Update from the FTC's Bureau of Competition

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Introduction

Thank you, Josh Soven, for that extraordinarily kind introduction, and thank you to Global Competition Review for inviting me to speak this morning. It's my great pleasure to

- that conduct condemned as an unfair method of competition need not amount to a violation of the Sherman or Clayton Acts.[10]

And that last point bears repeating: Congress intended the FTC Act to address a broader

A method of competition is conduct an actor undertakes in the marketplace that relates, directly or indirectly, to competition.[14] In that way it's distinguishable from marketplace conditions not of the respondent's making, such as high concentration or barriers to entry.[15]

Conduct is unfair if it goes beyond competition on the merits.[16] Based on past cases and Commission experience, this usually involves conduct that is facially unfair, particularly where coercive, deceptive, predatory or, in general, an abuse of one's economic power.[17] And yes, that's a lot of adjectives. But that's because we need to respond in kind to the staggeringly diverse anticompetitive conduct we encounter. Of course, more is needed to be unfair under Section 5. The conduct can't just be abusive—it must also tend to negatively affect competitive conditions.[18] For example, does the conduct tend to foreclose or impair the opportunities of market participants, reduce competition between rivals, limit choice or otherwise harm consumers or workers?

So how do we evaluate these two aspects of unfair methods of competition? Which, again, involve abuse and the negative impact on competitive conditions. Well, they're analyzed on a sliding scale. If the abuse or coercion is clear, less is needed to show a tendency to negatively affect competitive conditions.[19] But, when conduct is not facially abusive, more

asserting a justification for the conduct bears the burden of showing it is legally cognizable, non-pretextual,[23][24]

liquidated damages. Nor did the employees receive any monetary compensation or job security

The Commission also considered whether the companies had any legitimate objectives of such noncompete agreements—such as protection of trade secrets or other confidential information—and found to the extent they were meaningfully present at all, they could have been achieved through significantly less restrictive means, such as confidentiality agreements. In fact, both Ardagh Glass and O-I Glass nullified the challenged noncompete restrictions after learning of the Commission's investigation, "apparently without incurring any notable impediment to their ability to achieve any legitimate business objectives."[32]

Noncompete Public Rulemaking

These three consent agreements are just the tip of the iceberg. Approximately one in five American workers are bound by noncompete agreements.[33] That's about 30 million American workers restricted from pursuing better employment opportunities. That's unacceptable and suggests that case-by-case enforcement in this area may not act as a sufficient deterrent.

It's hard to think of something more foundational to an employee than the freedom to pursue a better job or better working conditions. As the Supreme Court has observed, workers have an inalienable right to quit their jobs.[34] Cynosure, Inc. v. Cheetah Medical, Inc.,

resulted in higher processing fees for merchants. It's a matter of a few cents here and there, but given the popularity of ewallet transactions, the harm was real and widespread.

The Commission order, which is subject to final approval, would restore payment card network competition for remote ewallet payments involving Mastercard-branded debit cards, and it represent

already been talk of this of late,[44] but I'd like to touch on it too, since I lived through it (perhaps there are some here in the audience who did as well). The FTC found that, using the standards spelled out in the 2010 Horizontal Merger Guidelines, the proposed acquisition was unlikely to substantially lessen competition. However, one of the FTC Commissioners disagreed—FTC Commissioner Pamela Jones Harbour. She wrote a dissenting statement, arguing that the combination of Google and DoubleClick likely would affect the evolution of the entire online advertising market, particularly in light of the network effects the transaction would generate.

Over the years, the FTC, as well as independent researchers and scholars, have examined the effectiveness of FTC remedies that allowed otherwise illegal mergers to go forward.[47] Those deep dives revealed that divestitures have not worked nearly as well as we had hoped, and definitely not as well as was necessary to prevent the illegal mergers from undermining competition. For example, a 2017 FTC report noted that about one-third of FTC remedies either failed outright or took much too long to return the affected markets to the pre-merger state.[48] The study also found that divestitures of anything less than ongoing businesses were much more likely to fail.[49] A review of academic research on the adequacy of proposed remedies reveals concern and skepticism over efforts to fix—rather than block—anticompetitive mergers.[50] I would also note that various studies have also found that mergers themselves on average underperform relative to expectations of the parties and frequently do not even create B

What this means for the Bureau is that we are not going to engage in extended negotiations that sometimes drag on for months as the parties attempt to avoid a fulsome remedy