United States of America
Federal Trade Commission

Bigger than "Big Tech?" The Need to Reform Our Health Care System Using Choice and Competition

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I. INTRODUCTION

Good evening! Many thanks to my alma mater, Georgetown University Law Center, and Professor Steve Salop, for whom I worked as a research assistant during law school, for inviting me to speak this evening. And many thanks to Jim Rill, an old friend and mentor of mine, for arranging for us to use this beautiful space. As always, I must begin by giving the standard disclaimer: The views I express today are my own, and do not necessarily reflect the views of the U.S. Federal Trade Commissi

special "strategic market status" for the very largest firms, a special "code of conduct," and expanded use of interim measures, particularly in fast-moving digital markets.[5]

Yet the idea that technology markets are fundamentally different, and therefore require different antitrust rules, has been advanced and rejected before. In *Microsoft*, for example, the D.C. Circuit noted "that there is no consensus among commentators on the question of whether, and to what extent, current monopolization doctrine should be amended to account for competition in technologically dynamic markets characterized by network effects."[6] It did not explicitly decide the question, but it did say there was "some suggestion that the economic consequences of network effects and technological dynamism act to offset one another,"[7] and as a practical matter it used traditional antitrust principles to affirm Section 2 liability. The Antitrust Modernization Commission (AMC) answered this question more directly several years later, stating in i6 (C 5a1der)4 (i)3.8 (rst r)4 (ecomm)8.8 (endation that)]TJ0.0001 Tc -0.0001 Tw 20.025 0 Td(“

B. No Special Antitrust Rles for Big Tech

Because there is nothing fundamentally different about digital markets, we should emphatically reject calls to formulate special antitrust rules for Big Tech. That means no special antitrust rules to promote privacy, or small businesses, or frankly any goal other than protecting competition to maximize consumer welrare. As I have said before, the FTC's antitrust and

[5] *Id.* at 5-6.
[6] *See*

users,"[19] which she says is in the tradition of previous railroad regulations policed by the Interstate Commerce Commission (ICC).[20] As our experience with the ICC and its sister airline regulator (the Civil Aeronautics Board, or CAB) showed, though, these apparently simple requirements were devilishly complex in practice.[21] Ultimately these agencies spawned anticompetitive regulations that cost consumers billions of dollars each year.[22] Eventually, policymakers realized their mistake, prompting a wave of deregulation ld

million settlement from Google's YouTube business. Nor were those fines just the cost of doing business – those settlements also required Facebook and YouTube to significantly change the way they operate, tightening privacy protections and imposing strong compliance procedures.

And although I believe the Commission has significant authority under existing law, I urge Congress to pass comprehensive privacy and data security legislation. Carefully crafted federal privacy legislation will set expectations for the business community, empower consumers to make informed choices, and fill emerging gaps in sectoral coverage – while preserving or even enhancing incentives to innovate and compete. To enable the FTC to exercise comprehensive oversight, I encourage Congress to repeal the common carrier and nonprofit exemptions to our statute. And to discourage misuse of consumer data, I encourage Congress to grant the FTC civil penalty authority for initial privacy violations. In the absence of legislation, the Commission and its dedicated staff will continue to safeguard Americans' privacy with the tools – and the limitations – that it currently has.

In short, there is nothing special about Big Tech that requires us to abandon longstanding principles that have served us well for many years. The Commission has long scrutinized this industry for both competition and consumer protection violations, and will of course continue to do so. Yet the *status quo* is not perfect, and I urge Congress to pass comprehensive federal privacy and data security legislation to augment our existing tools, standardize the emerging patchwork of state privacy laws, and promote interoperability in the international arena.

III. Health Care

So let me now turn to health care, which needs even more attention than we already give it.

The American health care industry is very important – both as a proportion of our overall economy and as a share of a citizen's paycheck. The Centers for Medicare and Medicaid Services (CMS) estimate that health care spending accounted for 17.9 percent of U.S. GDP in 2017, the most recent available year.[25] CMS also projects that health care will continue to grow almost 1 percentage point faster than the economy as a whole.[26] By 2027, CMS projects that health care spending will account for $6 trillion dollars, or 19.4 percent of U.S. GDP.[27]

Health care is also a significant priority for our citizens and their elected officials. For example, a recent poll by RealClear Opinion Research found that more respondents (36 percent) identified health care as the "top issue facing America today" than any other issue, and a majority of respondents (52 percent) ranked it as either their first or second most-pressing issue.[28] Similarly, a Gallup poll found that 24 percent of respondents were "very worried" about paying "medical costs for normal healthcare" and only 17 percent of respondents were "very satisfied" with the quality of medical care.[29] Given these concerns, it is not surprising that the topic attracts significant attention at both ends of Pennsylvania Avenue.

It likewise has attracted significant attention at 600 Pennsylvania Avenue, the Commission's headquarters. During recent decades, we have developed a laudable track record of protecting consumers and promoting competition in this industry. For example, under

[25] Centers for Medicare and Medicaid Services, National Health Expenditure Projec

Chairman Muris we revamped the way we analyze hospital mergers, an approach we still use with great success today. During the past 15 years, we have successfully sued to block several problematic hospital mergers, including recent transactions in Illinois and Pennsylvania.[30] We have also successfully used the approach to block significant mergers involving physician practices, including recent victories in Idaho and North Dakota.[31]

Similarly, the Commission has long battled anticompetitive patent litigation settlements in the pharmaceutical industry. Chairman Leibowitz in particular championed this effort, filing a number of new cases. These efforts culminated in the Commission's landmark Supreme Court victory in the *Actavis* case, which reversed an Eleventh Circuit ruling and held that patent litigation settlements can violate the antitrust laws and must be evaluated under the traditional rule of reason.[32]

Since then, the use of so-called reverse payments has plummeted, from an estimated 40 to

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50 percent of all pharmaceutical patent litigation settlements in fiscal years 2006 and 2007 to less than 1 percent – one settlement out of 232 – Tds12L00616. 40 to

Collectively, the Commission's enforcement efforts in the health care industry save consumers billions of dollars each year. The Commission remains very active,[40] though it takes serious effort to keep up with the pace of innovation in the industry. And I don't just mean the good kind of innovation – with billions of dollars at stake, savvy health care executives often face a very strong financial incentive to develop new business practices that weaken the competitive pressure they face from rivals. For this reason, we carefully monitor industry trends and are receptive to concerns from industry participants and consumers.

President Trump rightly has prioritized efforts to increase competition in the health care etitive prentn Tw

Treasury, the Department of Labor, and the FTC, issued a report called "Reforming America's Healthcare System Through Choice and Competition."[42] The report is packed with recommendations for increasing competition in the sector, including numerous proposals to expand competition among health care providers,[43] pare back state policies that restrict entry into provider markets,[44] reform insurance markets in ways that lower barriers to entry,[45] and arm consumers with better information about their health care options.[46]

Martin Gaynor, Farzad Mostashari, and Paul Ginsburg have released a similar report entitled "actionable policy proposals for the Executive branch, Congress, and the States."[47] They identify many of the same impediments to competition as HHS, and argue that the states should "eliminate certificate-of-need regulations," "eliminate any willing payer laws," loosen scope-of-practice restrictions, increase licensure portability, and "discontinue the use of certificates of public advantage."[48] The FTC has been active in many of these areas, often through competition advocacy or the Economic Liberty Task Force, and should continue to lend its voice to these efforts.

A third notable report was authored by current AEI scholar and former Food and Drug Administration head Scott Gottlieb. He recently released a call to action to protect competition

[42] U.S. Dep't of Health and Human Services, U.S. Dep't of the Treasury, & U.S. Dep't of Labor, Reforming America's Healthcare System Through Choice and Competition (Dec. 3, 2018) [hereinafter Joint Agency Health Care Report],

in the biologic drug industry.[49] Although fewer than 2 percent of Americans use biologic drugs, they account for 40 percent of total spending on prescription medications.[50] He worries that branded biologic firms are working overtime "to squelch competition from biosimilars,"[51] and recommends a number of steps to preserve competition in this space.[52]

In summary, there are many ideas to introduce greater competition in the health care system. Collectively, these proposals hit every level of the industry, including branded and generic pharmaceutical manufacturers, insurers, medical device manufacturers, pharmacies, pharmacy benefits managers (PBMs), providers, a

that harms consumers. Traditional antitrust tools are up to the task, just as they were when the D.C. Circuit decided *Microsoft* and when the Antitrust Modernization Commission issued its Final Report. Therefore, there is no need to formulate special antitrust rules for Big Tech, and certainly no need to short-circuit our traditional legal process by assuming liability and imposing a structural remedy by legislative fiat.

Although this debate is important, I fear that it is diverting our attention from the health care industry, which is at least as important to both the American economy and our citizens. The Commission has done great work in this area,