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September 17, 2019

Hon. Michael Lee, Chairman
Subcommittee on Antitrust, Competition Policy and Consumer Rights
Committee on the Judiciary
U.S. Senate
224 Dirksen Senate Office Building
Washington, D.C. 20510

Hon. Amy Klobuchar, Ranking Member
Subcommittee on Antitrust, Competition Policy and Consumer Rights
Committee on the Judiciary
U.S. Senate
224 Dirksen Senate Office Building
Washington, D.C. 20510

**RE: Hearing on "Oversight of the Enforcement of the Antitrust Laws"**

Dear Chairman Lee:

We at the R Street Institute ("R Street") commend you and the Subcommittee for holding this hearing on "Oversight of the Enforcement of the Antitrust Laws."[1] Consistent and meaningful oversight of the two federal agencies tasked with enforcing our antitrust laws—the Department of Justice ("DOJ") and Federal Trade Commission ("FTC")—is always important, but it is particularly vital now in light of recent developments in this area. Thus, this oversight hearing is both appropriate and timely.

R Street's mission is to engage in policy research and outreach to promote free markets and limited, effective government. As part of that mission, R Street has researched and commented upon multiple issues relating to antitrust law and competition policy. A full review of that work is beyond the scope of this hearing, but we offer the following points to guide the Subcommittee's examination of one important issue in this area: the overlapping jurisdiction between the DOJ and FTC over civil antitrust enforcement.

[1] Senate Committee on the Judiciary, "Hearing on 'Oversight of the Enforcement of the Antitrust Laws,'" (Sept. 17, 2019), *available at* http://bit.ly/2I4roKe.

As explained herein, this overlapping jurisdiction causes multiple problems with the administration and development of antitrust law, ultimately hurting American consumers and the economy. Congress can quickly and easily fix these problems by simply housing all civil antitrust enforcement within a single agency.

**Overlapping jurisdiction without clear division of responsibilities is inefficient, and it invites conflict between the DOJ and FTC that may confuse the development of antitrust law and stifle pro-competitive behavior in the marketplace.**

Currently, the DOJ and FTC share jurisdictional oversight of most antitrust law. While the DOJ alone can pursue criminal antitrust violations (i.e., cartels), both the DOJ and FTC can pursue civil antitrust violations (i.e., monopolies, unfair dealing, etc.), and there is no clear division of responsibilities between the two agencies.

At best, this overlapping jurisdiction is inefficient, as enforcers inside each agency may, unbeknownst to each other, conduct duplicative parallel investigations into the same conduct, wasting taxpayer dollars and subjecting firms to unnecessary discovery requests. The two agencies can coordinate with each other to avoid duplicative work, as they have recently done with investigations into several large tech companies,[2] but conflicts can still arise.[3] And even when it works, that coordination comes with added costs beyond what would be required if all investigations were housed within a single agency. This is certainly inefficient, and it gets even worse.

Overlapping antitrust jurisdiction invites conflicts between the DOJ and FTC, who may have widely different views on the legality of certain types of business conduct. And this concern is no mere hypothetical, as demonstrated recently in the high-profile investigation into chipmaker Qualcomm over the way it licenses certain standard-essential patents ("SEPs") used in mobile wireless services, like 4G LTE. After the FTC sued Qualcomm and won in district court,[4] the DOJ subsequently intervened to oppose that judgment and ask the 9th Circuit to stay the district court's judgment pending an appeal, expressing "stark disagreement that Qualcomm has any antitrust duty to deal with rival chip suppliers."[5]

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[2] *See, e.g.*, John D. McKinnon & James V. Grimaldi, "Justice Department, FTC Skirmish Over Antitrust Turf," *Wall. St. J.* (Aug. 5, 2019), *available at* https://on.wsj.com/2V4PARR.

[3] *See, e.g.*, John D. McKinnon & Brent Kendall, "U.S. Antitrust Enforcers Signal Discord Over Probes of Big Tech," *Wall. St. J.* (Sept. 16, 2019), *available at* https://on.wsj.com/2UZ5QDO.

[4] Fed. Trade Comm'n v. Qualcomm, Inc., Case No. 17-CV-0220-LHK (N.D. Cal. May 21, 2019), *available at* http://bit.ly/2UZD2LJ.

[5] Fed. Trade Comm'n v. Qualcomm, Inc., No. 19-16122, at 7 (9th Cir. Aug. 23, 2019) (order granting partial stay of district court's permanent injunction pending appeal), *available at* http://bit.ly/2V0GS6Z.

When "even the two government agencies charged with the enforcement of antitrust laws . . . disagree as to whether Qualcomm's conduct implicates the duty to deal,"[6] courts will struggle to interpret and apply antitrust law in different cases. And for firms dealing in SEPs—which underlie many major technology industries, from telecom and automotives to biotech and aerospace—this legal uncertainty may wreak even more havoc. When firms are unsure how the law applies to them, they may assume the worst and refrain from practices that are actually pro-consumer and pro-competitive due to fear of incurring antitrust liability. Ultimately, this slows the pace of innovation and business development, leading to fewer options and higher prices for consumers, directly contravening the purpose of antitrust law. This is a major problem, but Congress can still step in and fix it.

**The enforcement-driven nature of the development of antitrust law makes dual jurisdiction especially problematic, because each enforcer can create damaging precedent that binds the other.**

The antitrust laws—the Sherman Act,[7] the Clayton Act,[8] and the FTC Act[9]—have survived for over a century, protecting consumers from unfair competition in almost every industry, because they are short laws written in very general terms. These general terms—prohibiting unreasonable "restraint[s] of trade,"[10] "attempt[s] to monopolize,"[11] and "unfair methods of competition"[12]—are somewhat vague on their own, but they have developed into a coherent and relatively stable body of law through decades of litigation, during which legal precedent has been continually established, clarified, and overturned as business practices changed and economic understanding advanced.

This common-law–style evolution of antitrust doctrine has many features,[13] but it poses a serious problem for the dual-agency enforcement of the antitrust laws. Most notably, the enforcement-driven nature of antitrust means that bad decisions—be they meritless claims improperly granted (i.e., false positives) or meritorious claims improperly dismissed (i.e., false negatives)—may bind the hands of antitrust enforcers for decades. Bound by such bad precedent, antitrust enforcers are unable to police certain forms of unfair competition until a similar case presents itself in the future and the precedent can be reexamined and either limited or overturned. This makes case selection

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[6] *Id*. at 6–7.

[7] 26 Stat. 209 (July 2, 1890).

[8] 38 Stat. 730 (Oct. 15, 1914).

[9] 38 Stat. 717 (Sept. 26, 1914).

[10] 15 U.S.C. § 1.

[11] 15 U.S.C. § 2.

[12] 15 U.S.C. § 45(a)(1).

[13] *See, e.g.*, Donald Dewey, "The Common-Law Background of Antitrust Policy," 41 Va. L. Rev. 759 (Oct. 1955).

extremely important for the DOJ and FTC, since one agency's litigation may tie both its own hands and the hands of the other due to their overlapping jurisdiction over civil antitrust enforcement. This has exacerbated the problem of overlapping jurisdiction.

**To develop a more coherent and consistent approach to antitrust law, Congress should house all civil antitrust enforcement within a single agency.**

If Congress were to fix the jurisdictional overlap between the DOJ and FTC, these concerns about inefficient and counterproductive antitrust enforcement would be eliminated. The simplest way to do this would be to house all civil antitrust enforcement within the FTC, leaving the DOJ to focus on cartels and other criminal antitrust enforcement. Alternately, Congress could house civil antitrust enforcement within the DOJ, allowing the FTC to focus on its other consumer protection responsibilities under Section 5 of the FTC Act.[14]

In either case, doing so would allow the federal government to present a unified and consistent approach to competition policy, providing greater clarity on what types of conduct are fair and unfair under the antitrust laws while saving taxpayer dollars through more efficient administration. This would be a clear and easy win for all parties.

Some may worry that giving one agency sole responsibility over the antitrust laws may lead to greater lobbying and industry capture. There are two problems with this claim. First, industry capture is a two-way street: A firm may lobby an antitrust enforcer against investigation of the firm or its industry, or it may lobby in favor of investigation against its competitors. Unified jurisdiction makes the former type of lobbying easier since there is only one agency to lobby against an investigation rather than two. But unified jurisdiction makes the latter type of lobbying harder, since firms no longer have two bites at the apple in trying to punish their rivals through instigation of an antitrust investigation. Whether a one-agency system is subject to greater capture than a two-agency system is thus an open question.

Concern over industry capture is also tempered by the fact that the antitrust laws are enforceable by both state Attorneys General and private plaintiffs. For example, the antitrust case against Microsoft was brought in part by a coalition of state Attorneys General ("AGs"),[15] and recent investigations into both Google[16] and Facebook[17] have also been launched by coalitions of state AGs. AGs have authority over merger reviews, too, with multiple state AGs suing to challenge the

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[14] 15 U.S.C. § 45(a)(1).

[15] United States v. Microsoft Corp., 253 F.3d 34, 47 (D.C. Cir. 2001).

[16] *See* Press Release, Ken Paxton, Att'y Gen. of Tex., "Attorney General Paxton Leads 50 Attorneys General in Google Multistate Bipartisan Antitrust Investigation" (Sept. 9, 2019), *available at* http://bit.ly/2Nmbj6D.

[17] *See* Press Release, Letitia James, Att'y Gen. of N.Y., "AG James Investigating Facebook for Possible Antitrust Violations" (Sept. 6, 2019), *available at* https://on.ny.gov/2V03SDk.

proposed merger of T-Mobile and Sprint.[18] And private plaintiffs can pursue antitrust enforcement even when the federal agencies oppose their efforts, as seen in recent litigation involving Apple and the iOS App Store,[19] which the DOJ opposed.[20] States and private plaintiffs can therefore complement antitrust enforcement at the federal level, reducing the likelihood of agency capture and providing further protections for consumers and the competitive process.

Whether, among the two agencies, the FTC or the DOJ is the better agency in which to house antitrust enforcement is a question that Congress would have to address. As an initial matter, there are several reasons to favor the FTC: The presence of a collegial body of commissioners will tend to make decisions more predictable and somewhat less subject to the winds of politics; the FTC's staff and other ongoing consumer protection activities suggest that it will have broader knowledge of market conditions generally; and the FTC's longstanding focus on antitrust distinguishes the agency from the DOJ, which divides its time among criminal prosecution and many other activities. At the same time, there are important questions today about the proper place of independent agencies like the FTC within government, especially given the ongoing scholarly debate over the unitary executive under the Constitution.[21] And there may exist hybrid or compromise options to be arrived at with further thinking.

More attention to this question is necessary, but that should not detract from the simple fact that it is problematic for two agencies to be enforcing one body of law. There are numerous upsides to housing all civil antitrust enforcement within one agency—including greater efficiency and predictability of enforcement—and no real downside, as the only possible concern over agency capture is already addressable by state and private antitrust enforcement. Congress should therefore look to implement this change as soon as possible.

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[18] *See* Press Release, Xavier Becerra, Att'y Gen. of Cal., "Attorney General Becerra Files Lawsuit to Block Merger of T-Mobile and Sprint" (June 11, 2019), *available at* http://bit.ly/2UZDUjt.

[19] Apple v. Pepper, No. 17-204, slip op. (U.S. May 13, 2019), *available at* http://bit.ly/2V0uhAW.

[20] Brief for the United States as Amicus Curiae, Apple v. Pepper, No. 17-204, slip op. (U.S. May, 2018), *available at* http://bit.ly/2UXxr8o.

[21] *See, e.g.*, Elana Kagan, "Presidential Administration," 114. *Harv. L. Rev.* 2245 (2001), *available at* http://bit.ly/2NjYUQS.

We again commend you for your efforts to oversee enforcement of the antitrust laws. We look forward to working with you and the Subcommittee as you consider potential legislation in this area.

Sincerely,

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