2919 Ellicott Street, NW
Washington, DC 20008
April 14, 2020

To: Subcommittee on Antitrust,
Commercial, and Administrative Law
Committee on the Judiciary
U.S. House of Representatives

Re: Competition in the Digital Marketplace

I am Albert A. Foer, founder and former president of the American Antitrust Institute, www.antitrustinstitute.org, of which I am currently a Senior Fellow. I am a former Acting Deputy Director of the Federal Trade Commission's Bureau of Competition and the former CEO of a mid-sized chain of retail jewelry stores. This statement does not purport to represent the views of anyone other than myself. I will address in passing the three questions posed in your letter dated March 13, 2020, while addressing in more depth a specific proposal for reform which has a track record in several other countries that are our trading partners..

1. Adequacy of existing laws

The existing antitrust laws are not adequate to address all potentially significant anti-competitive conduct in the digital marketplace. Although the three principal antitrust laws (Sherman, Clayton, and FTC acts) are cast in broad and flexible language, the current interpretations that have evolved over time are too narrow and backward looking, subject to a court system that is too narrowly oriented to provide the policies that the new and rapidly changing digitally-based economy require.

The following topics seem to me to be four of the most problematical:

(1) The mixture of data abuse, privacy, consumer protection, and competition concerns requires a more unified approach than can be offered by today's antitrust agencies. The FTC seems to me best suited, with enhanced powers, to provide the needed policy coordination.

(2) The digital industry and its implications are global, whereas our antitrust laws are primarily domestic. I see little likelihood of a unified global policy emerging, but I am not convinced that we are making a sufficient effort to work with the rest of the computerized industrial world to arrive at coherent policies.

(3) Control over a platform often allows a company to discriminate against those who are dependent upon supplying goods and services through the platform, thereby giving the platform leverage because of its ability to favor certain vendors and to

engage in dual distribution by selling their own products in competition with those of their vendors. This can be alleviated by requiring network neutrality and eliminating dual distribution.

(4) The US economy has shifted in a related seismic way that has not been adequately recognized by the antitrust world, from its initial primary concern with the power of large-scale sellers (monopoly and oligopoly) to a world in which power lodges in large-scale buyers such as Walmart, Google, and Amazon. The dynamics are different where a much smaller national market share than what constitutes "monopoly" may generate de facto coercive power over those who depend on a platform for reaching their market. I will address this in section 2 below by focusing on Abuse of Superior Bargaining Position (ASBP).

2. Anti-Competitive Vertical Transactions: Abuse of Superior Bargaining Position

I present here one specific but not well-known reform which I believe could fill an important gap in the current law.

The gap is located in the law of vertical restraints and is exacerbated by the new importance of digital platforms. Antitrust today focuses almost entirely on horizontal relationships, where firms compete head-on against one another. For example, there is bipartisan agreement in favor of vigorous enforcement against price-fixing by direct competitors. But when a buyer and seller interact in a vertical manner, the teachings of the still-dominant Chicago School assure that the government rarely interferes with a vertical interaction. Because our antitrust focus today is on horizontal "markets" and "market power" rather than on the actual abuse of power itself by one strong economic player against a weaker one, the laws of monopoly and monopsony (*i.e*., monopoly on the buyer side) tend only to apply when the alleged abuser has a high share of a defined market, typically over 60%.

The troublesome gap in our laws occurs when a buyer or a seller with less than a monopolistic market share has the *de facto* coercive power to abuse its superior bargaining position *vis a vis* another party in the distribution chain. This could be a Google illegitimately disadvantaging one of the supplier companies that needs to be found in a search; or a Walmart demanding certain improper concessions from a vendor; or an Amazon threatening a seller who advertises at a price Amazon disapproves; or even a major unnamed real estate developer who systematically refuses to pay the full contractual price to contractors after the job is completed.

Several of our trading partners have dealt with the same gap through legislating a new kind of antitrust law called "Abuse of Superior Bargaining Power" (ASBP).

Our defenders of big business and many enforcers oppose the idea of ASBP because, if not applied very carefully, it could have a chilling effect on commerce. Responsible enforcement would require regulatory clarification of several key questions. How would a company predict that its bargaining power is "superior"? What level of "coercion" must be present? What is "abuse"? What ''safe harbors" are needed to avoid the unintended result that every contract becomes contestable? And what remedies are appropriate? These are definitely important questions.

On the other hand, countries like Germany, Japan, and South Korea have been dealing with such questions for sufficient time now that they might have a lot to teach us as to what approaches do or do not work in practice. If minds are open to the possibility of learning from other market-driven economies, there is no reason our government—or an independent foundation-- should not systematically study whether ASBP can be shaped within our country's framework to fill an expanding hole in the existing law that advantages the largest platform companies and makes it more and more difficult for smaller ones to compete on the merits.

For further detailed information about ASBP, please see my AAI Working Paper #16-2, https://www.antitrustinstitute.org/wp-content/uploads/2018/09/AAI-Working-Paper-No.-16-02.pdf, which concludes with the following specific recommendations:

1. Empirical information on the frequency and impact of the various forms of ASBP should be gathered by the FTC in public workshops and by formal investigation, including evidence of how ASBP has been enforced in other jurisdictions and the effects. The workshops would take into account current protections (or not) under civil contract and tort law and should lead to a public staff report including findings of fact and staff recommendations as to how the Commission should go forward (if at all), e.g., by enforcement actions aimed at specific conduct, by publishing guidance as to how the FTC will interpret Section 5 of the FTC Act in this area, by rulemaking, or (if Section 5 cannot be utilized) by formal legislative recommendation to Congress.

2. Critical issues in regard to possible reforms include: narrowing the vagueness of any standards so that every contract cannot be questioned; defining as clearly as possible how much dependency and what level of coercion is challengeable; and designing procedures that are relatively quick and inexpensive.

3. With regard to any substantial problems empirically identified, an enforcement strategy should be considered under Section 5. Such guidance or rule should provide as much transparency and specificity as possible so that parties will generally be able to predict *ex ante* what types of situations and practices will be deemed by the FTC to be abusive. Creation of a safe harbor should specify that a claim will be dismissed upon a showing

that the supplier has at least one reasonably feasible alternative outlet. A claim may be defeated upon a showing that reasonably anticipated significant efficiencies will be created and passed on in largest part to consumers.

4. Legislative consideration should be given to providing a private remedy as well as any clarification or expansion of FTC jurisdiction. The costs of litigation and the ability of small businesses to recover losses created by ASBP should be paramount. The ability to aggregate claims in litigation or at least in arbitration must be made available, with treble damages for clear abuses as a deterrent. This is likely to be the most controversial aspect of reform and might therefore be delayed until experience has been gained under whatever FTC program is effectuated.

Thank you for this invitation to provide my observations on these matters.

Sincerely,

s/

Albert A. Foer