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

August 20, 2018
SUBMITTED ELECTRONICALLY
Federal Trade Commission

NetChoice Response to FTC Request for Comments on
The State of Antitrust and Consumer Protection Law and Enforcement,
and Their Development, Since the Pitofsky Hearings

NetChoice submits this response regarding the Federal Trade Commission's ("FTC") request for comments on "The State of Antitrust and Consumer Protection Law and Enforcement, and Their Development, Since the Pitofsky Hearings."

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.

We caution the FTC against abandoning the "consumer welfare" standard. The consumer welfare standard continues to provide ample protections for competition in the marketplace, for consumers, and for businesses.

While there are calls to throw away a standard that has been successful for decades, today there are more choices and more price information for consumers than ever before. As U.S. Department of Justice Assistant Attorney General Antitrust Division Makan Delrahim said:

> The consumer welfare standard does not blind us as enforcers; it focuses our decision on appropriate considerations like price, output, innovation, quality, and choice. Enforcement of the free markets for the benefit of consumers

can be achieved with greater success, and greater fidelity to the fuel of law, within the contours of the consumer welfare standard, than without.[1]

There is no rationale for abandoning the consumer welfare standard

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.[2]

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;[3] Bosch (Robert Bosch GmbH);[4] and U-Haul International and AMERCO.[5] 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,[6] challenged the merger of Tronox and Cristal,[7] forced disbursement of Red Ventures and Bankrate.[8] In 2017, the FTC blocked mergers of businesses such as Sanford Health, Sanford Bismarck, and Mid Dakota Clinic,[9] and DraftKings and FanDuel[10] and the FTC forced breakup of Mars Inc. and VCA Inc,[11] Sherwin-Williams Company and Valspar Corporation.[12]

---

[1] U.S. Department of Justice Assistant Attorney General Antitrust Division Makan Delrahim, *Stand By Me: The Consumer Welfare Standard and the First Amendment*, Remarks as Prepared for the Open Markets Institute Event - Antitrust and the News (June 12, 2018).

[2] *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.

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

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

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

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

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

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

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

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

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

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

We recognize that businesses always face problems from competition and competitors. Some business models succeed while others fail. This is the nature of the free market. The consumer welfare standard achieves this goal, and barring evidence of its failure should be allowed to help grow our economy and competition within.

Abandoning the Consumer Welfare Standard Risks Injecting Politics into Commission Analysis and Decisions

Removing the consumer welfare standard would risk injecting politics into what should otherwise be impartial decisions. Doing so would seriously degrade the trust Americans have in the impartiality of the FTC and would expose yet another component of our government to political scrutiny.

U.S. Department of Justice Assistant Attorney General Antitrust Division Makan Delrahim said it best in his strong opposition to abandoning the consumer welfare standard:

> We also hear people saying that with a widened mandate, with setting aside the consumer welfare standard, antitrust could help win votes for the candidate or party that promises to use it.
>
> That's just the danger, of course. Antitrust has always had a political allure—cast the blame for your ill of choice on corporate power and let the unswung hammer of antitrust be the promised solution. It's a populist cry that has slipped in and out of vogue for over a century.[13]

If the FTC abandons the "consumer welfare" standard in favor of Open Markets Institute (OMI)'s "dangers to liberty" standard or other standards that do not focus on the welfare of consumers, we would see the result of General Delrahim's concerns.

No longer constrained by the "consumer welfare" standard, a politically-motivated regulator could target anti-administration businesses as "dangers to liberty." On the other hand, the regulator could *allow* problematic behavior if the company is promising more jobs, a factor now largely irrelevant to antitrust analysis. We would see an abandonment of the clear, impartial analysis under "consumer welfare" in favor of a standard that operates only in the eye of the beholder.

General Delrahim warned of this political "dangers to liberty" standard; "the message for enforcers is that in the zealous pursuit of justice through prosecution, we risk prosecuting unjustly."[14]

---

[13] U.S. Department of Justice Assistant Attorney General Antitrust Division Makan Delrahim, *Stand By Me: The Consumer Welfare Standard and the First Amendment*, Remarks as Prepared for the

Open Markets Institute Event - Antitrust and the News (June 12, 2018).

[14] *Id.*

Abandoning the Consumer Welfare Standard Erodes Decades of Work

In addition, changes to the consumer welfare standard would risk erasing decades of legal and institutional work where the FTC practiced economics-based analysis of competition. Abandoning the consumer welfare standard will result in the abandonment of court rulings, FTC interpretations and decisions, and staff experience in analyzing and prosecuting under the consumer welfare standard.

Abandoning the Consumer Welfare Standard Impedes Coordination with Other Government Agencies

If the FTC were to abandon the consumer welfare standard, it would not do so in a vacuum. Such a seismic change would be felt throughout several government agencies and across the business community.

The FTC also engages in cross-coordination with the DOJ.[15] DOJ Attorney General Delrahim has expressed his opposition to abandoning the consumer welfare standard.[16] However, should the FTC strike-out on its own in abandoning the consumer welfare standard it will strain the FTC's ability to effectively coordinate with the DOJ. In addition, the business community may be facing widely different antitrust standards depending on which agency picks up their file.

When analyzing their growth strategies and tactics, businesses rely on established rules and policies. This guidance allows them to operate both legally and efficiently. Today, businesses know that when looking at different forms of business growth, the consumer welfare standard operates as the underpinning to the government's analysis.

However, to change to an amorphous standard, such as "dangers to liberty," leaves businesses and other government agencies in the precarious position of operating without a roadmap – where the rules and outcomes are governed more by emotion than analysis.

Abandoning the Consumer Welfare Standard Harms Small Businesses

Anti-consumer welfare advocates claim that "big is bad." But for America's small and mid-size businesses, the bigger the platform the better for reaching larger audiences.

---

[15] *See, e.g.*, FTC-DOJ Merger Guidelines.

[16] "It's also important to emphasize that the current standard is capable of addressing the enforcement challenges presented by emerging digital technologies. Those advocating abandoning consumer welfare have often attacked a straw man—they describe the standard as requiring a myopic focus singularly on downstream consumer prices, to the exclusion of non-price values and the competitive process. This narrow approach, in turn, can be attacked for inability to confront technological changes that are redefining our democracy. Recent enforcement experience, however, I submit belies that notion." U.S. Department of Justice Assistant Attorney General Antitrust Division Makan Delrahim, *Stand By Me: The Consumer Welfare Standard and the First Amendment*, Remarks as Prepared for the Open Markets Institute Event - Antitrust and the News (June 12, 2018).

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[17] help consumers find active discounts. Services such as Honey[18] 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 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.

---

[17] Slickdeals.net

[18] JoinHoney.com

Significantly, this framework does not require additional legislation to establish any new laws regarding "informational injury."

The FTC should retain the existing and working consumer welfare standard. Doing so retains the model on which consumers and business have relied and it has and will continue to work.

We thank you for your consideration.

Sincerely,

Steve DelBianco
President, NetChoice

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

NetChoice is a trade association of e-Commerce and online businesses. *www.netchoice.org*