STATE OF NEW YORK
OFFICE OF THE ATTORNEY GENERAL
BARBARA D. UNDERWOOD
Attorney General
28 LIBERTY STREET
NEW YORK, NEW YORK 10005

October 10, 2018

<u>By Electronic Submission</u>

Donald S. Clark, Secretary of the Commission
Federal Trade Commission
Office of the Secretary
600 Pennsylvania Avenue, NW
Suite CC-5610 (Annex B)
Washington, DC 20580

Re: Competition and Consumer Protection in the 21st Century Hearing Project No. P181201
<u>Antitrust/Competition Issues</u>

Dear Secretary Clark:

The Attorneys General of California, Connecticut, the District of Columbia, Illinois, Massachusetts, Minnesota, Mississippi, New York, Oregon, Pennsylvania, Rhode Island, and Washington (the "State Attorneys General") submit the following comment in response to the announcement of public hearings on Competition and Consumer Protection in the 21st Century and request for public comments ("Announcement") issued by the Federal Trade Commission ("FTC"). This letter specifically addresses issues of competition and antitrust law. A separate letter has been jointly submitted by several State Attorneys General concerning consumer protection issues.[1]

[1] https://ag.ny.gov/sites/default/files/ftc_comments.pdf

The State Attorneys General have a legacy – stretching back more than a century – of actively enforcing federal and state antitrust policy, including decades of investigations and litigations conducted alongside the FTC. We are pleased to report that cooperation among the State Attorneys General and the FTC remains robust, at both leadership and staff levels. We look forward to continuing our joint efforts.

In our comments, the State Attorneys General offer our perspective on the status and direction of antitrust enforcement, in particular, concerning:

- Competition and consumer protection issues in communication, information and media technology networks (Topic 2);
- 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 (Topic 3);
- The intersection between privacy, big data, and competition (Topic 4);
- Evaluating the competitive effects of corporate acquisitions and mergers (Topic 6);
- Evidence and analysis of monopsony power, including but not limited to, in labor markets (Topic 7);
- The role of intellectual property and competition policy in promoting innovation (Topic 8); and
- The consumer welfare implications associated with the use of algorithmic decision tools, artificial intelligence, and predictive analytics (Topic 9).

1. Competition and consumer protection issues in communication, information and media technology networks (Topic 2)

The State Attorneys General believe that there can be an important role for antitrust enforcement in connection with communication, information and media technology networks, in particular concerning standardization and interoperability (Subtopic 2.b.) For example, a 2016 settlement with the NFL by a group of states led by New York has resulted in the industry adopting a new interoperable system that has seen new entry and more vigorous competition in the market for secondary NFL tickets.[2] Since that settlement, the NFL has required Ticketmaster to establish an interoperable system that allows several competing secondary ticketing platforms to deal in NFL tickets, while at the same time apparently making strides to reduce the incidence of fraudulent ticket sales.

The State Attorneys General will continue to be vigilant in ensuring that industry standard-setting does not become a pretext for prohibited anticompetitive horizontal collusion.

[2] https://ag.ny.gov/sites/default/files/11.15.2016_-_nfl_tix_investigation_final.pdf

2. **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 (Topic 3)**

The State Attorneys General are concerned about the proper application of the antitrust laws to matters involving multi-sided platforms following the Supreme Court's decision in *Ohio v. American Express Co.*, 585 U.S. __ (2018). In particular, the State Attorneys General are troubled by the majority's decision to "credit" apparent positive output effects that were not established in the record, while insisting that a plaintiff prove, as part of its *prima facie* case, net harm in the two-sided credit card transaction market as a whole. We also are concerned that the *American Express* decision might be interpreted to invite deviation from the traditional determination of market definition, which has been made on a case-by-case basis yet always premised on the economic concept of substitutability. The State Attorneys General believe that two-sided transaction markets do not require new rules of antitrust law, and that traditional economic and legal analysis is elastic enough to deal with multi-sided platforms without adopting novel legal principles. Accordingly, the State Attorneys General will seek opportunities to ensure that the law evolves appropriately as lower courts apply the *American Express* analysis to other two-sided markets, especially those that do not involve transactional platforms.

3. **The intersection between privacy, big data, and competition (Topic 4)**

The State Attorneys General are mindful of the many consumer benefits arising from web-based retail and social media platforms over the years, and we understand that in many cases the companies' business models rely upon the users' willingness to make certain of their personal data available for monetization in return for the often "free" services they receive.

However, the data collected is concentrated in a small number of dominant companies/platforms. Today around 90% of internet searches use one search engine, and over 90% of young people have a profile on one social media platform. Just 1% of smartphones use an operating system other than Apple's iOS or Google's Android. The State Attorneys General have several concerns about possible long-term anticompetitive harms arising from the aggregation of "big data" by a small number of dominant platforms:

- Firms may be accumulating big data – in some cases against consumers' wishes – on account of a lack of choice and immense imbalances in market power between service providers and consumers. Consumers often concede valuable competitive data and their privacy interests because they in practice have no choice, other than foregoing the service altogether. This is compounded by a lack of meaningful information for consumers to make choices in certain spheres. Lengthy user agreements have become standard, and may also hinder competition. Such practices could raise barriers to entry and inhibit switching by consumers.

- Concentration of big data in the hands of a small number of firms, each of which already dominates a substantial sphere of internet-based activity, may create *de facto* barriers to competitive innovation. This may happen for a variety of reasons, including that a firm's deeply entrenched knowledge of individual consumers' habits can make it nearly impossible for a rival or potential rival to target advertisements with comparable accuracy, or woo third-party online advertisers based on a dramatically thinner accumulation of historical data. Studies show that the historical search improves search results up to 31%. In effect, today's search engines cannot reach high-quality results without this historical user behavior. Although accumulation of data may generally be pro-competitive, there is concern that the immense advantages certain firms have in consumers' data – amplified by network effects attendant to such accumulations – may effectively block new entry or expansion, thereby limiting choice and, in some cases, harming competition. Dominant firms often acquire potential challengers before they become a threat. Some entrepreneurs may feel they have no choice but to sell or close. It is unclear whether, and to what extent, third party data services mitigate these effects.

- Firms that have obtained a disproportionate advantage in one line of business may find it easy to abuse that advantage by applying it to other lines of business in order to keep out competitors – who may be equally or more efficient but-for the data advantage carried over from the first market. This could be of concern with new lines of business, and perhaps particularly in the context of new services. For example, firms with an asymmetric advantage in data might be able to identify competitive rivals at a very early stage, and perhaps eliminate competition by preemptively acquiring them. This could lead to loss of consumer choice or quality which, although difficult to quantify, may be cognizable antitrust harms. In the long run, once the dominant firm has secured control of the new line it can recoup any losses it suffered and use its market power to raise prices. This may be a particular concern in the context of evolving technologies, in which new lines of business that previously did not exist can appear.

More broadly, the State Attorneys General are concerned that misguided application of the consumer welfare standard may have the unintended effect of shielding anticompetitive wrongdoers – possibly including dominant accumulators of big data – from meaningful scrutiny. Antitrust has often been described as a consumer welfare statute. At a minimum, it focuses on the price effects that challenged conduct may have on the consumer. But it does – and should – encompass more. For example, antitrust law also reaches conduct with harmful effects on innovation and quality, as well as effects that are likely to cause consumer harm, albeit indirectly. It seeks to protect the competitive process, for the ultimate benefit of consumers. As one respected commentator put it: "[A]pplying the 'consumer welfare' standard means that a business practice is judged to be anti-competitive if it disrupts the competitive process and harms trading parties on the other side of the market."[3]

[3] Opening Statement of Professor Carl Shapiro, Senate Judiciary Committee Subcommittee on Antitrust, Consumer

To be clear, the Attorneys General continue to support the consumer welfare standard. When properly applied, the consumer welfare standard should protect both the competitive process and end-user consumers, as the antitrust laws intended, while ensuring that there is an economic basis for a finding of liability. There is concern, however, that the standard is sometimes applied too narrowly.

When correctly applied, the consumer welfare standard should capture harm to quality and innovation, as well as price effects. The consumer welfare standard should address long-term effects, as well as short-term ones – which can be challenging because some econometric tools are less reliable for long-term predictions than for the short-term. This may be particularly applicable in the context of big data, as the markets are still evolving and dominant firms are still in an expansion mode.

The consumer welfare standard must also be carefully applied in monopsony cases, because it is well-established as a matter of economics that there is a symmetry of harm between the economic harm flowing from monopolized output markets compared to monopsonized input markets.[4] Dominant firms with overwhelming advantages in big data might be in a position to abuse monopsony power, particularly in the context of online retail platforms.

The emerging field of competition law in the context of big data is well served by the overlapping federal, state and international enforcement authorities. Creative and vigorous enforcement efforts will flesh out deficiencies, if there are any, in existing law. The State Attorneys General look forward to robust enforcement and the promotion of competition in these areas, alongside the FTC where appropriate.

4. <u>Evaluating the competitive effects of corporate acquisitions and mergers (Topic 6)</u>

The State Attorneys General have been expanding their roles in M&A enforcement, at times on their own, as in the case of *State of California v. Valero Energy Corp.*, Civ. Action No. C 17-03786 (WHA) (N.D. Cal.), and at times alongside the FTC. *See, e.g., FTC and Commonwealth of Pennsylvania v. Penn State Hershey Medical Center and Pinnacle Health System*, 838 F.3d 327 (3rd Cir. 2016); *FTC and State of Illinois v. Advocate Health Care Network, et al.*, 841 F.3d 460 (7th Cir. 2016).

The State Attorneys General believe that vertical mergers should attract the appropriate level of antitrust scrutiny and have been involved in several recent vertical merger investigations.

The State Attorneys General also remain committed to approaching merger (and conduct) cases without artificially limiting remedies in advance as a matter of policy. The State Attorneys

---

Protection and Consumer Rights "The Consumer Welfare Standard in Antitrust: Outdated, or a Harbor in a Sea of Doubt?", December 13, 2017.

[4] *See* Caves & Singer, *When the Econometrician Shrugged: Identifying and Plugging Gaps in the Consumer Welfare Standard*, p.18, George Mason Law R. (forthcoming 2018).

General continue to believe that structural remedies are by far the preferred way to remedy anticompetitive effects of mergers, as they are permanent and monitoring compliance is neither a complex nor long term endeavor. However, conduct remedies may play an important role in resolving antitrust concerns in appropriate cases. For example, in one unusual case involving two hospitals in the city of Utica, New York, a significant underserved refugee population, and the poor financial condition of one of the hospitals, led to a remedy that permitted the merger but mandated monitored price negotiations until the merged entity implemented certain efficiency enhancing improvements.[5] Conduct remedies may be particularly useful in some vertical mergers. The State Attorneys General will continue to consider conduct remedies in appropriate cases, perhaps in combination with other remedies, since taking such remedies off the table as a matter of policy would unnecessarily limit options to promote a competitive marketplace.

Regarding the use and empirical validation of analytical tools used to evaluate mergers (Subtopic 6.f.), the State Attorneys General caution against *a priori* adopting or rejecting any particular method. Courts should be reminded that an analytical tool that is appropriate in one case may not be in another. For example, a case centering on price may call for different tools than cases focusing on quality or innovation. Similarly, cases that focus on long-term effects may require different econometric tools than inquiries focused on the short-term. Antitrust law properly contemplates use of a full panoply of analytic tools, including new ones – although their applicability in particular contexts will need to be considered as they arise. Appropriate models need to be used for particular cases. It should be noted that the development of empirical methods for proving coordinated effects lags behind unilateral effects.

The State Attorneys General urge the FTC to continue its retrospective studies of mergers – especially those that might provide some answers to 21st century antitrust questions, *e.g.*, vertical mergers, mergers in two-sided markets, and the effectiveness of particular behavioral remedies.

5. Evidence and analysis of monopsony power, including but not limited to, in labor markets (Topic 7)

Recent antitrust enforcement actions suggest that employers may in some cases wield anticompetitive power against their employees in various labor markets because of the widespread adoption of non-compete and no-poach agreements. For example, the State of New York in 2016 reached a settlement with Jimmy John's sandwich chain to discontinue the use of a non-compete agreement that prohibited sandwich makers from working in competing establishments within a two-mile radius for a period of two years.[6]

Whereas non-compete agreements have long been a feature of contracts with senior executives and highly-skilled professionals, they are now appearing with regularity in contracts

[5] https://ag.ny.gov/press-release/ag-schneiderman-announces-settlement-utica-hospitals-address-competitive-concerns

[6] *See* https://ag.ny.gov/press-release/ag-schneiderman-announces-settlement-jimmy-johns-stop-including-non-compete-agreements

with low-skilled and unskilled laborers. The State Attorneys General believe that such non-compete agreements have the potential to cause significant competitive harm by increasing the monopsony power of certain employers and reducing wages and labor supply below the levels that would prevail in a competitive market. The State Attorneys General believe that non-compete agreements for low-skilled workers may be unjustified in the absence of legitimate concerns of intellectual property theft or some other form of misappropriation.

Similarly, the State Attorneys General are concerned about the rise of no-poach agreements. The State Attorneys General believe that agreements between competitors not to poach one another's employees – like all horizontal agreements to restrain competition – are unlawful *per se*, and in certain cases may give rise to criminal liability under the antitrust laws of certain states. The State of Washington recently announced a settlement with fast-food chains under which they will cease enforcing no-poach agreements in franchise agreements that had the effect of suppressing employee wages.[7] Similarly, a group of 12 states recently sent letters to eight national fast food franchisors as part of a multistate investigation of the industry concerning no-poach agreements.[8] In 2014, the State of California settled a litigation with eBay concerning a no-poach agreement with Intuit.[9]

The State Attorneys General believe that further analysis is necessary concerning the tensions between antitrust and labor laws, as well as between federal law and local regulations, relating to drivers for online platform-coordinated car services (*e.g.*, Uber, Lyft). Twelve states and the District of Columbia filed an *amicus* brief in 2017 in the 9th Circuit in *U.S. Chamber of Commerce v. City of Seattle,* Case No. 17-35640. The State Attorneys General argued that, although drivers for these services may be independent contractors under federal labor laws, states and local governments are nonetheless not preempted from regulating the industry in ways that include permitting some form of collective bargaining on behalf of the drivers.[10] The 9th Circuit unfortunately rejected this position, on the basis of its contrary interpretations of state action and preemption. *Chamber of Commerce of the United States v. City of Seattle,* 890 F.3d 769 (9th Cir. 2018). The State Attorneys General have submitted an *amicus* brief in support of a rehearing *en banc.*[11] Broadly speaking, the State Attorneys General believe the 9th Circuit's ruling creates unnecessary conflicts between federal law and local regulations, and also between antitrust and labor laws.

The State Attorneys General are committed to ensuring competitive labor markets, unhindered by anticompetitive limits on employee mobility.

---

[7] https://www.atg.wa.gov/news/news-releases/ag-ferguson-announces-fast-food-chains-will-end-restrictions-low-wage-workers
[8] https://ag.ny.gov/press-release/ag-underwood-part-11-ag-coalition-investigates-no-poach-agreements-national-franchises
[9] https://oag.ca.gov/news/press-releases/attorney-general-kamala-d-harris-reaches-4-million-settlement-ebay-over
[10] http://members.naag.org/assets/files/Antitrust/files/Amicus--City%20of%20Seattle.pdf
[11] http://members.naag.org/assets/files/Antitrust/files/US%20Chamber%20of%20Commerce%20v%20Seattle%20amicus%20brief%2014%20states.pdf

As discussed above, the State Attorneys General are concerned that the consumer welfare standard be appropriately applied in monopsony contexts, including with regard to labor markets.

6. **The role of intellectual property and competition policy in promoting innovation (Topic 8)**

The State Attorneys General recognize the vital importance of intellectual property rights and dynamic competition in promoting consumer welfare. But this should not mean a "hands off" approach with respect to high-tech industries. The State Attorneys General are concerned by sometimes unsupported claims that challenged conduct is justified because it creates incentives to innovate by protecting the firm's ability to realize the entire value of an innovation or investment. Too much deference to such claims – particularly when made by dominant firms – can inhibit investment and innovation by rival firms. Accordingly, enforcers need to carefully weigh the potential costs and benefits of antitrust intervention in rapidly evolving markets.

This approach of carefully evaluating dominant firm conduct and innovation and investment incentives was illustrated by the *Namenda* product-hopping case. In that case, the State of New York successfully obtained an injunction in 2014 against a brand-name pharmaceutical company that was implementing a scheme to force vulnerable patients with Alzheimer's disease to switch to a newer formulation of their drug which had longer patent protection than the older formulation – and which was facing imminent competition from generic entry.[12] The Southern District of New York and the Second Circuit both rejected defendant's contention that its lawful ownership of intellectual property rights somehow justified its anticompetitive acts, i.e., its unlawful maintenance of a monopoly.[13] *See also In Re Suboxone (Buprenorphine Hydrochloride and Naloxone) Antitrust Litig.*, slip op., 2017 U.S. Dist. LEXIS 145501 (E.D. Pa. Sept. 8, 2017) (denying motion to dismiss).

7. **The consumer welfare implications associated with the use of algorithmic decision tools, artificial intelligence, and predictive analytics (Topic 9)**

The State Attorneys General believe that the increasing use of algorithmic decision tools raises some complex antitrust issues that are worthy of further study. Although technological innovations in algorithmic decision-making will, in many contexts, not implicate the antitrust laws, the use of such tools could lead to collusion or facilitate tacit coordination on pricing, output, or other terms that may have a direct impact on pricing or output. The use of such tools could lead to more efficient pricing, but may also lead to more effective price-discrimination or price-targeting with potentially negative distributional consequences for certain groups of consumers. The concern may be heightened because of the lack of transparency concerning how an algorithmic decision tool reaches its conclusion.

---

[12] https://ag.ny.gov/press-release/ag-schneiderman-announces-resolution-lawsuit-protected-alzheimer%E2%80%99s-patients

[13] *New York v. Actavis PLC*, 787 F.3d 638 (2nd Cir. 2015).

The low-hanging fruit would be cases in which horizontal competitors agree among themselves on using, or on how to use, an algorithmic decision tool, *e.g.*, for pricing. However, it is possible that current antitrust law is, in some cases, insufficient to guard against loss of competition resulting from unilateral but parallel use of such algorithms. Although further legislation or regulation may be necessary for such cases, existing law may reach anticompetitive actions arising from algorithmic decision tools where there is an agreement or where they are used in combination with exclusionary conduct. Serious study ought to be given to whether certain firms should be required to keep a human-intelligible record concerning pricing or output decisions in cases where algorithmic decision tools are utilized.

* * *

The State Attorneys General look forward to addressing some of these issues in more detail as the process continues, in written filings, or if requested, by live testimony. We thank you for your consideration of our comments, and we look forward to our ongoing efforts with the FTC.

Respectfully submitted,

XAVIER BECERRA
California Attorney General

GEORGE JEPSEN
Connecticut Attorney General

KARL A. RACINE
District Of Columbia Attorney General

LISA MADIGAN
Illinois Attorney General

MAURA HEALEY
Massachusetts Attorney General

LORI SWANSON
Minnesota Attorney General

JIM HOOD
Mississippi Attorney General

BARBARA D. UNDERWOOD
New York Attorney General

ELLEN F. ROSENBLUM
Oregon Attorney General

JOSH SHAPIRO
Pennsylvania Attorney General

PETER F. KILMARTIN
Rhode Island Attorney General

BOB FERGUSON
Washington State Attorney General