CHAMBER OF COMMERCE
OF THE
UNITED STATES OF AMERICA

SEAN HEATHER
EXECUTIVE DIRECTOR
ANTITRUST POLICY

1615 H STREET, N.W.
WASHINGTON, D.C. 20062-2000
202/463-5368

Makan Delrahim
Assistant Attorney General
Antitrust Division
U.S. Department of Justice
950 Pennsylvania Avenue, NW
Washington, DC 20530-001

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The U.S. Chamber of Commerce (the Chamber) welcomes the opportunity to provide comments to the Department of Justice (DOJ) on the anticompetitive effects of regulation as part of a roundtable series examining competition and deregulation. The Chamber believes it is important that competitive effects of regulation be considered and examined both on an ex-ante and ex-post basis. We offer these comments in support of that perspective.

1. The Role of Regulation

The Chamber is a strong believer in the power of the market to self-regulate for the benefit of consumers. For this reason, we prefer antitrust enforcement to regulation. Antitrust enforcement, rather than regulation, is the proper remedy for market failures. Antitrust intervention can and should be precise in addressing anti-competitive conduct in a manner that restores self-regulating market forces, avoiding the sweeping impact regulation has across all market participants and consumers.

While regulation is often needed to advance societal economic and non-economic goals, those goals are set by elected officials, not antitrust enforcers. Regulators are empowered by statute to regulate only in accordance with the legal frameworks designed to govern them. Regulation must be narrowly tailored to meet stated statutory objectives.

2. Good Regulatory Design

Much work has been done to develop good regulatory practices and embed those understandings into a well-developed body of U.S. administrative law. There are

established practices to ensure transparency, allow for stakeholder input, require reliance on quality data, incorporate a standard methodology for calculating and weighing costs and benefits, and guarantee consideration for distributive effects and compliance considerations, as well as many other forms of guidance addressing various aspects of rulemaking, all with the aim of creating a quality regulatory process that leads to high quality regulatory outcomes.

However, arguably less has been done to flesh out a competitive-effects framework for analysing either ex-ante or ex-post regulation. A heightened justification should be required for regulation that restrains competition. Free competition is so central to the nation's economy that restraints must be compellingly justified and no broader than necessary to serve the justification. For these reasons, it is important for rule makers to consider competitive impacts as part of the rulemaking process.

3. Adverse Effects of Anti-competitive Regulation

Anti-competitive regulation can tilt the competitive playing field in the direction of certain economic actors at the expense of others. It can ward off new market entrants or it can outright foreclose innovation and new market opportunities from emerging. In other instances, anti-competitive regulation can create perverse market incentives that have a chilling effect on pro-competitive conduct. All of these anti-competitive regulatory instances result in a loss to consumer welfare.

One important consideration in regulatory analysis is the impact the regulation has on large versus small businesses. Large businesses are better positioned to take on regulatory burdens and more easily can comply with a complex regulatory environment, whereas small businesses can ill-afford the compliance costs. Indeed, regulatory complexity can easily prevent new competitors from entering the market. By overly burdening small businesses and preventing new entrants, cumulative regulatory burdens can result in protection for incumbent market actors.

The goals and methods of economic regulation often are antithetical to antitrust. Instead of promoting free markets, regulation can inhibit competition. It may restrict entry, control price, skew investment (causing too much or too little), or limit innovation (delaying innovations by subjecting them to regulatory approval, barring marketing of innovations, or forcing innovations to be shared with rivals on regulated terms).

Even when regulation and antitrust have the same goals, regulation works by methods that are substantively contrary to antitrust—indeed, regulatory methods may tend to preserve monopolies. For example, the swiftest and surest way to end a monopoly is to let it charge a market price; high prices attract entry. Conversely, regulation that seeks to impose a "competitive" result (for example, restricting price to some measure of costs) may deter competitive entry. Similarly, forcing a dominant firm to share its productive facilities with rivals results in shared dominance while deterring the rivals' independent investments in competing facilities. Treating the symptoms of monopoly may keep it intact longer.

Even more concerning is when regulation inhibits firms from engaging in pro-competitive conduct, such as cutting prices, innovating, and investing. There is a popular view that allowing dominant firms to cut prices will harm competition by injuring rivals. That view is wrong. Dominant firms, most of all, should be encouraged to lower prices, invest, and innovate because by definition full market pressure to do so is missing, and the dominant firm has more customers who stand to benefit.

4. Importance of Competition Advocacy

Some of the largest public policy debates in recent American history have centred around questions of market competition. This was true of the debate around capital market regulation following the Great Recession as well as the debate over healthcare. In each, societal objectives and expectations where debated against the backdrop of economic considerations, the need to promote competition, and consumer choice and protection.

While debates such as these are largely unguided by antitrust enforcers, the regulatory decisions that follow statutory decisions can and should be influenced through competition advocacy at the federal, state, and local level. The Chamber strongly supports the Antitrust Division of the DOJ and the Federal Trade Commission (FTC) acting as an advocate for competition considerations in public policy debates. Lending the expertise of antitrust enforcers on market structure, barriers to entry, and consumer welfare to rulemaking by other executive departments and agencies may provide invaluable counsel. That counsel has been called upon at the federal and state level, but should be sought by regulators more frequently.

One potential recommendation would be to place on a permanent basis a rotation of DOJ and FTC economists at the Office of Information and Regulatory Affairs

(OIRA). These economists could lend their antitrust expertise to the regulatory review process to help OIRA better align rulemaking with pro-competitive outcomes and steer clear of anti-competitive impacts. This would also be important as OIRA continues to improve its capacity and capabilities to conduct retrospective review of regulation with various regulatory agencies. Similar arrangements could also be made with regulatory agencies that are independent of OIRA review authority.

Finally, competition advocacy should be backed up by enforcement when regulators seek to impose anticompetitive restraints that are not properly authorized by federal or state law.

5. Examples

The Chamber offers the following specific examples of situations where the views of DOJ could help shape regulation to have pro-competitive effects.

a. Seattle Independent Contractor Ordinance

A good recent example of domestic advocacy against anticompetitive regulatory activity is the amicus brief filed jointly by DOJ and the FTC against the City of Seattle's ordinance to permit independent contractors to collude over prices and output. The Chamber brought suit against the City, claiming that its ordinance was pre-empted by federal antitrust and labor law. The federal district court in Seattle initially granted a stay of the ordinance on antitrust grounds, but then reversed course and concluded that Seattle's ordinance was immune from federal antitrust law under the state action immunity doctrine.

On appeal to the Ninth Circuit, the DOJ and the FTC filed a powerful amicus brief in opposition to Seattle's ordinance, arguing that the district court misapplied settled principles of state action immunity. The Ninth Circuit recently issued a unanimous panel opinion agreeing with the DOJ and the FTC, and reversing the district court's judgment and remanding for further proceedings.

There are more than 43,000 municipalities in the United States, and in many there may be powerful political incentives for those jurisdictions to regulate in anti-competitive ways that are contrary to the federal antitrust laws. The antitrust enforcement agencies have historically guarded against anti-competitive conduct by municipalities masquerading as permissible state regulation. Amicus briefs, such as

the one filed in the Ninth Circuit, and other litigation efforts are appropriate tools to fulfil that historic mission.

b. Universal Postal Union Terminal Dues

The United States is a member of the Universal Postal Union (UPU), which facilitates international mail between government post offices around the world. The organization sets "terminal dues" that bind the price charged between postal systems to send mail and packages. Instead of the price being reflective of the cost to deliver mail and packages, prices are based on a scale correlated with the level of development a country is assigned. Therefore, packages shipped from "lesser" developed countries to "more" developed countries pay far less than mail headed in the other direction.

As a result, a huge volume of mail, much of which is e-commerce from China, enters the U.S. postal system at rates that vastly distort competition. Often, it costs U.S. e-commerce merchants more to ship an item within the United States than it does to ship that same item from China. Further, while the arrangement is arguably a violation of U.S. postal laws, the United States is not forced to accept these rates, but it chooses to do so.

The U.S. State Department represents the United States at the UPU, and every four years the pricing arrangement is negotiated. When this occurs the State Department looks to the U.S. Postal Regulatory Commission for guidance on the proposed UPU rates and the impact on competition in the market. While the Postal Regulatory Commission is increasingly sympathetic to the distortion, there should be a more robust inter-agency process that involves the competition authorities regarding terminal dues levels.

c. State Occupational Licensing

At the state level, there has been much discussion about the anti-competitive impact of occupational licensing. In July of 2015, the Council of Economic Advisors to President Obama found that such practices cost millions of jobs and more than one hundred billion dollars. These requirements often on the surface may seem well intended, as they attempt to serve as a regulatory check over whether an individual is qualified to perform a service. However, in some cases the licensing requirements are questionably extensive or unnecessary. In these instances, the intention to better inform or protect the consumer is outweighed by the harm to consumers that is a

result of a lack of competition. The Chamber applauds the recent work of the FTC to expose these types of anti-competitive regulations that stifle job creation and economic opportunity for individuals.

6. Conclusion

The Chamber thanks you for the opportunity to share our member's views on anti-competitive effects that can occur with regulation.

Sincerely,

Sean Heather
Executive Director, Antitrust Policy
U.S. Chamber of Commerce