTC, In Markets Featuring 'Platform' Businesses."

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.

The FTC enjoys ample tools to review, evaluate, and address competition and acquisitions regarding corporate mergers.

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

Today the FTC has several tools to analyze and address 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.[1]
- Section 7 of the Clayton Act stops mergers and acquisitions which "may be substantially to lessen competition, or to tend to create a monopoly."[2]
- The DOJ-FTC Horizontal Merger Guidelines provide rules and policies when reviewing a potential merger.[3] Note that this was updated in 2010.
- Section 5 of the FTC Act[4] empowers the FTC to take actions against unfair or deceptive trade practices which could also be used to protect against consumer-harming business practices.

Clearly, there is a panoply of tools the FTC can wield to maintain a competitive market. There has been little showing that these tools are inadequate. Lacking overwhelming evidence of 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 markets.

We have seen no overwhelming justification for abandoning the consumer welfare standard, other than emotional rationales. While raising rallying cries about growth of businesses, critics of the consumer welfare standard fail to present evidence where the standard has actually failed.[5]

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 the role of the government to protect failing business models. Instead it is the role of government to police against anticompetitive behavior that harms consumers. The consumer welfare standard achieves this goal and barring evidence of its failure should be allowed to help grow our economy and competition within.

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

[2] 15 U.S.C. §§ 12–27, 29 U.S.C. §§ 52–53.

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

[4] 15 U.S. Code § 45.

[5] *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.

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 one 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 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[6] help consumers find active discounts. Services such as Honey[7] enable real-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

[6] Slickdeals.net

[7] JoinHoney.com

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,

Steve DelBianco
President, NetChoice

Carl M. Szabo
Vice-President & General Counsel, NetChoice

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