U.S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General *Washington, DC 20530*

The Honorable Amy Klobuchar
Chair
Subcommittee on Competition Policy, Antitrust,
and Consumer Rights
Committee on the Judiciary
United States Senate
Washington, DC 20510

Dear Chair Klobuchar:

Enclosed please find responses to questions for the record arising from the appearance of Jonathan Kanter, Assistant Attorney General for the Antitrust Division, before the Senate Committee on the Judiciary, Subcommittee on Competition Policy, Antitrust, and Consumer Rights on September 20, 2022, at a hearing entitled "Oversight of Federal Enforcement of the Antitrust Laws." We apologize for the delay in responding and hope that this information is of assistance to the Committee.

Please do not hesitate to contact this office if we can be of additional assistance regarding this or any other matter. The Office of Management and Budget has advised us that there is no objection to submission of this letter from the perspective of the Administration's program.

Sincerely,

Christina M. Calce
Deputy Assistant Attorney General

Enclosure

cc:

The Honorable Mike Lee
Subcommittee on Competition Policy, Antitrust,
and Consumer Rights
Committee on the Judiciary
United States Senate

Responses from the Department of Justice
To Written Questions for the Record from

The U.S. Senate Committee on the Judiciary
Subcommittee on Competition Policy, Antitrust, and Consumer Rights

Following a Hearing on September 20, 2022, entitled
"Oversight of Federal Enforcement of the Antitrust Laws"

RESPONSES TO QUESTIONS FOR THE RECORD
FROM CHAIRMAN DURBIN

1. In the pharmacy benefit manager (PBM) market, three companies control 86 percent of the private market. There has been similar consolidation among pharmaceutical manufacturers. Between 1995 and 2015, the 60 leading pharmaceutical companies merged to only 10. That consolidation has only continued.

   This concentration and associated lack of competition has happened at the same time that new drug prices in the United States have skyrocketed, with increases of 20 percent per year between 2008 and 2021.

   a. What steps is the Department of Justice's Antitrust Division taking to ensure that there is competition in the prescription drug manufacturing and PBM markets?

RESPONSE:

Affordable pharmaceuticals and quality healthcare are essential to our lives, and the Division continues to scrutinize competition problems within this industry. Our criminal enforcement program in particular has been especially focused in this area. To date, the Division's ongoing investigation into cartel activity among generic drug manufacturers resulted in charges against seven companies and four executives for schemes affecting critical drugs relied on by vulnerable and elderly American consumers to treat a range of diseases and chronic conditions. In addition, the Division continues to collaborate with law enforcement officers, the inspector community, and other antitrust enforcers, including the Federal Trade Commission, to explore new approaches to enforcing the antitrust laws in the pharmaceutical industry.

   b. Does the Department require any additional tools or authorities to help ensure drug companies, PBMs, and others in the prescription drug supply chain are not using anticompetitive practices to take advantage of patients?

RESPONSE:

Effective antitrust enforcement requires a deep understanding of market realities and facts to determine whether specific conduct or a proposed merger harms competition. The Division has a team of attorneys and economists dedicated to investigating anticompetitive activity in the prescription drug supply chain. In most instances, antitrust laws are effective in deterring --and, when necessary and appropriate, prosecuting – antitrust violations. However, as always, the Division welcomes working with Congress to consider legislation that would create additional tools aimed at halting anticompetitive conduct in drug markets.

2. Last year, the Judiciary Committee held a hearing on the increasing consolidation and lack of competition up and down the supply chain in the food industry. We heard, for example, that just four companies control over 80 percent of the beef processing market.

We also heard how this consolidation disadvantages both small farmers on one end of the chain and consumers at the other end, because they are decentralized and do not have bargaining power to negotiate with the dominant companies.

What steps is the Department of Justice taking to ensure excessive concentration and anticompetitive practices in the food supply chain are stopped?

RESPONSE:

Protecting competition across agricultural markets is among the Antitrust Division's highest priorities. We will continue to remain vigilant to enforce the law across all agricultural markets. For example, earlier this year, the Division and the U.S. Department of Agriculture announced a joint initiative to better coordinate their efforts, including a new portal for farmers and ranchers to report concerns about potential violations of the competition laws. In our independent enforcement efforts, the Division takes very seriously any potential violations of the antitrust laws in the critically important livestock industry. On July 25, 2022, the Department filed a civil lawsuit and proposed consent decree in the U.S. District Court for the District of Maryland against a data consulting firm and its president as well as three poultry processors, to end a long-running conspiracy to exchange information about wages and benefits for poultry processing plant workers and collaborate with their competitors on compensation decisions in violation of the Sherman Act.[1] The Division also obtained abandonments of Cargotec's proposed acquisition of Konecranes and CIMC's proposed acquisition of Maersk, two mergers involving manufacturers and sellers of shipping containers and container handling equipment, respectively, used in the transportation of food and other essential goods. The Division continues to assess competition concerns in agricultural markets and the food chain supply for further evidence of unlawful and anticompetitive conduct.

3. Access to educational opportunities has expanded, but the textbook market has not kept pace. Publishers restrict improvements to access while raking in more than $3 billion per year. The result: textbook prices rise rapidly while students cannot get the materials they need.

   Rising textbook costs have contributed to the national student debt crisis. Textbook prices increased by nearly 90 percent between 2006 and 2016. It is estimated that the average student at a four-year public college spends $1,240 on books and supplies.

   The Department of Justice's scrutiny of the proposed merger between Cengage and McGraw-Hill—two of the largest textbook publishers—was a good step. The Department's required divestitures coupled with public concerns from students, consumer

[1] *See* Press Release, Justice Department Files Lawsuit and Proposed Consent Decrees to End Long-Running Conspiracy to Suppress Worker Pay at Poultry Processing Plants and Address Deceptive Abuses Against Poultry Growers (July 24, 2022), https://www.justice.gov/opa/pr/justice-department-files-lawsuit-and-proposed-consent-decrees-end-long-running-conspiracy (describing actions and providing links to complaint and proposed final judgment).

groups, and Members of Congress stopped the merger in 2020. But this did not mark the end of problems within the publishing industry.

What is Department of Justice doing to preserve competition and protect students in the college textbook market, where three publishers control 80 percent of the market?

RESPONSE:

The Antitrust Division has been active in protecting competition in the textbook industry in recent years. As you note, the Division successfully halted the merger of Cengage and McGraw-Hill, which threatened to form an effective duopoly in the college textbook industry. During that investigation a variety of stakeholders, including student leaders and universities, expressed concerns about skyrocketing textbook prices resulting from years of industry consolidation, unsustainable practices, and a lack of price competition.

Today, the textbook industry remains highly concentrated. The Antitrust Division is concerned any time firms, especially those with market power, take actions that may harm competition. To the extent that the textbook companies' actions raise competition issues under the antitrust laws, we will review them. The Antitrust Division is committed to working to ensure that American students are afforded the benefits of competition in the textbook industry.

RESPONSES TO QUESTIONS FOR THE RECORD FROM RANKING MEMBER GRASSLEY

1. What are the most pervasive problems you've seen in the health care and drug competition area? Is there any legislation you'd like to see enacted that would help you on these issues?

RESPONSE:

The Division continues to see the harms of anticompetitive consolidation across various healthcare markets, impacting multiple dimensions of competition. Concentrated market structures not only harm patients downstream but also harm healthcare workers upstream. Anticompetitive mergers and conduct undertaken by powerful firms are resulting in higher prices, lower quality, less innovation, and reduced access to care. Moreover, as health data takes on a greater and more meaningful role in our economy the Division is closely examining its connection to power in healthcare. Everyone loses except the powerful firms in the middle.

Effective antitrust enforcement requires a deep understanding of market realities and facts to determine whether a specific conduct or proposed merger harms competition. As markets evolve and new competition issues arise in the healthcare markets, the Division is always eager to work with Congress to develop legislation that would create additional tools aimed at halting anticompetitive conduct in healthcare and drug markets.

2. In your opinion, are the current laws on the books adequate or inadequate to deal with the competition issues we're seeing in the tech industry?

RESPONSE:

While the Division will continue to use its existing legal tools to deter anticompetitive behavior in digital markets, we also believe that new legislation from Congress targeted to digital markets would greatly enhance our ability to challenge anticompetitive conduct by the largest digital platforms in a timely and cost-effective manner. For example, legislation that clarifies the types of discriminatory, exclusionary, and self-preferencing conduct Congress finds to be harmful would benefit antitrust enforcement.

Ultimately, we defer to Congress to determine appropriate enforcement tools, and we will use them as effectively as we can consistent with the plain language of the statute.

3. In the last Congress, a bill I sponsored to create anti-retaliation protections for whistleblowers who reported criminal antitrust violations was signed into law.

a. Can you tell us how this bill has been helpful to DOJ with respect to going after antitrust law violators? How have whistleblowers helped recoup moneys for the American people in the antitrust arena?

b. Do you think that this law should be expanded to cover civil violations of antitrust law? Please explain why or why not.

c. Would creating a whistleblower award program similar to the SEC and IRS encourage more whistleblowers to come forward? Would this help DOJ in pursuing these types of cases?

RESPONSE:

The Antitrust Division applauds the passage of the Criminal Antitrust Anti-Retaliation Act (CAARA). Since CAARA became law in December 2020, the Antitrust Division has partnered with the Department of Labor's Occupational Safety and Health Administration (OSHA) to facilitate the implementation of CAARA, including by providing training and technical assistance to OSHA staff on what constitutes a criminal antitrust violation and making available a public link to OSHA's website, which provides public information on CAARA and resources on workplace retaliation. This year, the Division also signed a formal MOU with the Department of Labor that enhances our partnership with OSHA. We firmly believe that CAARA's protections help to increase detection of antitrust crimes and bolster the Antitrust Division's leniency program. And we would welcome CAARA's expansion to civil violations of the antitrust laws, which would further strengthen the Division's enforcement efforts.

4. Could you give me your views on the No Oil Producing and Exporting Cartels Act? Will you commit to working with me to hold OPEC accountable and deliver lower gas prices to American consumers?

RESPONSE:

The Administration is continuing to review and discuss the No Oil Producing and Exporting Cartels Act and will follow up any views it may have.

5. The U.S. sheep and lamb industry has been shrinking for decades as the numbers of sheep and producers have declined since World War II. We have seen consolidation of the sheep packing industry, higher feed and energy costs, and increased competition from imports of lamb cuts. The consolidation in the packing industry has left Iowa producers with no opportunities to fairly market their animals and many are being forced out of business.

a. Has the Antitrust Division looked specifically at the sheep and lamb market?

RESPONSE:

Longstanding policy and practice of the Department generally prevents us from commenting on or confirming or denying any investigation. However, as a general matter, protecting competition across all agricultural markets – including markets for sheep and lamb – is a high priority for the Antitrust Division. We are committed to vigorously enforcing the law across all agricultural markets.

b. What else is being done to investigate the consolidation in the livestock industry?

RESPONSE:

Protecting competition across agricultural markets is among the Antitrust Division's highest priorities. We will continue to remain vigilant to enforce the law across all agricultural markets, including livestock. Earlier this year, the Division and the U.S. Department of Agriculture announced a joint initiative to better coordinate their efforts, including a new portal for farmers and ranchers to report concerns about potential violations of the competition laws. In our independent enforcement efforts, the Division takes very seriously any potential violations of the antitrust laws in the critically important livestock industry. On July 25, the Department filed a civil lawsuit and proposed consent decree in the U.S. District Court for the District of Maryland against a data consulting firm and its president as well as three poultry processors, to end a long-running conspiracy to exchange information about wages and benefits for poultry processing plant workers and collaborate with their competitors on compensation decisions in violation of the Sherman Act. The Division continues to assess livestock markets for further evidence of unlawful and anticompetitive conduct.

RESPONSES TO QUESTIONS FOR THE RECORD
FROM SENATOR LEAHY

1. The antitrust landscape is changing – the consumer welfare standard, which has been the prevalent legal theory, is being replaced by market concentration and size considerations. This makes sense in the tech age, where many platforms that consumers use are free or much cheaper than smaller startup alternatives. The DOJ must evolve with the times and look at antitrust through this new lens to ensure a truly free marketplace and fair competition.

    a. Mr. Kanter, is the DOJ looking at the antitrust landscape differently under the lens of market concentration?

RESPONSE:

Yes. Concentration is an important metric to understand whether a market is in, or close to, oligopoly or monopoly. The core questions in antitrust are how competition actually plays out based on market realities, and how a merger or conduct may threaten it. When we answer that question carefully, we better protect competition and vindicate Congress' vision for the antitrust laws.

    b. Is this different approach to competition policy something your Department has adopted? If so, what challenges have you encountered using this approach?

RESPONSE:

Right now, the Antitrust Division has the will, but not the resources, to fully address the competition challenges facing the American people. As I explained in more detail in my written testimony, for every dollar that Congress invests in antitrust enforcement, we are delivering results at a multiple that would be the envy of Wall Street. Simply put, our enforcement efforts are saving taxpayers billions of dollars a year. It is money well spent and our use of resources is efficient and effective. But we are still under-resourced. Although the economy expanded enormously through 2021, the Division ended that fiscal year with 352 fewer employees than it had in 1979. We currently have pending seven civil antitrust lawsuits, the largest number of civil cases in litigation in the last 20 years. We will litigate more merger trials this year than in any fiscal year on record. Notably, this litigation occurs against the backdrop of nearly 3,000 notified transactions in FY 2022, which follows FY 2021 as the largest number of filings any year since the reporting thresholds were adjusted in 2000. With more resources, we can do far more to restore competition and protect taxpayers and consumers.

    c. How are the FTC and DOJ working together to sync your regulations and litigation strategies in the changing antitrust landscape? How are you working to standardize your antitrust policies between your agencies in general?

RESPONSE:

It is vital for the Antitrust Division and the FTC to work together to protect competition. We owe to the businesses, workers and consumers that rely on fair competition in free markets to work closely and collaboratively. I believe we have been doing so and will continue to do so. For example, in our efforts to modernize the merger guidelines, we have been side by side with the FTC, including jointly issuing the Request for Information regarding merger enforcement and reviewing the subsequent comments as well as jointly hosting meetings with a wide variety of stakeholders effected by merger enforcement, including consumers, workers, entrepreneurs, start-ups, farmers, investors, and independent businesses as well as state and foreign antitrust enforcers.

RESPONSES TO QUESTIONS FOR THE RECORD F
FROM SENATOR WHITEHOUSE

1. Since 2019, I have sought answers regarding possible political influence in the Antitrust Division's investigation of four automakers' fuel-emission agreement with California. In the intervening years I have submitted Questions for the Record, sent six letters, and had three meetings with Department of Justice officials regarding my oversight on this troubling issue. Although some of my questions have been resolved, many remain unanswered, and my document requests remain unfulfilled. After years of delay, the Department is now citing the recent initiation of an inspector general investigation into this same matter as a reason not to provide answers to my questions.

    a. If not you, in which office and under whose custody are the requested records located? If not you, who in the Department of Justice (DOJ) made the decision to refuse to provide the requested records? Please provide their name, title, and official contact information.

    b. It is my understanding that DOJ is withholding the requested documents because of an Inspector General investigation into the same matter. Under what legal and constitutional authority does the Department assert that the existence of an internal Inspector General investigation vitiates the oversight authority of Congress and precludes providing the legislative branch with requested documents? Please cite to specific case, statutory, or constitutional authority.

    c. Given the advent of modern communication technologies (i.e. copier, fax, email, cloud storage), why cannot DOJ provide copies of the relevant documents to both the Inspector General and Congress concurrently?

RESPONSE:

I appreciate your interest in this matter and the urgency of your request. As I committed to doing at the hearing, I have passed on your concerns to the Office of Legislative Affairs, which I understand is reviewing your requests for specific documents and other relevant information.

2. Will the Department of Justice and Federal Trade Commission's forthcoming joint revised merger guidelines address labor markets as a priority focus of the agencies' antitrust merger analysis and enforcement efforts?

RESPONSE:

Protecting labor market competition is of vital importance to the Department. Together with our colleagues at the FTC, the Justice Department is currently undertaking a full public review of federal merger guidelines. We received over 5,000 public comments, many from workers and independent contractors, which overwhelmingly supported greater

enforcement. While the guidelines review process remains ongoing, the Department is committed to protecting workers from mergers that may harm their ability to benefit from free and fair labor market competition, including potential acquisitions by dominant technology firms.

3. When new mergers are announced, or otherwise made known to the agencies, does your agency, as a matter of practice, consult labor unions with respect to the potential impact of the proposed transaction on labor markets regardless of whether the acquiring firm or target is unionized or not?

RESPONSE:

The Antitrust Division's merger review process is designed to include input from a wide range of stakeholders, including any individual or group who may have evidence relevant to determining whether competition may be harmed by a proposed merger or transaction.

RESPONSES TO QUESTIONS FOR THE RECORD FROM SENATOR BLUMENTHAL

1. As anyone who attends concerts and other live events knows, the ticketing market is broken — consumers can't buy tickets without being hit with exorbitant and hidden fees. Part of the issue is that the ticketing market is nearly dominated by one company, Live Nation. The Department of Justice allowed this consolidation when it approved the merger of Ticketmaster and Live Nation, and then further allowed the firm to acquire and undermine nascent rivals. This March, Sen. Klobuchar and I wrote the Department of Justice on our continued concerns about anticompetitive conduct by Live Nation, calling for an investigation into the ticketing market and compliance with its 2020 consent decree.

   Has the DOJ taken steps to investigate competition in the live entertainment and ticketing market, including Live Nation's compliance with the 2020 consent decree?

RESPONSE:

Longstanding policy and practice of the Justice Department generally prevents us from commenting on or confirming or denying the existence of any investigation beyond the charging and other public documents. However, as a general matter, we take seriously our duty to investigate credible allegations of potentially anticompetitive conduct, and the Department has and will continue to closely monitor the state of competition in live entertainment and ticketing, and take all appropriate action to preserve competition in these important industries, including monitoring compliance with and enforcement of provisions of existing consent decrees.

2. Big Tech firms, especially Amazon, have significant power over both the seller and buyer sides of the market – monopsony power. That monopsony power has a significant impact on labor markets. This is especially concerning given that Big Tech has fought unionization efforts and used their vertical integration to undermine unionized competitors.

   You both referenced in remarks the DOJ and FTC's forthcoming merger guidelines and other efforts to bolster our antitrust enforcement through guidelines and enforcement. How do you expect that labor markets will factor in, and be a priority, in these guidelines and enforcement actions?

RESPONSE:

The Division has a long history of enforcing the antitrust laws against mergers and employer conduct that harms workers. Protecting labor market competition is of vital importance to the Department. Together with our colleagues at the FTC, the Justice Department is currently undertaking a full public review of federal merger guidelines. We

received over 5,000 public comments, many from workers and independent contractors, which overwhelmingly supported greater enforcement. While the guidelines review process remains ongoing, the Department is committed to protecting workers from mergers that may harm their ability to benefit from free and fair labor market competition, including potential acquisitions by dominant technology firms.

3. Today, Apple and Google use their duopoly in the mobile market to take a cut of digital goods and services — as much as 30% off the top. That appears to be monopoly rent. The Open App Markets Act — which Senators Blackburn, Klobuchar, and I authored — would open up competition in the mobile market. That bill was approved by the Senate Judiciary Committee in February on a 20-2 vote, and is waiting for a floor vote. You testified at the hearing that the Antitrust Division is "working with Congress and the courts to faithfully realize Congress's original intent," and that "both the American Innovation and Choice Online Act and the Open [App] Markets Act awaiting floor vote in full Senate are important to these goals." You also noted that the Antitrust Division faces well-resourced defendants when it brings antitrust actions against Big Tech companies.

   How could having specific legislation like the Open App Markets Act make it easier for the DOJ to enforce our antitrust laws against dominant gatekeepers in the app market that abuse their power?

RESPONSE:

The Department greatly appreciates the ability to work with Congress on proposals like the Open App Markets Act, which is important legislation that seeks to ensure that independent app developers are able to compete on fair and equal terms and to prohibit the worst types of anticompetitive conduct by the gatekeeper firms that own and operate the largest app stores and mobile platforms. While the growth of the mobile app ecosystem over the past fifteen years has brought enormous benefits to American consumers, the continued viability of this ecosystem is threatened by the increasing power held by a handful of dominant digital gatekeepers, who are able to use their control over app stores and mobile operating systems to pick winners and losers, extract above-market fees, and favor their own apps in ways that harm competition and sap incentives to innovate. The Act identifies and prohibits some of the most egregious anticompetitive practices which are currently prevalent in the mobile app ecosystem.

While the Division will continue to use its existing legal tools to deter anticompetitive behavior in digital markets, we also believe that new legislation from Congress targeted to digital markets would greatly enhance the ability of the DOJ and FTC to challenge anticompetitive conduct efficiently and effectively and enable the Agencies to prevent the largest digital companies from abusing and exploiting their dominant positions to the detriment of competition and the competitive process.

4. Last week, Mozilla published a report outlining how dominant tech firms that offer operating systems (Apple, Google, Microsoft) can use that control to preference their own web browsers and browser engines (the core software responsible for rendering web pages). As the report notes, tech firms have often made it essentially impossible to provide an alternative browser, as with Apple's restrictions on iOS, or frustrated competitors through self-preferencing. Web browsers and the standards adopted by web browsers are the heart of the open internet, and vital to the economic and culture benefits the internet has brought. Consumers benefit from competition between web browsers, especially when that competition prevents dominant firms from using their control of browsers to set the rules for the internet (for example, by weakening standards to disadvantage efforts to protect privacy). Attempts to undermine competitive web browsers were also at the heart of the Microsoft antitrust case, where Microsoft sought to use its control over Windows to undermine Internet Explorer's chief rival, Netscape.

   Do you share these concerns that control over operating systems, web browsers, browser engines, and web standards could be used by dominant firms to disadvantage rival web browsers and rival web platforms? What types of conduct in the web browser market could be indicators of the abuse of dominance and what type of remedies may be appropriate for such abuse?

RESPONSE:

Longstanding policy and practice of the Justice Department generally prevents us from commenting on or confirming or denying the existence of any investigation beyond the charging and other public documents. However, as a general matter, the rise of dominant digital platforms presents a significant threat to open markets and competition, with risks for consumers, businesses, innovation, resiliency, global competitiveness, and our democracy. Vesting the power to pick winners and losers across markets in a small number of corporations contravenes the foundations of our capitalist system, and given the increasing importance of these markets, the power of such platforms is likely to continue to grow unless checked.

RESPONSES TO QUESTIONS FOR THE RECORD FROM SENATOR LEE

1. In a speech last May to the New York City Bar Association, you argued that the consumer welfare standard should be abandoned in favor of a focus on, "competition and the competitive process." That still requires us to define competition, which is the point of the consumer welfare standard—to help judges distinguish between vigorous competition and exclusionary conduct. How does the vagueness of "competition and the competitive process" improve upon that?

    a. Please list each factor besides consumer welfare that a judge should take into consideration when adjudicating whether conduct harms competition.

RESPONSE:

Competition plays out in many different ways, evolving over time with changes in market realities. The antitrust laws protect competition and the competitive process whatever form that takes in a market, and the factors relevant to that determination vary based on the competitive circumstances. For example, in many cases, higher consumer prices are a good indication of competitive harm. In others, lower wages for workers or harms to other trading partners can demonstrate competitive harm. In still others, conduct may harm the competitive process without generating a readily quantifiable effect on any particular group. The benefits of competition are expansive and can differ based on the industry and circumstances—for example in markets involving the flow of information, competition can heighten political discourse and lead to a better-informed citizenry. The absence of competition can yield the opposite. Effective enforcement must account for the full range of harms that may result from a lack of competition.

    b. How will consideration of these factors avoid turning antitrust analysis into a balancing of competing political interests?

RESPONSE:

Central planning is inconsistent with the role of competition as a pillar of our economy. Accordingly, antitrust law promotes competition.

    c. Do you agree that the Constitution reserves the balancing of political interests to Congress alone?

RESPONSE:

As an Executive Branch official, I am obligated to focus on the law as written by Congress and interpreted by the judiciary.

2. Last year, Rep. Ken Buck and I sent letters to the Department of Justice and the Department of Defense Inspector General raising concerns about possible efforts by

Amazon Web Services to monopolize the cloud computing space by undermining competition for the JEDI government cloud contract. Specifically, we are concerned that former Amazon consultants who worked at the Department of Defense may have steered the Department's procurement process to favor Amazon. Does this concern you from an antitrust perspective?

a. Will you commit to looking into the matter to ensure that Big Tech firms can't buy their way to dominance by corrupting federal procurement efforts?

RESPONSE:

While longstanding policy and practice of the Justice Department generally prevents us from commenting on or confirming or denying the existence or status of any investigation, as a general matter, enforcement of the antitrust laws in digital and adjacent markets is a high priority for the Division. President Biden's Executive Order on Competition calls on agencies to promote competition by, among other things, adopting pro-competitive approaches to procurement and spending.[4] We are deeply committed to this collaborative, whole-of-government approach to promoting competition.

As you know, the Division has vigorously pursued enforcement against anticompetitive practices in procurement. Since 2019, when the Antitrust Division created the Procurement Collusion Strike Force, we have trained over 23,000 people on the risks of procurement collusion and opened more than 60 criminal investigations. Anticompetitive schemes that target government purchases are particularly problematic because they potentially cost United States citizens billions of dollars. It remains a very high priority to address efforts to corrupt federal procurement. We commit to continue our vigorous enforcement against any such practice.

3. I have been alarmed by recent reports of Chinese companies buying up U.S. farmland near military bases.[5] What are you doing to scrutinize acquisitions by state-owned entities?

a. Do you believe that, for the purposes of assessing market share and market concentration, companies that compete against each other but which are owned or controlled by the same sovereign entity should be viewed as a single economic actor?

RESPONSE:

Common ownership is an area that generates substantial and challenging questions for antitrust enforcement. It is difficult to speak in a blanket way about common ownership and control because the particular market realities are so important to determine the extent and scope of liability, if any. However, it is not difficult to say that common ownership or

[4] Exec. Order No. 14,036, 86 Fed. Reg. 36,987 (2021).
[5] China Is Buying the Farm, WALL STREET JOURNAL (Sept. 8, 2022), https://www.wsj.com/articles/the-chinese-are-buying-the-farm-north-dakota-hong-kong-land-food-shortage-supply-chain-usda-11662666515.

control has an important part to play in antitrust analysis. To that end, when reviewing a merger, antitrust enforcers benefit from as much information as possible. This is one reason why the Division strongly supports passage of H.R. 3843, the Merger Filing Fee Modernization Act as just passed by the House of Representatives because the amended version includes provisions that make information about subsidies and other ownership by foreign entities available in the merger review process.

4. The Antitrust Division has been beset by a string of recent losses—in criminal no poach, wage-fixing, and merger cases. At a time when the agencies are requesting ever larger budget appropriations, I am concerned that Division resources are not being wisely deployed. What are you doing to ensure that the Division brings the right cases going forward?

RESPONSE:

In all enforcement decisions, the Antitrust Division is guided by the facts and the law.

5. You have been vocal about the Division's aversion to settlement agreements under your leadership. What are you doing to ensure that parties do not evade necessary antitrust scrutiny through the use of pre-HSR filing "fix it first" measures?

    a. What are you doing to ensure that the Division does not allow deals to slip through the cracks that deserve greater scrutiny, simply for the purpose of not settling?

RESPONSE:

At its core, the Division is a law enforcement agency, not a regulator. Our duty is to litigate, not settle, unless a remedy fully prevents or restrains the violation. While some remedies may sufficiently address the potential threats to competition present in mergers, these are likely the exception to the rule.

Even deals revised through "fix it first" measures are subject to the same filing requirements as other deals under the HSR Act, which affords the Department an opportunity to thoroughly consider the competitive implications of the transaction as proposed. Consent decrees only relate to the details of the implementation of a divestiture—they typically do nothing to provide assurances or protections should the divestiture fail to protect competition.

6. In 1978, Congress determined that utility poles and conduits are essential facilities that lack a viable market-based alternative, which led it to require utilities to extend nondiscriminatory access of utility poles to cable operators and competitive telecommunications providers. Some pole owners are exempt from federal

nondiscriminatory access. Congress's recent commitment to build out rural broadband, especially in unserved areas, could be jeopardized by constraints placed by exempted pole owners on competitors seeking to come into the marketplace to provide broadband services in unserved and rural areas. With $65 billion set aside for broadband projects in the 2022 Infrastructure Investment and Jobs Act alone, and other funding sources for broadband already available, I want to ensure that federal taxpayer dollars are spent in the most efficient and effective manner.

Has the Division looked at pole attachment access for broadband—especially in unserved communities—where exempted pole owners may be leveraging their entrenched positions to thwart potential new entrants from serving more rural consumers and connecting consumers that currently lack broadband service?

RESPONSE:

The Antitrust Division believes that competition is the best driver of innovation and consumer benefits. Pole attachments are especially critical to the deployment of next-generation broadband services. I am a firm believer that where you live should not dictate the level of competition that you enjoy or the level of access that you have to broadband services. To the extent that pole owners' actions raise competition issues under the antitrust laws, we will review them. In addition, we will continue to work closely with the Federal Communications Commission on issues involving competition in broadband services. Together, we can create and protect economic opportunity in the marketplace for broadband Internet access services provided to individual consumers.

7. Do you believe the Competition and Transparency in Digital Advertising Act would improve consumer outcomes in the market(s) for digital advertisements and assist the Division in protecting competition in the digital advertising space?

RESPONSE:

I agree strongly that transparency in digital markets is crucial for competition. The Division would be glad to work with your office to provide any technical assistance that you request.

8. I am closely following the Division's lawsuit against Google, and potential forthcoming additional suits against Big Tech firms. Having clear and effective leadership is essential for such efforts.

    a. What is the status of the Department's review of your recusal status with respect to these matters?

    b. Who has the final say on the question, and when will it be rendered?

RESPONSE:

The Department makes decisions on recusal matters in consultation with ethics officials and according to the particular facts of each situation and the relevant statutes, regulations, and other authorities. Beyond that I cannot comment.

9. Do you agree that the antitrust agencies' ability to hold big tech monopolies accountable for anticompetitive conduct would be strengthened and enhanced by new legislation, like the Open App Markets Act, which this Committee advanced on a nearly unanimous and bipartisan basis in March of this year?

RESPONSE:

As I explained in my written testimony, I believe the Open App Markets Act is important legislation that would help ensure that independent app developers are able to compete on fair and equal terms and to prohibit the worst types of anticompetitive conduct by the gatekeeper firms that own and operate the largest app stores and mobile platforms. While the growth of the mobile app ecosystem over the past fifteen years has brought enormous benefits to American consumers, the continued viability of this ecosystem is threatened by the increasing power held by a handful of dominant digital gatekeepers, who are able to use their control over app stores and mobile operating systems to pick winners and losers, extract above-market fees, and favor their own apps in ways that harm competition and sap incentives to innovate. The Act identifies and prohibits some of the most egregious anticompetitive practices which are currently prevalent in the mobile app ecosystem.

10. The Division recently lost its challenge to U.S. Sugar's proposed acquisition of Imperial Sugar Company. At trial, the United States Department of Agriculture provided testimony that appeared to help the defendants.

    Is this the "whole of government" approach to antitrust enforcement envisioned by President Biden's executive order on competition and championed by you and Chairwoman Khan?

RESPONSE:

President Biden's Executive Order underscored that competition is a cornerstone of the American economy, and called for a whole-of-government response to "excessive market concentration threaten[ing] basic economic liberties [and] democratic accountability." The Executive Order and its whole-of-government approach created unprecedented opportunities for the Division to work with partner agencies to promote competition policy. In the last year, the Division has established and expanded relationships with close to a dozen federal agencies to provide technical assistance, key reports on competition and enter

into memoranda of understanding to improve the exchange of information and cooperation on enforcement efforts.

For example, earlier this year, the Division and the U.S. Department of Agriculture ("USDA") announced a joint initiative to better coordinate their efforts, including a new portal for farmers and ranchers to report concerns about potential violations of the competition laws. As part of the Division and the USDA's enforcement partnership, the agencies signed a memorandum of understanding earlier this year to further foster cooperation and communication between the agencies and effective process the complaints received through the portal, including potential referrals of Packers and Stockyards Act violations from USDA to the Division for enforcement. The Division has provided competition training for USDA staff and technical assistance related to proposed competition-related rulemakings under the Packers and Stockyards Act called for by the Executive Order.

At the merger trial for U.S. Sugar's acquisition of Imperial, an individual who is employed by the USDA did testify, in her personal capacity, that she believed based on her prior relationships with the merging firms that U.S. Sugar's acquisition of Imperial Sugar would benefit consumers. She testified regarding the merging parties that "[k]nowing these people as long as I have…I had high faith that [their merger] was good."[6] The district court denied the Government's motion for an injunction because, in part, "…[t]he public interest lies in allowing the Proposed Transaction to go forward…[the individual who is an employee of the USDA] testified credibly that she anticipates that the Proposed Transaction is not likely to lead to higher prices…"[7]

This testimony and the district court's decision contradicted well-settled antitrust law, including the structural presumption of anticompetitive effects that applies to mergers of competitors in highly concentrated markets. The Third Circuit has set an expedited briefing schedule for the Department's appeal.

[6] Trial Transcript at 882, *United States v. U.S. Sugar Corp.,* No. 21-1644 (D. Del. Sep. 28, 2022) (Doc. 228).
[7] *United States v. U.S. Sugar Corp.,* No. 21-1644, 2022 WL 4535621 (D. Del. Sep. 28, 2022).

RESPONSES TO QUESTIONS FOR THE RECORD
FROM SENATOR CRUZ

1. You previously remarked, "To me, consumer welfare is a catch phrase, not a standard."

    a. What alternative framework then is utilized for antitrust enforcement under your leadership?

RESPONSE:

A standard requires broad based agreement on meaning and application. I have observed that the lack of a consensus view on the meaning of "consumer welfare," notwithstanding decades of use of the term, has created challenges to both. That results in an approach that falls short of providing the benefits of a standard.

The antitrust laws protect competition and the competitive process. In my view, antitrust enforcers should not decide what values should be promoted at the expense of others or attempt to weigh impacts among diverse market participants. The value that Congress laid down when it passed the antitrust laws is competition. Our job is simply to promote competition as the organizing principle of our economy, from which a wide range of benefits flow, including to consumers, workers, and our democracy.

2. On September 15, 2021, the FTC withdrew the 2020 Vertical Merger Guidelines issued under the Trump Administration. Although the 2020 guidelines were viewed as strengthening the agencies' stance toward vertical mergers, the Biden Administration has indicated that they did not go far enough. Notably, the DOJ Antitrust Division has not withdrawn the 2020 Vertical Merger Guidelines.

    a. Why did the DOJ not withdraw the 2020 Vertical Merger Guidelines alongside the FTC?
    b. Does the DOJ have future plans to do so?

RESPONSE:

On January 18, 2022, DOJ and FTC jointly released a Request for Information (RFI) to help our agencies understand why so many industries have become so consolidated, and to think carefully about how our merger analysis tools—both horizontal and vertical—can do better to prevent this problem from getting worse. The RFI stated that "Department of Justice shares the Commission's substantive concerns with economic and legal errors in them and seeks to replace them expeditiously with a document better reflecting its current approach." Additionally, one of the questions raised in the RFI asked whether the traditional distinction between horizontal and vertical mergers should be

revisited in light of recent economic trends in the modern economy.[2]

In response to the RFI, we received over 5,000 comments from a wide range of stakeholders, including from state Attorneys General, economists, attorneys, academics, workers, unions, trade associations, small business owners, and concerned citizens. We are now working intensely with the Federal Trade Commission to review those comments and determine next steps.

In particular, we are working with the FTC to modernize our merger guidelines, including by replacing the 2020 Vertical Merger Guidelines with a document that better reflects the law and market realities.

3. Has the Department of Justice engaged in conversations with companies subject to Hart-Scott-Rodino review regarding their mergers that resulted in structural or behavioral changes at such companies, including divestitures? If so, what were those instances?

RESPONSE:

As a general matter, the Division's policy is not to accept incomplete or risky settlements to illegal mergers because the American public bears the risk of failure. That risk is too great in a range of industries that American consumers and businesses, among others, rely on every day. Earlier this year, I outlined some concerns with remedies and also described circumstances under which divestitures may be appropriate.[3] I am concerned that merger remedies short of blocking a transaction too often miss the mark. Complex settlements, whether behavioral or structural, suffer from significant deficiencies. Therefore, when the Division concludes that a merger is likely to lessen competition, as a general matter, an injunction to block the transaction is the most appropriate remedy.

[2] *See* U.S. Dep't of Justice and Fed. Trade Comm'n, "Request for Information on Merger Enforcement," (Jan. 2022), *available at* https://www.justice.gov/opa/press-release/file/1463566/download.

[3] Jonathan Kanter, Asst. Att'y Gen., Antitrust Div., U.S. Dep't of Justice, Speech at the New York State Bar Association Antitrust Section (Jan. 24, 2022), *available at* https://www.justice.gov/opa/speech/assistant-attorney-general-jonathan-kanter-antitrust-division-delivers-remarks-new-york.

RESPONSES TO QUESTIONS FOR THE RECORD FROM SENATOR COTTON

1. On September 26, 2022, a federal judge in D.C. ruled that UnitedHealth Group may proceed in its acquisition of Change Healthcare.

   Does the Department of Justice plan to file an appeal?

RESPONSE:

The Division is evaluating its next steps in this matter and will continue to work tirelessly to enforce the antitrust laws to reduce healthcare costs in the commercial healthcare insurance markets as well as the market for a vital technology used by health insurers to process health insurance claims.

2. In your testimony before the Committee, you noted that the App ecosystem is threatened by "the increasing power held by a handful of dominant digital gatekeepers, who are able to use their control over app stores and mobile operating systems to pick winners and losers, extract above-market fees, and favor their own apps in ways that harm competition and sap incentives to innovate."

   a. Do you agree that seeking relief through the judicial system can be insufficient considering the long-time delay before a court makes a final resolution?

   b. How could Congress and federal agencies ensure timely relief in digital markets?

RESPONSE:

While the Division will continue to use its existing legal tools to deter anticompetitive behavior in digital markets, we also believe that new legislation from Congress targeted to digital markets would greatly enhance the ability of the DOJ and FTC to challenge anticompetitive conduct by the largest digital platforms in a timely and cost-effective manner. The most significant benefits would arise from legislation that would identify and prohibit the worst kinds of discriminatory, self-preferencing, and exclusionary conduct, and thereby enhance the ability of the DOJ to challenge that conduct effectively and restore competition in digital markets.

Resources are also a significant limiting factor in the timeliness and effectiveness of antitrust enforcement. The Merger Filing Fee Modernization Act, which would update merger filing fees for the first time in over twenty years, would substantially enhance the resources available to the Division and allow it to better protect competition both in digital markets and economy-wide.

Similarly, the legislation you have introduced, the Foreign Merger Subsidy Disclosure Act, would help facilitate a more transparent and effective enforcement regime. We were pleased that legislation to this end was incorporated into Title II of H.R. 3843, the Merger Filing Fee Modernization Act of 2022, which passed the House of Representatives on September 29, 2022. Requiring disclosure of foreign subsidies in the premerger notification process will assist the DOJ and the FTC in preventing anticompetitive transactions through which adversaries could gain influence over important parts of the economy.

3. Purchasers of aluminum say that they are encountering serious pricing irregularities in the aluminum market that are causing artificially increased prices. One area with unexplained price spikes is the "Midwest Premium," (the MWP) an index that is charged to all end users of aluminum in the United States, purportedly for the cost of storage and transportation of aluminum. This past year, the MWP has reportedly increased over 450% over the last year, despite the fact there were no significant increases in the cost to transport or store aluminum. One industry ratings source has a monopoly on the setting of the Midwest Premium, and it has been alleged that the MWP is subject to market manipulation in conjunction with major producers and traders.

    a. Will you pledge to see that the Justice Department seriously examines these allegations and the issue of whether anticompetitive conduct is the cause of undue price increases in the aluminum market?

RESPONSE:

Yes. The Division takes seriously all allegations from participants in the market and remains dedicated to promoting and preserving competition in aluminum markets.

    b. I am informed that at least one major aluminum user has taken these complaints to the Antitrust Division but that the Division has taken little, if any, action. Do you have an explanation as to why the Division has not acted on these complaints?

RESPONSE:

While longstanding Department policies and practice generally prevent us from commenting on or confirming or denying the existence of any investigation, the Division remains committed to seriously examining complaints of anticompetitive conduct from industry participants with on-the-ground experience of market realities. The Antitrust Division will take all appropriate action when it our investigations point to anticompetitive conduct that harms competition or the competitive process in aluminum and other markets.

4. End users of "scrap" aluminum contend that aluminum producers have been overcharging them. I am informed that about 70% of beer cans are made from US recycled used beverage containers and scrap, and not from imported aluminum. Beer and beverage companies, however, have been paying as if 100% of their aluminum is imported and subject to the tariff on aluminum. With the dramatic recent increase in the Midwest Premium, all beverage producers are now effectively paying a tariff on all of the metal content in their cans even though on average only up to 30% is primary imported aluminum that could possibly carry a tariff.

   Is it a deceptive trade practice when a supplier of aluminum charges their customers for scrap metal a price that includes a tariff where that metal was never subject to any tariff?

RESPONSE:

Given the fact-specific nature of determining anticompetitive effects, it would be inappropriate for me to comment on the legality of pricing practices generally. However, the Division is always on alert for instances where dominant companies may be abusing pricing power. If a company can force its customers to pay prices that are above the market rate, that may be evidence of a violation of the antitrust laws. Our investigators regularly examine markets for such anticompetitive practices and we welcome any evidence or information that market participants may have regarding any specific abuses.

RESPONSES TO QUESTIONS FOR THE RECORD
FROM SENATOR TILLIS

1. Increasingly, large tech platforms are using their market dominance to infringe on the intellectual property rights of smaller entities that do not have the money to challenge the infringement.

   a. What steps has your agency taken to ensure that monopolistic companies are not able to use their market power to infringe on the intellectual property rights of smaller entities without the resources to fight back?

   b. Do you believe that legislation is needed to assist you in your efforts to increase competition and protect intellectual property rights?

RESPONSE:

The Antitrust Division is committed to fighting monopolistic conduct by entities big and small that may harm competition. Intellectual property rights can be a key driver of innovation in our economy, and the Antitrust Division has long believed that intellectual property rights and antitrust laws work in tandem to promote innovation. We welcome efforts to strengthen our enforcement tool kit so that the Antitrust Division may vigorously protect competition and the competitive process, including when intellectual property rights are at stake.

2. In 2019, the Department of Justice, USPTO, and NIST released a "Policy Statement on Remedies for Standards-Essential Patents Subject to Voluntary F/RAND Commitments." The statement was widely viewed as being favorable towards patent-holders. In June of this year, the agencies withdrew the 2019 policy statement. No statement has been issued in its place.

   Can we expect a new statement and if so what can we expect from it and when?

RESPONSE:

On June 8, 2022, the Department of Justice, the U.S. Patent and Trademark Office (USPTO), and the National Institute of Standards and Technology (NIST) announced the withdrawal of the 2019 Policy Statement on Remedies for Standards-Essential Patents Subject to Voluntary F/RAND Commitments (2019 Statement). After considering public input on the 2019 Statement and possible revisions, the agencies concluded that withdrawal of the 2019 Statement is the best course of action for promoting both competition and innovation in the standards ecosystem. As the press release accompanying that announcement explained, "[i]n exercising its law enforcement role, the Justice Department will review conduct by standards essential patent (SEP) holders or standards implementers on a case-by-**case basis to determine**

if either party is engaging in practices that result in the anticompetitive use of market power or other abusive processes that harm competition."[8]

The Antitrust Division has no plans to issue a new statement and will assess conduct by participants in the standards ecosystem on a case-by-case basis. We expect that this case-by-case approach will encourage good-faith efforts to reach F/RAND licenses and create consistency for antitrust enforcement policy so that competition may flourish in this important sector of the U.S. economy. Moreover, the Antitrust Division will not hesitate to act if any participants in this space are acting anticompetitively to the detriment of standards' development and competition. We also will continue to work cooperatively with the USPTO and NIST when standards, intellectual property, and competition intersect.

3. You have said that you're open to criminally prosecuting violations of Section 2 of the Sherman Act, which prohibits monopolization.

   a. Could you clarify how you intend to decide whether to bring a criminal case against a business?

   b. Do you plan to issue written guidance of your approach to criminal violations to businesses?

RESPONSE:

All decisions to bring criminal charges against business organizations, including under Section 2 of the Sherman Act, are guided by the Principles of Federal Prosecution of Business Organizations, Justice Manual 9-28.000.[9] In addition, the bar and business community should be guided by the standards developed in prior cases, which includes hundreds of precedents on Section 2 dating back over a century.

4. Google has questioned whether you could remain impartial in a case involving Google due to your past work with Yelp and the News Media Alliance.

   Do you believe there is any merit to that claim?

[8] *See* Press Release, U.S. Dep't of Justice, Justice Department, U.S. Patent and Trademark Office and National Institute of Standards and Technology Withdraw 2019 Standards-Essential Patents (SEP) Policy Statement (June 8, 2022), https://www.justice.gov/opa/pr/justice-department-us-patent-and-trademark-office-and-national-institute-standards-and.

[9] *See 9-28.000 - Principles of Federal Prosecution of Business Organizations,* ANTITRUST DIV., U.S. DEP'T OF JUSTICE, https://www.justice.gov/jm/jm-9-28000-principles-federal-prosecution-business-organizations. (last visited Oct. 18, 2022).

RESPONSE:

I am committed to fairly and impartially enforcing the law, and I work hard every day to pursue justice without fear or favor. Consistent with longstanding Department policies and practice, I defer to the relevant officials in the Department on any decisions related to recusals.

5. Under the Trump administration, the DOJ filed a suit against Google for allegedly monopolizing the search engine and search advertising markets in violation of the Sherman Act.

   a. How aggressively do you intend to pursue cases like this one against Google and other Big Tech companies in violation of our antitrust laws?

   b. Do you consider cases against Big Tech companies to be a priority?

RESPONSE:

The Division has made it a priority to revitalize monopolization enforcement in key industries including technology. The digital economy in particular has enabled monopoly power to a degree that we have not seen in a century. We have seen that monopolists in digital markets have the power to influence many millions of people's lives and to shape adjacent industries. Too often dominant players in digital markets turn that power toward exclusionary tactics and moat building to strengthen and exploit their existing power. It is among the Divisions highest priorities to meet this challenge in the modern economy by faithfully enforcing the antitrust laws as Congress intended.

Prior to the Division bringing its monopolization case against Google, nearly two decades had passed since the last major monopolization case. We are dedicated to enforcing against monopolization and anticompetitive practices in vital industries including technology markets. This is especially true where companies in the digital economy operate as gatekeepers and wield market power in ways that damage small business, the free flow of information, and the vitality of our economy. The Division will continue aggressively challenging anticompetitive conduct to the fullest extent of our ability.

6. You have said that the DOJ has, in the past, intentionally under enforced the law. Could provide some clarification on this?

RESPONSE:

As I explained in public remarks earlier this fall, forty years ago, lawyers opposed to antitrust enforcement advocated that enforcers should get it wrong on purpose, and

intentionally underenforce the law.[10] In their view, monopolies inherently self-correct, but judicial errors do not, so we should avoid enforcement mistakes at all costs.[11] From this perspective, we cannot risk enforcement against even a single bad act, much less a strategy of monopolization, because the costs of "overenforcement" are greater than the costs of "underenforcement."

This was wrong on both fronts. Monopolies do not self-correct. We have seen that in digital markets, as in others, monopolies self-sustain through exclusionary behavior and manipulation of regulatory processes. Moreover, judicial errors need not be set in stone. As Justice Gorsuch explained in the *Alston* case last year, "whether an antitrust violation exists necessarily depends on a careful analysis of market realities … If those market realities change, so may the legal analysis."[12]

I believe that enforcers should seek to fairly enforce the laws as they find them, without intentionally erring in favor of either underenforcement or overenforcement. Judgments as to the relative costs and benefits of a particular law should be left to Congress.

[10] *See* Jonathan Kanter, Asst. Att'y Gen., Antitrust Div., U.S. Dep't of Justice, Keynote Address at Fordham Competition Law Institute's 49th Annual Conference on International Antitrust Law and Policy (Sept. 16, 2022), *available at* https://www.justice.gov/opa/speech/assistant-attorney-general-jonathan-kanter-antitrust-division-delivers-keynote-fordham.

[11] For a modern explanation of the history and errant underpinnings of this doctrine, *see* Herbert Hovenkamp, *Antitrust Error Costs*, 24 U. PA. J. BUS. L. 293 (2022); Jonathan B. Baker, *Taking the Error Out of "Error Cost" Analysis: What's Wrong with Antitrust's Right*, 80 ANTITRUST L.J. 1 (2015).

[12] *NCAA v. Alston*, 141 S. Ct. 2141, 2158 (2021).

RESPONSES TO QUESTIONS FOR THE RECORD FROM SENATOR BLACKBURN

1. You have previously stated that the Antitrust Division's enforcement efforts are constrained by limited resources.

   Do you agree that the bipartisan legislation this Committee marked up in March, like the Open App Markets Act, will likely save the government resources in holding big tech platforms accountable for anticompetitive conduct, in part, by setting forth clear rules of the road for platforms?

RESPONSE:

Antitrust enforcement that is faithful to Congress' intent means the Division will and must continue to use its existing legal authorities to detect and deter anticompetitive behavior in digital markets. New legislation from Congress that is targeted to digital markets would greatly enhance our ability to challenge anticompetitive conduct efficiently and effectively. It also would enable the Agencies to prevent the largest digital companies from abusing and exploiting their dominant positions to the detriment of competition and the competitive process.

As I stated in my written testimony, the Open App Markets Act is an important legislative proposal, which seeks to ensure that independent app developers are able to compete on fair and equal terms and to prohibit the worst types of anticompetitive conduct by the gatekeeper firms that own and operate the largest app stores and mobile platforms. While the growth of the mobile app ecosystem over the past fifteen years has brought enormous benefits to American consumers, the continued viability of this ecosystem is threatened by the increasing power held by a handful of dominant digital gatekeepers, who are able to use their control over app stores and mobile operating systems to pick winners and losers, extract above-market fees, and favor their own apps in ways that harm competition and sap incentives to innovate. The Act identifies and prohibits some of the most egregious anticompetitive practices which are currently prevalent in the mobile app ecosystem.