DEPARTMENT OF JUSTICE

"Opportunities (Let's Make Lots of Money)"*: The Role of Venture Capital in a Competitive Economy

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Good morning. On behalf of the Department of Justice's Antitrust Division, the Stanford Graduate School of Business, and the Rock Center for Corporate Governance, I want to welcome you to Paul Brest Hall and Stanford University. I am Makan Delrahim, and I have the privilege of serving as the Assistant Attorney General for Antitrust at the Department of Justice.

Today's event is part of our on-going effort at the Department of Justice to understand the competitive conditions under which online platforms operate.[1] I am thrilled to have Stanford as a partner in this inquiry. By virtue of its brilliant faculty and location in the heart of Silicon Valley, I can think of no better institution to engage with us in understanding the intersection of entrepreneurship, investment, and competition policy. Stanford has provided thought leadership, has organized this lovely venue, and has made sure that our panels today will explore the most vital questions about how venture capital is working to spur innovation and competition. Without Stanford's critical contribution, this workshop would not have been possible. So, thank you.

I also want to recognize the incredible work over several months by my colleagues at the Antitrust Division. The team was led by my counsel in the front office, Taylor Owings, and our Chief of Competition Policy, David Lawrence; and the project was really helmed by our talented Competition Policy attorney, Karina Lubell. You will get a chance to meet all of them as moderators on our panels later today. I also want to thank Associate Deputy Attorney General Ryan Shores, who is moderating one of our panels today and leading our investigations in this area. I also thank the many others on our staff in the San Francisco Office and around the Division who turned this workshop into a reality.

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[*] PET SHOP BOYS, *Please* (Parlophone/EMI America 1986).

[1] Press Release, Justice Department Reviewing the Practices of Market-Leading Online Platforms (July 23, 2019), https://www.justice.gov/opa/pr/justice-department-reviewing-practices-market-leading-online-platforms.

The author Charles Duhigg once wrote that "between calculated risk and reckless decision-making lies the dividing line between profit and loss."[2]

This is an ethos that venture capitalists know well. So must antitrust enforcers. We both care deeply about market conditions that encourage entrepreneurs to take calculated risks that benefit society. This sort of risk-taking is part of the success story for any American business. It is also part of our national identity. It is no surprise that market-changing innovations in molecular biology and information technology, alike, are coming from the United States. One of our shared goals today, I think, is making sure that the balance between risk, hard work, and reward, upon which our thriving market economy has been based, remains strong.

Another characteristic antitrust enforcers and venture capitalists have in common: we both spend a lot of time thinking about what might happen to business in the future. As the Supreme Court put it, our review of mergers "requires a prediction of [a] merger's impact on competition, present *and* future."[3] We measure harm based on how the market might respond to a merger or to a course of conduct. This is not guesswork. Neither is venture capital investment. Instead, we both look at the market, draw from economics, and make educated predictions.

The antitrust laws also forbid "unreasonable" restraints of trade. How do you know if a restraint is unreasonable? In most cases, you have to think about how it affects firms' motivation and ability to compete. Then you need to measure the potential upsides against the possible downsides. This is similar to how a venture capitalist might evaluate an investment. What is the risk? What is the reward? Are we striking the best balance?

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[2] Charles Duhigg, *The Odds of Disaster*, L.A. TIMES, Jan. 25, 2005, https://www.latimes.com/archives/la-xpm-2005-jan-25-os-razorsedge25-story.html.

[3] *See F.T.C. v. Procter & Gamble Co.*, 386 U.S. 568, 577 (1967) ("The core question is whether a merger may substantially lessen competition, and necessarily requires a prediction of the merger's impact on competition, present *and* future." (emphasis added)).

Moreover, the antitrust laws prohibit firms from using exclusionary conduct to achieve or maintain monopoly power. In painting a picture of monopoly power, antitrust enforcers predict how diminished competition will result in the monopolist raising prices, or reducing quality. Of course, a common argument by defendants in antitrust cases is that the future of the market will not allow them to exercise that monopoly power. Instead, they argue that disruptive innovation is just around the corner.[4]

To address these arguments, antitrust enforcers often have to think hard about where innovation will really come from, or whether it will come at all. That means thinking a bit like a venture capitalist to assess whether a new platform or startup will actually be able to challenge those in power today.

In any case whether a merger is harmful, a restraint is unreasonable, or a course of conduct is exclusionary, antitrust enforcers have to ask the same question—what do we do about it now? In doing so, we focus on trying to restore competition in the market going forward.[5] That often involves asking what new competitors need to thrive in a constantly changing marketplace. It is a difficult challenge, but one familiar to many investors who support early-stage companies.

Not only do venture capitalists and antitrust enforcers often ask similar questions, I think we share similar values. Dynamic competition should drive markets. Investment should go to the best ideas. Disruption can create consumer value. These are the principles I have continually

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[4] *United States v. Microsoft Corp.*, 253 F.3d 34, 58 (D.C. Cir. 2001).
[5] *Id.* at 49 ("Conduct remedies may be unavailing in such cases, because innovation to a large degree has already rendered the anticompetitive conduct obsolete (although by no means harmless). And broader structural remedies present their own set of problems, including how a court goes about restoring competition to a dramatically changed, and constantly changing, marketplace.").

returned to in both of my tenures at the DOJ, and most recently as AAG. I first outlined these principles in my New Madison Approach to the intersection of antitrust enforcement and intellectual property rights.[6] They are also part of venture capital's DNA.

I also think we share similar goals. Venture capital is a critical part of healthy competition according to antitrust theory and policy because it makes monopoly prices unsustainable. After all, where a monopolist gains the ability to charge a higher price, a venture-backed startup finds an opportunity to take hold and share in those rents. The health of venture capital, and its promise of disciplining competition, is therefore vital for American consumers.

Venture capital, as most in this room know, also drives our innovation economy. It ensures that a good idea leads to an even better mousetrap. Incentivizing and rewarding this type of innovation is essential to spurring competition and disrupting monopolies because even a single bet can uproot an industry. Antitrust enforcers and venture capitalists both depend on making sure that these types of bets—in good ideas and in great entrepreneurs—are encouraged and rewarded.

Of course, the ability to take advantage of investment, such as through better innovation or development of intellectual property, is the essence of a strong market economy, and that result is not frowned upon by the antitrust laws.

To take one such example that I find fascinating: Slack is a company that invented a better solution to an office communications problem, despite Microsoft's leading role in that space.

[6] Makan Delrahim, Assistant Att'y Gen. for Antitrust, U.S. Dep't of Justice, The "New Madison" Approach to Antitrust and Intellectual Property Law (Mar. 16, 2018), https://www.justice.gov/opa/speech/file/1044316/download.

Before its official launch to the public in February 2014, Slack faced a fragmented market in enterprise collaboration — but the market was one in which many giants competed. At the time, Microsoft, IBM, and Cisco each had a version of an office "social network." There was no clear front-runner in the market, but Slack nevertheless encountered daunting odds: Financial analysts observed that Microsoft's Yammer, which functioned similarly to Slack in many respects, was "growing strongly in the nascent enterprise social networks segment," experiencing year-on-year growth of 34%.

Yet, through its integration with other useful programs and its accessible interface, Slack grew astronomically in daily active users — from zero to over 8 million within 5 years. It did much better than many others in solving problems with team communication, showcasing how an entrant can gain footing in a market otherwise dominated by experienced firms.

Notably, Slack would not exist but for the faith of the VCs in the product and, most importantly, in the people who make them. For this reason, the origin story of Slack is captivating:

Stewart Butterfield, the founder of Slack, had once been the CEO of a company called "Tiny Speck." He spent two years and raised $11 million to build an online adventure game — but by 2012, it was clear the game was a failure. Butterfield made plans to shutter the company and return the money to investors. Yet Andrew Braccia, a partner at the VC firm Accel, refused to accept the refund. Along with a few others, he encouraged Butterfield to keep the remaining $5 million and try something new.

The "something new" was Slack, which went public in June 2019 with a value of $19 billion at closing. Of course, one of the questions for our panelists here today is whether the success of Slack is an anomaly at odds with trends in the venture capital market. Slack's ability

to IPO and provide an independent source of competition to other technology platforms is an example of a venture capital system working to create a healthy economy. There is some evidence we will hear about later in the day, that these IPOs are increasingly rare. We as antitrust enforcers needs to understand this evidence and if there are any causal explanations at odds with the antitrust laws.

The decision to continue to invest was I presume, due largely to Braccia's faith in Butterfield. As Braccia later explained: "The reason we invested in Tiny Speck was because we were investing in that *team*. I told Stewart, 'If you want to continue to be an entrepreneur and build something, then I'm with you.'"

Why this determination? Perhaps Braccia understood the wisdom once observed by Brooks Atkinson, Pulitzer-prize winning American theatre critic: "This nation was built by men who took risks—pioneers who were not afraid of the wilderness, businessmen who were not afraid of failure, scientists who were not afraid of the truth, thinkers who were not afraid of progress, dreamers who were not afraid of action."

As many of you know, I came to this country as an immigrant. My parents were the ultimate entrepreneurs. They risked everything for a better life for me and my siblings. They picked America, as many other generations have. That is because among many other freedoms, our system of free markets provides the most promising returns on investments in hard work, education, and creative thinking. Our market economy, when it is free from unnecessary regulations by the government, and free from illegal monopoly restraints by companies, provides a risk-return rate that is the key to prosperity and dynamism.

As we engage in our discussions today, I am hoping to learn answers to several questions:

a. First, What does the VC community know about the likelihood of future disruptive innovation that could challenge today's technology giants?
b. Second, Are any of today's digital platforms so dominant, with such a capability to restrict access to inputs or to distribution of products, that investors are not willing to develop products that rely on those platforms?
c. Third, Where are we in the life cycle of the market for data about how people interact with websites, and with their phones or wearables? We are engaged in a national debate about the value of keeping that information private, but do we have a sense of what that information might be worth in different markets and how consumers may be served by rules that allow the collection and use of that data?
d. Fourth, What tools does the VC community use to evaluate the strategic value of a transaction, that we as antitrust enforcers can utilize to think about whether a transaction is premised on creating value for consumers, versus preventing competition?

Before I turn the floor over to our first panel of the day, I want to encourage you all to take note of the email address we have set up for this event, which is posted on the slides above (ATR.VCworkshop@usdoj.gov).

We hope that today's discussion will be so dynamic that you will want to get involved by emailing your thoughts, or maybe even your concerns about anticompetitive conduct you have witnessed, to our DOJ email account. You are of course welcome to request anonymity and confidentiality—it will be our DOJ staff receiving these emails only. We will also be using this email throughout the day to keep track of audience questions. Each panel's moderator will draw from the inbox to pose audience questions to their panelists. So please feel free to have your

phones out during this discussion and use the email address to ask your most burning questions to our excellent panelists.

With that, please welcome to the stage the W.A. Franke Professor of Law and Business, Dr. Joe Grundfest. Joe will introduce our first distinguished guest from the venture capital community.