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Federal Trade Commission
Office of the Secretary
600 Pennsylvania Avenue, NW
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Washington, DC 20580

Re: Competition and Consumer Protection in the 21st Century Hearings (Project Number P181201)

RILA commends the Federal Trade Commission's efforts to create a comprehensive factual record through this series of hearings and its willingness to scrutinize its existing approach to antitrust enforcement and consumer protection in the rapidly transforming, 21st century economy. As we explain below, we believe that new approaches may well be necessary to capture what matters most about competition policy in the modern, data- and technology-driven economy, but that there is also a lot the Commission can do with its existing powers to remedy current conduct that is harmful to competition and consumers.

RILA is the U.S. trade association for leading retailers. We convene decision-makers, advocate for the industry, and promote operational excellence and innovation. Our aim is to elevate a dynamic industry by transforming the environment in which retailers operate. RILA members include more than 200 retailers, product manufacturers, and service suppliers, which together account for more than \$1.5 trillion in annual sales, millions of American jobs, and more than 100,000 stores, manufacturing facilities, and distribution centers domestically and abroad.

Retail Today

U.S. and global consumers are driving change in retail like never before. Ubiquitous internet access, coupled with changing consumer preferences, has led to significant disruption in the industry. This digital revolution continues to transform the way customers interact with retailers and buy products and services. And the pace and depth of these changes are both unprecedented and accelerating. Retailers are adapting to this new consumer landscape through the pursuit of transformative innovation. The convergence of retail and technology means that the retail business model has fundamentally changed, resulting in a business imperative to meet the desires of highly empowered consumers who have many choices for how and where to shop.

Customers can still reach retailers in physical stores and can now connect directly through digital media (like websites and apps) and indirectly (through Internet search and other digital platforms like social media platforms). Competition in retail is now a click or voice command away, which means that retailers operate within the most competitive industry in the world. This competitive environment has empowered

consumers and driven traditional retailers to focus on more than the transaction. They must focus on building and maintaining long-term relationships with customers through positive interactions and experiences, both in store and digitally. Retailers face a daily referendum on the state of their relationships with customers. Unlike some tech or telecom companies whose services or platforms tend to dominate their sectors, if a customer loses trust in one brand, they can easily shop with another.

Retail Leaders Embrace And Thrive In Competitive Markets

Intense competition is the hallmark of America's core retail industry. Competition drives innovation and brings consumers both lower prices and new products and services. However, the absence of competition elsewhere in the retail ecosystem stifles the benefits that have historically resulted from this intense competition. RILA members believe the Commission has a responsibility to protect consumers by ensuring that competition exists throughout the retail ecosystem. That requires pursuing policies and enforcement actions that curtail anticompetitive business practices, remove roadblocks to innovation, and ensure the ability of all retailers to improve the customer experience, unconstrained by the market power of other actors who can shape that experience to their own benefit. We believe the Commission must focus on ensuring that competition among retailers actually benefits consumers, rather than seeing those benefits stifled by dominant players and persistent oligopolies in other parts of the retail ecosystem like digital marketplaces, technology platforms, payment networks, or telecommunications platforms.

RILA does not file this comment to complain about competition from Facebook, Google, Amazon, Visa, or any other technology or payments platform. Indeed, retail leaders comment to ask for *more* competition, not less. But all competition must be on a fair and level playing field. As Commissioner Slaughter noted in hearing remarks, "Technology is no longer simply an industry. It is a part of every industry."¹ RILA members believe FTC actions now and in the future are essential to ensuring that new and legacy anticompetitive business practices driven by technology receive the scrutiny demanded by existing antitrust laws – and swift action where they do not comply.

In RILA's August comment to the Commission at the outset of these hearings, we set out four broad topics along with several questions that we asked the Commission to consider and investigate.² RILA believes the robust record developed by the Commission begins to answer these questions and demonstrates a clear need for additional investigation and action by the Commission, the US Department of Justice Antitrust Division, the Federal Communications Commission, and Congress.

¹ FTC Commissioner Rebecca Slaughter, *FTC Hearing #2: Monopsony and the State of U.S. Antitrust Law*, opening remarks from *Hearings on Competition and Consumer Protection in the 21st Century*, Federal Trade Commission, September 21, 2018. Audio, 5:56, <https://www.ftc.gov/news-events/audio-video/video/ftc-hearing-2-welcome-ftc-commissioner-rebecca-kelly-slaughter-opening>.

² Retail Industry Leaders Association, *Re: Competition and Consumer Protection in the 21st Century Hearings (Project Number P181201)*, (Comment to the Federal Trade Commission, August 20, 2018). (incorporated by reference).



How Should Competition And Consumer Protection Law Respond To Concerns About Market Power In The "Information Infrastructure"?

RILA's initial comment raised several questions about market power in the "information infrastructure." Leading retailers remain concerned about firms with significant market power within these highly concentrated industries. For example, retail leaders are particularly dependent on telecommunications platforms (ISPs) to connect with consumers through explicitly digital means like websites and apps, but also through digital tools in stores such as Internet-enabled technologies to improve backend operations and customer-facing experiences. This deeper reliance creates opportunities for beneficial partnership with ISPs. But, as retailers have experienced with the payments industry and its ever-increasing interchange fees, retailers are also concerned about becoming the target of rent-seeking by ISPs who control the flow of indispensable information to and from consumers. As digital commerce and digital tools become increasingly interwoven within the retail industry fabric, leading retailers encourage federal regulators to remain vigilant in policing the abuse by ISPs of information bottlenecks in ways that either impose excessive fees on users, or seek to skew the flow of information in potentially self-serving ways.

Relatedly, it is important that antitrust enforcement policy recognize how central information flows are to the competitive process—particularly in the digital age. While classical antitrust analysis assumes that consumer behavior is driven by prices, the reality is that consumers can only make price-driven decisions if they have accurate, trustworthy, and timely access to *information about prices*. The same is true for information about product quality, availability, and the like.

It should thus be quite concerning to the Commission that Amazon and Google control the majority of all of Internet product search³, and can very easily affect whether and how price and product information actually reaches consumers. Moreover, these firms are extraordinarily adept at determining how small changes in the way in which information is conveyed affect consumer behavior—given that nearly everything they do is driven by big-data science and machine learning models. The Commission's approach to retail markets must thus be driven by a recognition that control over an information bottleneck by such a company has the power to skew markets and shape consumer behavior in ways that circumvent the traditional power of price competition. To put the matter as simply as possible, a firm does not need to have the power to control prices if it has the power to control effective access to price information.

To be clear, digital technology platforms and online marketplaces can provide significant benefits to consumers and sellers alike. They offer a wide range of opportunities for fast and efficient access to consumer markets while providing millions of consumers with products and services at a scale that vastly exceeds what is available in a purely physical realm. Concerns arise, however, when these platforms achieve a level of dominance that enables them to disregard those interests. Thankfully, the Commission

³ Who is winning the shopping search race — Amazon or Google?, Retail Wire (2019), <https://www.retailwire.com/discussion/who-is-winning-the-shopping-search-race-amazon-or-google/>.



can respond to issues like those above, created by such dominant platforms, by using not only its antitrust powers, but its more flexible powers to control unfair or deceptive practices as well. The Commission should consider rules or enforcement actions requiring such bottleneck technology platforms to convey information to consumers in ways that are transparent and do not mislead consumers about where products come from, whether they are new or used, whether their sale by a given retailer is authorized, and how the total price from one seller compares to the prices charged by others. In this context, the Commission should be particularly focused on the possibility of self-serving behavior when a firm both controls information access on an essential platform (like Amazon's marketplace) and competes on that platform itself. Such rules need to be robust, and must recognize the capacity for very small changes in the display of advertising to have major effects on consumer perception given the feedback immediately available to data-driven companies about how users respond to experimental changes.

More generally, our view is that modern antitrust enforcement needs to be driven by a greater recognition that control over *information* can drive anticompetitive effects just as much as market power and price control. Indeed, scholars have noted that it is the *combination* of information control and market power that should worry antitrust regulators most⁴. That unhealthy combination exists at the level of the Internet's pipelines, at the level of product search, in webhosting, on social media platforms, and elsewhere. It is thus of paramount importance that the Commission focus on addressing abuses in those areas going forward.

What Competitive Concerns Are Raised By "Platform" Businesses? How Do The Antitrust Laws Apply To Data? What Avenues Exist For Detecting And Remediating Anticompetitive Data Utilization?

Platform businesses have revolutionized retail, and that disruption stems in no small part from genuine innovation that should be celebrated and incentivized. But dominant platform businesses also can pose competitive concerns that merit close scrutiny and swift action when they both control access to information and influence price. Leading retailers believe that conduct by platform providers merits not only competitive concern, but investigation and action where warranted. This is true in large part because platform businesses tend to quickly accumulate durable market power, and antitrust enforcement has thus far failed to adequately appreciate the consumer harm that market power is causing.

As RILA previously commented, platform businesses can exhibit strong network effects, and the dominant platform companies themselves appear to understand that their ideal competitive strategy thus involves building out the largest network possible by offering consumers low prices or free services, sometimes cross-subsidizing the platform business with other profit streams. Current antitrust thinking views this as mostly unproblematic—a price-war tactic that tends to benefit consumers through lowered prices and

⁴ Khan, Lina and Pozen, David E., A Skeptical View of Information Fiduciaries (May 25, 2019). Harvard Law Review, Vol. 133, 2019, Forthcoming; Columbia Public Law Research Paper No. 14-622. Available at SSRN: <https://ssrn.com/abstract=3341661>.



because current theory views it as unlikely that these companies will be able to raise their prices later.⁵ The companies that engage in these tactics are not foolish, however, and it is therefore likely that traditional antitrust analysis and its focus on consumer prices is missing something important about how users on both sides of these platforms are harmed as these businesses transition from competitive environments to dominant platforms.

Accordingly, retailers believe antitrust regulators' traditional reliance on price is ripe for reevaluation and are encouraged by recent statements by policymakers indicating a renewed commitment to evaluating non-price competition harms. In a recent speech, Assistant Attorney General Makan Delrahim discussed his perspective in the context of several foundational antitrust cases including Standard Oil⁶ saying:

Another important parallel for modern observers is that consumers actually enjoyed lower prices during the height of Standard Oil's dominance. This was likely due to, among other things, a combination of economies of scale, superior bargaining power, and overall declining input prices. It nonetheless demonstrates that price effects are not the sole measure of harm to competition under the U.S. antitrust laws.⁷

Retailers agree with this view and agree with the recommendation of 43 State Attorneys General that consideration of non-price effects should be given greater priority in technology platform market mergers.⁸

Non-price Anticompetitive Effects

Antitrust law is full of examples of innovators subsequently turning into "lazy" monopolists to the detriment of consumers and competition. And in the retail space—when it comes to both merger policy and enforcement against anticompetitive conduct—it is important that the Commission recognize this kind of development as both important proof of market power and evidence of anticompetitive effects. Two versions of this effect with particular salience to retail are the erosion in the quality of a platform's consumer experience after competition has been eliminated, and the surreptitious collection and use of consumer data by firms that do not face competition from rivals.

Start with product quality—a traditional antitrust concern that is frequently overlooked in favor of a focus on price. The pro-consumer story for platforms like Google, Facebook, and Amazon is that, while the

⁵ Retail Industry Leaders Association, *Re: Competition*, 3.

⁶ *Standard Oil Co. of N.J. v. United States*, 22 U.S. 1 (1911).

⁷ Assistant Attorney General Makan Delrahim, "...And Justice for All": *Antitrust Enforcement and Digital Gatekeepers*, remarks from the *Antitrust New Frontiers Conference*, June 11, 2019. <https://www.justice.gov/opa/speech/assistant-attorney-general-makan-delrahim-delivers-remarks-antitrust-new-frontiers?>

⁸ National Association of Attorneys General, *Public Comments of 43 State Attorneys General* (Comment to the Federal Trade Commission, June 11, 2019), 19. <https://www.regulations.gov/document?D=FTC-2019-0031-0003>.



companies wield enormous power on the "seller" or "advertising" side of their platforms, consumers benefit with free or very low-cost products or services on the other. But, it is worth observing how the quality of those products and services have degraded as these companies shifted from fierce competitors to dominant monopolists. Google search used to be elegant and free from advertising; today, any search vaguely related to a product returns a page awash in different advertisements and sponsored posts, which may or may not disclose their sponsored characteristics in understandable ways. Similarly, Facebook co-founder Chris Hughes recently observed that Facebook's initial innovations—including its "simple, beautiful interfaces"—were forged by the pressure of competition.⁹ Facebook's eventual dominance, however, has meant that much of that simplicity has given way to advertising and interfaces that make it difficult for users to avoid content they do not wish to see. Also, retailers may be disincentivized to innovate as more and more consumers are funneled through these platforms. The key point is hardly surprising: Even on the supposedly "free" side of these platform businesses, monopoly is making consumers worse off.

The collection of consumer data by dominant platforms holding significant market power—and its use in ways that consumers may not realize or appreciate—represents another consequence of monopoly that is masked by an excessive focus on prices. Some panelists suggested that the anticompetitive effects of technology-platform monopolists might be better seen if we put a price on the consumer data they collected.¹⁰ Nothing so complicated is necessary to appreciate the key point.

The ever-increasing tide of revelations about the ways in which these dominant platform companies fail to protect users' privacy or manipulate their attention in unfriendly ways represents an ever-increasing trade-off for using these services. For example, because nearly two-thirds of consumers search directly on Amazon when looking for a consumer product, it has a massive amount of data on consumer shopping needs and behaviors. According to its Privacy Notice, Amazon can and has shared consumer data with many unaffiliated companies, including the largest wireless carriers. Moreover, Amazon does not offer the consumer a choice to opt-out of this data sharing. As a result, consumers are asked to make tradeoffs that they could not anticipate or understand – provide their personal data to Amazon (and potentially any other company) or not be allowed to shop on the most widely used platform in the world. Though these are non-price harms, they should easily suffice to place further acquisitions, exclusionary conduct, or deceptive interfaces and advertisements created by these dominant companies under the heaviest possible

⁹ Chris Hughes, *It's Time to Break Up Facebook*, New York Times, 2019,

<https://www.nytimes.com/2019/05/09/opinion/sunday/chris-hughes-facebook-zuckerberg.html>.

¹⁰ Roger McNamee *FTC Hearing #3: Multi-Sided Platforms, Labor Markets, and Potential Competition*, panel remarks from *Hearings on Competition and Consumer Protection in the 21st Century*, Federal Trade Commission, (October 15, 2018), 179-180,

https://www.ftc.gov/system/files/documents/public_events/1413712/ftc_hearings_session_3_transcript_day_1_10-15-18.pdf.



scrutiny—especially where this conduct tends to increase the amount of potentially sensitive data they control.

Platform Control of Digital Marketplaces Creates Anticompetitive Effects

The ways in which Amazon has begun to degrade the consumer experience on its own platform are particularly relevant for retailers, and they are particularly pernicious, because Amazon's platform frequently masks Amazon's own responsibility for problems with that experience. Dominant digital shopping platforms present a strong information asymmetry related to the sale of goods as between the marketplace on the one hand (which has complete visibility into the transaction and its fulfillment) and consumers, brands, and third-party sellers on the other (who know little about how Amazon fulfills transactions into which they have only limited visibility). The Chicago Booth Sigler Center Report outlines this platform dilemma:

In and of itself, a platform setting the terms of trade, quality levels, services, and so on may not be problematic if the purpose of the change is to "grow the pie" in a way that complementors view as fair (i.e., not involving expropriation). For example, Amazon, Facebook, or Google know in real time which products are sold to whom, at what price, and which packaging or incentives work, which may drive their rules. However, if these rules become opaque and uncertain or the insights gleaned from an app or vendor are biased or used against it in an asymmetrical manner, then the rule changes may not be about increasing everyone's revenue, but about moving a larger share to the platform.¹¹

This asymmetry can cause harm on both sides of the platform. Small sellers who presently feel that they have no choice but to operate on Amazon, because Amazon represents nearly half of the e-commerce market,¹² risk giving Amazon information that allows it to capture their business if the data shows it to be profitable or growing. Meanwhile, if the digital interface masks or obfuscates the true identity of the seller, or leaves the misimpression that an item is new and from the manufacturer, or falsely implies that a knock-off item is just like the option from a well-known brand, consumers (as well as regulators and enforcers) have no ability to uncover the truth until after their purchase. That harms consumers who do not get what

¹¹ Fiona Scott Morton et al., *Committee for the Study of Digital Platforms, Market Structure and Antitrust Subcommittee*, report, Stigler Center for the Study of the Economy and the State, The University of Chicago Booth School of Business, July 01, 2019, 53. <https://research.chicagobooth.edu/-/media/research/stigler/pdfs/market-structure---report-as-of-15-may-2019.pdf?la=en&hash=B2F11FB118904F2AD701B78FA24F08CFF1C0F58E>.

¹² Ingrid Lunden, *Amazon's share of the US e-commerce market is now 49%, or 5% of all retail spend*, July 13, 2018, <https://techcrunch.com/2018/07/13/amazons-share-of-the-us-e-commerce-market-is-now-49-or-5-of-all-retail-spend/>.



they were looking for, and may not even realize it because the provenance or nature of their item has been obscured by the very information source through which they sought out the item in the first place.

This information asymmetry is a feature of such dominant digital platforms created by design both to steer consumers to particular products and to create the illusion of having a product even if the desired brand is not sold on the platform. To put the point directly, it is now part of Amazon's business model to create the impression that every brand is sold new and can be found there—even though that is not true and tends to deceive consumers. Doing so serves Amazon's interests in two ways. First, it allows Amazon to immediately capture sales from other branded retailers with pages and product-search results that incorrectly suggest that Amazon is an authorized source of products "by" well-known retailers who prefer to remain off Amazon. And, second, it allows Amazon to erode the brand loyalty through which these retailers compete with Amazon's different business model, because when consumers do not get the quality they wanted, their lack of information causes them to blame the brand they think they have purchased from, rather than Amazon.

Relationships that venerated retailers have with their customers—the "crown jewels" for these retailers—are thus being systematically undermined by dominant digital platforms such as Amazon that blur the lines between the brand and the platform. In the absence of strong antitrust scrutiny and enforcement, market actors must avail themselves of other means to address these non-price harms to their businesses and the quality of their consumers' experiences online. For example, Williams-Sonoma filed a trademark infringement lawsuit against Amazon¹³ to stop Amazon from displaying Williams-Sonoma products in ways that lead consumers to believe that the products were new, or authorized, or coming directly from Williams-Sonoma.

Counterfeit goods represent another serious example of this problem. Where a platform both obfuscates origin or source and provides fulfillment services, a seller of counterfeits is harder for consumers to uncover because the item appears to have the backing of the platform in much the same way that a traditional store backs the products that are on its shelves. Moreover, a platform profiting twice from a sale through purchase and fulfillment (and potentially three times through advertising) has little incentive to protect another brand's product. Instead, the platform may try to coerce retailers and brands onto the platform with a promise to protect their valuable brands if the companies agree to sell directly through the platform. The flipside of this agreement is that Amazon will accumulate data about the competitor's business (as the Chicago Report suggests), and will now hold the customer data that is the lifeblood of the brand, eroding the brand's ability to connect with its own, most-valued customers. And that should be particularly disconcerting to antitrust regulators, because maintaining a strong, independent brand that is separate

¹³ *Williams-Sonoma Inc. v. Amazon.com Inc.*, 3:18-cv-07548, U.S. District Court, Northern District of California (San Francisco).



from Amazon appears to be one of the only ways that retailers can effectively compete with the platform. This perverse outcome underscores the dilemma for retailers interacting with platforms.

Anticompetitive Uses of Data

Information asymmetry and the use of data also contribute to anticompetitive conduct such as the potential misuse by dominant platforms of retailers' data to create, and then favor, their own private label products in terms of pricing and placement in ways that are possible only because of the nature of digital product placement and consumer attention spans. A report from antitrust scholars at the University of Chicago recently outlined the challenge for retailers and brands selling on Amazon:

Likewise, by selling logistics services to many of its sellers, Amazon gains an advantage when it wishes to launch a store brand. It can analyze the data from its rivals to develop an entry plan against those sellers. It is important to measure whether, and how much, quality increases with these strategies.¹⁴

The ability for a super-dominant digital platform to operate a marketplace, determine demand, control placement to an extent unparalleled in the physical world, provide fulfillment, and then produce a similar product that it also has the data to target directly to specific consumers raises clear antitrust concerns because of the unique characteristics of such a platform. This has the potential to short cut innovation and the value that brings to consumers. As previously discussed, the challenge associated with digital search and the inability for consumers to differentiate create an anticompetitive outcome that does not exist for non-dominant marketplaces, online retailers, or in physical stores. In addition, the ability for such a platform to hold data not only about its competitors and their customers but also competitors' upstream suppliers through fulfillment data creates even greater anticompetitive risk.

Has Technological Change Obviated The Justification For Competitor Collaboration?

Retailers believe that technological progress has completely eliminated any justification for competitor collaboration in the credit card market. While the technological challenges associated with processing credit transactions may have justified the collaboration among bank competitors that led to the Visa and Mastercard networks a half century ago, those challenges have been drastically reduced, if not eliminated. Today, there is no reason why merchants should be required to accept every credit or debit card issued under a network brand, no matter the price imposed by the network, and no reason why merchants should not be enabled to negotiate pricing as they do with any other service provider. Banks that participate in the Visa and Mastercard networks can and should compete with each other to distinguish their products --

¹⁴ Morton et al., *Committee for the Study*, 52.



such as by negotiating acceptance terms with merchants – and thereby develop their own direct relationships with merchants.

Innovation is held back, however, by the Visa and Mastercard model, which became entrenched during the Mad Men era, and the supracompetitive prices that have been generated for banks via the joint fixing of interchange fees that is achieved through this model. While Visa and Mastercard are no longer owned by their member banks, the fundamental proposition remains the same: banks do not compete for merchant acceptance of their credit cards and banks all agree to accept the same interchange fees as their competitors are receiving. There is no competition among the banks in this market, and there is no regulation of the joint fees that are fixed for all issuing banks by the two dominant credit card companies. Nor is there any constraint on the exercise of market power that Visa and Mastercard wield. Technology has obviated the need there may once have been for this type of competitor collaboration; it should not be allowed to continue in this age of sophisticated technology simply because it was necessary decades ago. Leading retailers call on the Department of Justice to draw on the robust record created by this FTC process and begin a new review of this arrangement and take action to end this antiquated and anticompetitive business model.

RILA stands ready to work with the Commission as it completes its ambitious review of all comments and testimony and to provide any other assistance the Commission may deem appropriate and useful. Please direct questions or requests for further information about this comment letter to Nicholas Ahrens, vice president, innovation, nicholas.ahrens@rila.org.

Sincerely,



Brian Dodge
Chief Operating Officer

