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ANTITRUST DIVISION ROUNDTABLE DISCUSSION

ON

"ANTICOMPETITIVE REGULATIONS"

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Thank you for inviting Consumers Union, the advocacy division of Consumer Reports,[1] to this important discussion on the appropriate role of regulation in an economy grounded, first and foremost, in free-market forces.

Today's topic is sort of the mirror image of the topic we discussed in the first roundtable – how to decide when it's appropriate for the antitrust laws to be displaced because of some other policy objective. And I will be saying again today what I said then – that competition and regulation each works best when they work hand-in-hand.

From our founding over 80 years ago, we have been strong supporters of the antitrust laws. We deeply appreciate the importance of sound and effective antitrust enforcement in protecting and promoting healthy competition in the marketplace, and the benefits that competition brings all of us as consumers, springing from the leverage of choice.

But our organization does not embrace unlimited business freedom. Our focus is on ensuring that consumers have a marketplace that they can trust to be safe, fair, and just. Competition is one aspect of promoting that, because – combined with enough transparency so that consumers are aware of their choices – it helps align business incentives with the interests of consumers.

But experience has demonstrated time and time again that we cannot rely on free market forces to ensure that the incentives of businesses, acting on the opportunities that present themselves for profit-making, are aligned with consumer interests, always and completely.

Accordingly, our advocacy on behalf of consumers goes far beyond supporting a competitive marketplace as protected by the antitrust laws. Competition policy and regulatory policy work most effectively when they each appreciate the role of the other – when they work hand in hand.

[1] Consumers Union is the advocacy division of Consumer Reports, an expert, independent, non-profit organization whose mission is to work for a fair, just, and safe marketplace for all consumers and to empower consumers to protect themselves. Consumers Union works for pro-consumer policies in the areas of antitrust and competition policy, food and product safety, health care, financial services, telecommunications and technology, privacy and data security, transportation, and other consumer issues, in Washington, D.C., in the states, and in the marketplace. Consumer Reports is the world's largest independent product-testing organization, using its dozens of labs, auto test center, and survey research department to rate thousands of products and services annually. Founded in 1936, Consumer Reports has over 7 million subscribers to its magazine, website, and other publications.

A free market governed only by competitive market forces is not going to ensure that products are safe. It is not going to ensure that consumers are not cheated. It is not going to ensure that consumer privacy is not violated and exploited. It is not going to ensure that consumers have access to a full variety of viewpoints on important issues of the day.

It is not going to ensure that consumers are not left vulnerable because a business is in such a rush to get its products and services to market, or in such a rush to complete one project and get on to the next one, that it cuts corners in a careless and risky manner.

Experience has demonstrated that we need regulation to guard against these and other risks and hazards.

We need a Food and Drug Administration. We need a Consumer Product Safety Commission. We need a Federal Aviation Administration. We need a Federal Communications Commission. We need an Environmental Protection Agency. We need a National Highway Traffic Safety Administration. We need a Federal Trade Commission. We need a Securities and Exchange Commission. We need a Consumer Financial Protection Bureau. We need a Criminal Division in the Justice Department, not just an Antitrust Division. To name a few prominent examples at the federal level.

And here's a small list of a few protections those agencies have been responsible for bringing to consumers over the past few decades:

- The ban on lead paint, and on its use in children's products and furniture.
- Safety standards for cribs, including a ban on hazardous drop-side cribs.
- Food safety standards for meat and poultry.
- Vehicle fuel economy standards – and seat belts.

- The "Do Not Call" list.

- Required prior consent for cable companies to collect and share a consumer's personal information.

- Fair Credit Reporting Act requirements that credit bureaus permit people to access and challenge the information on file, and that limit the purposes for which these personal records can be accessed and used.

And that's just at the federal level. At the state and local level, you have building codes, for example.

Granted, any one of these consumer protections might eventually have been offered by some businesses, over the course of time. But the fact is, they weren't. And too many people were being harmed.

Furthermore, even if we assume that the free market would eventually have induced *some* businesses to offer protections like these, as a selling point, it would never have induced *all* businesses to do so. And do we want to leave it up to a toy maker to decide the pros and cons of using lead-based paint in children's toys?

So competition is no substitute for regulation. Granted, competition might potentially help *reinforce* incentives to comply with a regulation, by enhancing a brand's reputation, on the margins. Competition might thereby help promote greater compliance, and might help reduce enforcement costs. But regulation provides the foundation.

In any regulatory endeavor, there's going to be a search for that appropriate spot, where the rules provide adequate protections for the public, without unduly burdening the businesses who must adjust their practices to comply. Excessive burdens do impose unnecessary costs, and divert productive resources. Inadequate protections lead to avoidable harm, sometimes devastating harm, and often to unjust enrichment for those responsible for causing the harm.

In searching for that appropriate spot, every federal regulatory endeavor is undertaken pursuant to Congressional authorization, and is subject to public notice and comment, and to a deliberative process in the agency. The agency can be overturned if a court finds that a resulting rule is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. There's a similar authorization, process, and review at the state and local level. Often, and perhaps understandably, it is the businesses being regulated who are able to devote disproportionate resources to getting their point of view across, both to the legislature and to the agency, as well as to the courts. Nonprofit consumer organizations like us also do what we can, with the resources we have.

One consideration in searching for finding that appropriate spot can be whether the approach being proposed in the regulatory endeavor is going to create undue impediments to competition. But it is important that this consideration be properly understood and contained.

In antitrust circles, we understand the objective of a "competitive marketplace" in terms of healthy rivalry among businesses each seeking to offer products and services. In the loose parlance of business circles, however, "competitiveness" is often understood to mean something different, something like "strength," or "ability to make profits."

The former conception is well within the experience and expertise of the Antitrust Division and the Federal Trade Commission. In fact, the agencies have a unique combination of experience, expertise, and credibility to draw upon in assessing how a particular restriction or requirement might make more likely, or less, the viability of healthy business rivalry that would give consumers the benefits that flow from the leverage of having meaningful choice.

The antitrust agencies have over the years provided a valuable service to other federal agencies and to Congress, and to state agencies and legislatures, that were considering market regulation, in advising them on alternatives for achieving a regulatory objective without unduly restraining competition. Perhaps the most common situation has been some effort by a state to restrict entry into a business, trade, or profession.

A prominent example of this is the Division's joint recommendations, along with the Federal Trade Commission, supporting repeal – or opposing enactment – of certificate-of-need laws that erect hurdles to the creation of new medical facilities, or to their expansion. Originally intended to reduce health care costs by avoiding the creation of unneeded facilities, these laws have been shown instead, with experience, to enable established facilities to block entry from new competition, and thereby to increase health care costs, and sometimes inhibit innovation. These joint agency recommendations to rein in certificate-of-need barriers have been submitted to Georgia, Florida, North Carolina, Virginia, South Carolina and, most recently, Alaska.

Similarly, the FTC has advised state legislatures on a number of proposals to open up, or to restrict, professional services, such as its comments in March of this year on an Ohio State Senate proposal regarding what dental hygienists and dental therapists are permitted to do.

And on the federal level, the Antitrust Division has submitted formal comments to the FCC on spectrum auctions, to the FAA on managing airport capacity constraints, and to the SEC on conflict-of-interest protections in implementing Dodd-Frank, to cite a few examples.

In addition to these formal public comments, the Division also routinely advises other federal Executive Branch agencies on the competitive implications of proposed rulemakings informally via the interagency review process.

When a regulation involves directly raising or relaxing a barrier to market entry, an antitrust perspective can be particularly useful. While still recognizing, of course, that there can be countervailing policy interests – like safety – that may justify what might be viewed, through a strictly antitrust prism, as a restraint of trade. The Sherman Act prohibits only *unreasonable* restraints of trade. And Congress ultimately has the prerogative, as do the states under the state action doctrine, to decide that a particular restraint is reasonable. We might not want to leave it up to the antitrust laws and the free market to decide who can perform brain surgery.

When I was on the House Judiciary Committee staff, we spent a good deal of effort stopping other committees from tossing an antitrust exemption into a larger regulatory bill. Sometimes it seemed to be some kind of offsetting gift to soften the blow of a new regulatory requirement. Sometimes the apparent purpose was to help induce companies to join forces together in pursuit of some regulatory objective, by shielding their collaborations against antitrust uncertainty, real or imagined. But in all cases, the premise was generally the other committee's view that the antitrust laws could serve as a bargaining chip, and could be negotiated away.

Of course, Congress enacted the antitrust laws, and it can create antitrust exemptions. On the Judiciary Committee, we said there should be a high bar for creating one, that it should be done only where there is a demonstrable and compelling overriding public interest that is truly irreconcilable with antitrust. But importantly, we thought the right place in Congress for making that assessment was in the Judiciary Committee, which had the experience and expertise, and the appreciation for the importance of antitrust, to make it. And had the sensitivity to look for ways that a regulatory objective in the public interest could be pursued without interfering with the antitrust laws. We quite rightly didn't think other committees were as capable of making that assessment.

But saying antitrust should not be relegated to second class does not mean it belongs at the top of the pyramid. Even less should there be a laissez faire retreat from regulatory protections, based on faith that free-market competition under the antitrust laws will give us all the protections we need. Again. competition and regulation work best when they work hand in hand. And the further away we are from assessing effects on competitive rivalry, and its benefits to consumers through the leverage of choice, the less reason there is for the antitrust agencies to be involved in advising the rest of the government on how to regulate.

A generalized observation that regulatory compliance imposes costs that can be harder for smaller companies to absorb, and that can make it harder for new firms to enter the market, is not an antitrust insight, and does not need to come from the antitrust agencies.

Rest assured, that still leaves a wide range of regulations and regulatory proposals where the antitrust community, and the antitrust agencies in particular, have an important perspective to contribute.

Even in the core situations, when a regulation directly and overtly restricts market entry into an occupation, there generally is an underlying safety concern, or important quality-of-service concern, put forth as justification. The question is whether the particular licensing qualifications, or other restrictions on practicing the occupation, are necessary to address the concern, or if there is an alternative means of effectively addressing it that is less restrictive on competition.

Still, the mere fact that a regulation directly and overtly restricts competition, and that existing players benefit from that restriction, and even that they support the regulation because of that benefit, does not necessarily condemn the regulation, although those are certainly relevant factors to consider.

Finally, while all markets have their special characteristics that must be understood to make assessments about appropriate regulation, Telecommunications and media are probably in a class by themselves. There are numerous interactions among a variety of businesses in production and distribution, involving complex technology. And even where the regulatory interests overlap with antitrust's interest in competition, the FCC's public interest standard is broader, also taking other concerns into account. Like ensuring universal affordable service, and access to a full diversity of viewpoints.

And even as to the core issue of competition, consumers' interest in choice goes beyond just making sure rivals are not conspiring not to compete, and making sure dominant firms are not seeking to monopolize. Net neutrality is a prime example of the limits of the Sherman Act.

In short, the broader issues of the impact of regulation on business and on the economy are important, and worthy of discussion. We should just be careful not to try too hard to turn them into antitrust issues.

Thank you.