STATEMENT OF

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ON

COMPETITION POLICY FOR THE TWENTY-FIRST CENTURY: THE CASE FOR ANTITRUST REFORM

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Chairwoman Klobuchar, Ranking Member Lee, Subcommittee Members, thank you for the opportunity to appear before you today as you consider whether our nation's antitrust laws are working as they should, and what might be done to make them work better.

The simple answer is that they are not. Sensible clarifications are needed to ensure that the antitrust laws can continue performing their vital mission in our economy and our society.

Consumer Reports was founded 85 years ago. As part of our mission to work for a marketplace that is fair and just for all, we have emphasized the fundamental importance of competition for ensuring a marketplace that works for consumers, by empowering them with the leverage of choice, the ability to go elsewhere for a better deal. That motivates businesses to be responsive to consumers' interests, with more affordability, better quality, and new innovative thinking, in response to consumers' wants and needs.

That is why we have been strong and consistent supporters of the antitrust laws as the essential protector of competition.

Today, there is a profound imbalance of power in the marketplace. Increasing concentration and consolidation is leaving consumers with fewer choices and less leverage. Sellers of essential products and services are increasingly able to offer consumers one choice – take it or leave it. Consumer spending is the engine that drives the economy, yet consumers are being denied a fair voice.

The high concentration and resulting power imbalance have become starkly evident in the online marketplace, where a handful of dominant digital platforms are calling the shots as gatekeepers. But it is happening in many other critical sectors, from agriculture to pharmaceuticals and health care to wireless and broadband service to household appliances to air travel. The trend toward higher corporate concentration is occurring throughout the economy. According to one study, there have been marked increases in corporate concentration, as measured by the Herfindahl-Hirschman Index, in 75 percent of the industrial sectors, over the past two decades, with the average concentration level close to doubling.[1]

We are encouraged that Congress is giving serious attention to this problem, and is considering proportionate proposals for correcting it within the general framework of the existing antitrust laws.

Congress was on target in creating the antitrust laws in 1890, expanding them in 1914, and amending them in the 1950s and 1970s. There have been other amendments since then. It is time to amend them again. To correct off-the-mark court interpretations of the current statutes, and their effects on enforcement decisions being made in light of those interpretations, by reaffirming the original intention of Congress and providing appropriate guidance to the courts.

The measured reforms we are seeking will have enormous benefits for consumers. Improving competition will give consumers more and better choices, at more affordable prices, and will spur more innovation to create even better products and services. Corporations that are attempting mergers that would set back competition, or that are abusing their power by closing off opportunities for others, can be more reliably stopped.

These reforms are far from all that is needed to right the imbalance and give consumers the power in the marketplace that they need and deserve; but they are an absolutely essential part of what is needed.

Two areas that need a course correction are the standards for enforcement against anticompetitive mergers, and for enforcement against exclusionary conduct by dominant corporations to solidify and maintain their dominance by freezing out their competitors.

Merger Enforcement

Merger enforcement has lost its potency.

[1] Gustavo Grullon, Are US Industries Becoming More Concentrated? *Review of Finance*, Oxford University Press, July 2019, https://academic.oup.com/rof/article/23/4/697/5477414.

There was a time 55 years ago, when Justice Potter Stewart famously remarked that merger challenges were receiving so much deference in the courts that, "The sole consistency that I can find is that … the government always wins."[2] That time has long since passed.

Antitrust enforcers now face courts that are skeptical of merger challenges, viewing them as business interference, and requiring too much irrefutable certainty to justify. The courts too often seem all-too-ready to accept the claims from the merging corporations that their merger will strengthen them and thus enable them to provide greater benefits, and that that should be the decisive consideration.

There's also an erroneous notion that enforcers need to prove that the merging corporations have bad motives or intentions for merging. That's not the case, although those motives and intentions could be present inside the corporate boardrooms. Merger enforcement usually has nothing to do with assessing how good or evil the merging corporations might be. It's about how the resulting change in marketplace structure will affect the natural incentives of the corporations in the marketplace, before and after the merger, to pursue their profit-maximizing business plans, and their capabilities to pursue those plans in ways that reduce meaningful choice.

By the same token, genuine risks to competition won't be fixed by pledges of good behavior, even when they are reduced to writing as part of a consent decree. As others have noted, including the immediate past Assistant Attorney General for Antitrust, Makan Delrahim, that unrealistically depends on the merged corporation making business decisions, day in and day out, and over the long haul, that run counter to its profit-maximizing incentives – that run counter to its basic business DNA.[3] That's simply not sustainable without continued monitoring that diverts agency resources away from investigating and taking enforcement action against new violations. It also requires that there be consequences if the corporation strays again, that are sufficiently credible and severe to provide effective deterrence.

[2] Unites States v. Von's Grocery Co., 384 U.S. 270, 301 (Stewart, J., dissenting).
[3] https://www.justice.gov/opa/speech/assistant-attorney-general-makan-delrahim-delivers-keynote-address-american-bar.

One of the principal purposes Congress had in enacting section 7 of the Clayton Act for merger enforcement in 1914, and then amending it in 1950, was to ensure that trends toward harmful market concentration could be stopped before it is too late and the harm is occurring and too locked in to be easily reversed. In the words of the Supreme Court, by "provid[ing] authority for arresting mergers at a time when the trend to lessening of competition in a line of commerce is still in its incipiency … to brake this force at its outset and before it gathered momentum."[4]

This purpose is embodied in the text of Section 7, which prohibits acquisitions where "the effect of such acquisition *may be* substantially to lessen competition or to tend to create a monopoly" (emphasis added).[5]

In recent decades, however, the courts, and therefore the enforcement agencies, have become too reluctant to apply this standard as vigorously as Congress intended. They have effectively read the "may" out of Section 7. The standard has devolved instead into something tantamount to requiring the government to prove demonstrable, concrete, imminent, quantifiable harm. This not only makes a case more difficult to prove than Congress intended. It has also resulted in consideration of each merger in too isolated a fashion, disregarding unmistakable trends until they have already reached the point where one more merger is demonstrably too many.

This disregard provides no safeguard against miscalculation, let alone against unanticipated later changes in the marketplace that can exacerbate the effects of concentration even without another merger taking place.

We need to reaffirm and revive the incipiency standard, so that merger enforcement can look not just at the immediate result, but look down the road, and where possible, around the corners, and give appropriate consideration to foreseeable effects under market conditions that may now be only on the horizon, but are clearly in view. We also need to reaffirm and clarify the longstanding presumption that acquisitions by the largest corporations that already have

[4] Brown Shoe Co. v. United States, 370 U.S. 294, 317-18 (1962).
[5] 15 U.S.C. § 18.

significant market power are anticompetitive and unlawful, subject to a clear showing that they are not.

Taking the longer view is also important because, if mergers are permitted to increase concentration right up to the very brink of obvious and immediate harm, there's no margin for error, or for all-too-foreseeable developments beyond the control of the antitrust laws or anyone else. What if one of the current key players later decides to downsize or close shop? The antitrust laws don't force someone to work, and they don't force a company to stay in business.

The riskiness of this short-sighted brinksmanship has become evident in the COVID pandemic, where reliable supply chains suddenly became unreliable, exposing our overreliance on one or a very limited set of suppliers of critical products and inputs. This critical aspect of competition has been underappreciated in the quest to diminish its values to just economic efficiency in the immediate term.

Importantly, we need to avoid being confused by the double meaning of the word "competitive." In the business world, it can refer to one corporation, and has become a synonym for strong. But in antitrust, it refers to the entire marketplace, and means the presence of effective competition that makes the marketplace vibrant. In antitrust matters, we need to keep focused on the antitrust meaning.

Exclusionary Conduct

The prohibition against a dominant corporation harming competition by sabotaging the ability of others to compete, by cutting off access to critical supplies or customers or means of distribution, has been weakened in two ways.

First, the prohibition against anticompetitive conduct by one corporation acting alone is found in section 2 of the Sherman Act, the prohibition against monopolization or attempt to monopolize. The Supreme Court has interpreted this to require that the conduct either must actually result in creating or maintaining a monopoly or, for an attempt to monopolize, must have a "dangerous probability of success" in creating a monopoly.[6] As a result, corporations that clearly have enough market power to cause harm to competition through engaging in exclusionary conduct are not subject to the prohibition.

Second, various theories have been put forward, and have gained currency in the commentary and the courts, to explain why such exclusionary conduct does not make business sense for a corporation even when it has the power to engage in it, and so a claim that it is occurring should never be seriously entertained. Instead, whatever appears to be happening is explained away as some kind of routine business decision, and the apparent harm to competition as logically impossible. Taken together, these explanations create a theoretical bulwark against common-sense consideration of concrete empirical evidence of actual harm.

We believe both of these obstacles to taking enforcement action against exclusionary conduct warrant Congress's attention.

Enforcement Resources

We would also like to see the enforcement agencies get more resources. Over the past four decades, the economy has grown astronomically, and the largest corporations have higher stock value than the GNPs of many countries. And yet the budget for antitrust enforcement has not kept pace. Antitrust enforcement actions are expensive, and can take years. Enforcers need sufficient resources to provide effective deterrence.

So increasing antitrust enforcement budget resources is absolutely necessary. But it is not sufficient. Enforcers also need the laws to work right, so those resources can be put to effective use.

Efficiencies, and the Consumer Welfare Standard

Two other issues that deserve to be part of the discussion are the proper use of efficiencies, and the proper interpretation of the consumer welfare standard.

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[6] *E.g.,* Spectrum Sports v. McQuillan, 506 U.S. 447, (1993).

Efficiencies

Claimed efficiencies are at the core of the case made for virtually every merger proposal, in the submission to the enforcement agencies, and in the public relations campaign. Or as they are often referred to, "synergies." Essentially, the merging corporations claim that their merger will give them new cost savings and new capabilities, and that that should be enough for their merger to pass muster. These claims need to be assessed with skepticism, but too often they are not. Instead, it is assumed that anything that decreases costs for the merged corporation or increases its capabilities can be taken into account to offset concerns about the effects on competition. This is a fundamental misconception about efficiencies. And it puts the cart before the horse.

Efficiencies become potentially relevant only if the merger is initially deemed to be anticompetitive. And then, they cannot be used to excuse harm to competition, or to be traded off or balanced against that harm. They merit consideration only if they demonstrate that what might appear to be harm to competition actually isn't, because the efficiencies actually result in a net *increase* in competition. Thus, the only efficiencies that should count are ones that can be shown to give the merged corporation clear ability and incentive to improve competition in the marketplace.

That means, for starters, that they must be actual and demonstrable, not vague and speculative or aspirational.

Second, it means that they have to benefit competition in the marketplace, not just benefit the merged corporation's own bottom line.

As one example, a merger typically combines two workforces into one. After the merger, the corporation can often save costs by eliminating jobs. The jobs that are eliminated may be regarded as redundant by the merged corporation. But they were necessary before, when there were two corporations competing. So the ability to eliminate them after the merger as a cost-cutting measure is a by-product of the merger's eliminating a competitor.

Same for production facilities or flight routes or other assets that are essential for two corporations to compete, but that having two of becomes redundant for the merged corporation.

Moreover, the merged corporation wouldn't be likely to share these or other cost savings, unless competition forces it to. Why would it?

And third, the efficiencies have to be achievable only by merging – or what is referred to as "merger-specific." A short-cut to the corporation's desired growth is not an efficiency. That would run counter to the bedrock premise of merger enforcement under the Clayton Act. That it is generally better for consumers, and for the economy, for corporations that want to add a product or service to their offerings to *build* it, not *buy* it – to *compete* with each other, not to *combine* with each other. Making a corporation stronger faster does not justify making the marketplace weaker.

The Merger Guidelines are clear on all these points. Efficiencies "will not be considered if they are vague, speculative, or otherwise cannot be verified by reasonable means." The merging corporations must demonstrate "how each would enhance the merged firm's ability and incentive to compete." The enforcement agencies are mindful that "the antitrust laws give competition, not internal operational efficiency, primacy in protecting customers."

But these caveats often fall on deaf ears among merging corporations, over-skeptical courts inclined to be receptive to business justifications, and some commentators.

The Consumer Welfare Standard

As a leading consumer organization, we naturally view the benefits of antitrust through a consumer-oriented lens. We fully agree that consumers belong at the forefront of the beneficiaries of an open, competitive marketplace. But ours is a wide-angle lens.

In our view, the consumer welfare standard, properly understood, has been a useful organizing focus for assessing potential harm to competition from mergers and practices of concern. But "properly understood" is an important qualifier.

Some theorists have tried to constrict the consumer welfare standard to focus narrowly on measuring the potential for consumers to get a lower retail price in the immediate term. Then they try to further distort that into a focus on measuring the potential for a corporation to save money by cutting costs, as a supposedly easier-to-quantify proxy, on the premise that if the corporation saves money, it will surely pass those savings on to consumers – a premise that doesn't hold up when there's not enough competition.

Our concept of consumer welfare is much broader. Properly understood, consumer welfare is an all-encompassing look at all the ways consumers benefit from having meaningful choice in a competitive marketplace, in the short term and the long term. That choice empowers consumers by motivating businesses to offer a greater variety of better products and services at more affordable prices, and to be continually striving to improve its offerings in all those respects. A more affordable price is just one of the array of beneficial byproducts of consumers having choice.

Our view of consumer welfare as it is safeguarded by the antitrust laws is shared by the Supreme Court. As the Court stated 40 years ago:

"All elements of a bargain – quality, service, safety, and durability – and not just the immediate cost, are favorably affected by the free opportunity to select among alternative offers."[7]

Moreover, we appreciate that consumer welfare ultimately benefits from competition at all levels of the production and distribution and marketing chain. And that means sufficient numbers of independent companies, and workers, at all those levels, because that's what generates the choice for consumers. Reducing the workforce is often a by-product of reducing competition and consumer choice.

[7] National Society of Professional Engineers v. United States, 435 U.S. 679, 695 (1978).

There is absolutely no tension between protecting choice for workers, suppliers, farmers, producers, and creators, and protecting it for consumers. Indeed, they all go necessarily hand in hand.

For the marketplace to be working for consumers, it has to be working for all who seek to reach them. It has to be working for everyone.

Senator Klobuchar's bill, the Competition and Antitrust Law Enforcement Reform Act, addresses both the merger enforcement and exclusionary conduct problems I described, along with making important clarifications in some other areas that have gone off-track, and adding enforcement powers to increase deterrence.

Importantly, the bill hews to established antitrust principles, concepts, and terminology in making these necessary course corrections. We believe this will ensure that the *good* case law that has evolved in the courts over the past century-plus is not upended. Despite their shortcomings as currently applied, the antitrust laws continue to provide essential benefits. We don't want to lose those benefits in pursuit of the needed improvements.

We believe Senator Klobuchar's bill provides a solid basis for bipartisan discussion that we hope will lead to a consensus that moves us forward to effective solutions to ensure that our antitrust laws are effective guardians of competition in the 21st century marketplace. Consumer Reports stands ready to assist you in that effort however we can. We will look forward to continued engagement with the Subcommittee as it considers these important issues.

Thank you again for the opportunity to be before you today. I would be happy to answer any questions.