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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 Commission or any other Commissioner.

It's now September, which means two things. First, many of us – myself included – have returned to the office after some rest and relaxation. Second, all that R&R means folks are recharged and ready to dive back into the big cases and policy debates.

One of the hottest debates in town right now pertains to the role that large technology companies – which I'll call "Big Tech" for simplicity – should play in our lives and our markets. This debate includes both traditional competition analyses, as applied in merger and conduct matters, and consumer protection issues, including data security and the emerging patchwork of privacy laws. In the past two months, the Commission has announced two historic privacy settlements, one with Facebook and the other with Google's YouTube business. More broadly, it seems that everyone here and abroad – from our sister agency to Congress to the states to foreign enforcers – is taking a close look at these companies.

I agree that scrutiny of Big Tech is warranted. Yet I also fear that the current debate may divert a disproportionate amount of our attention from anticompetitive practices in many other sectors of the economy. So this evening, I will briefly join the debate on Big Tech and then shift to discuss competition in the health care sector, which I believe is at least as important but has received considerably less attention of late.

II. BIG TECH

So let us start with Big Tech. As I mentioned a moment ago, regulators around the world are debating whether and how to regulate the sector. Numerous governments, including Australia, the EU, Japan, and the U.K., have released policy proposals on this topic.[1] Academics are also eagerly entering the fray, holding conferences, publishing articles, and writing policy manifestos.[2]

A. There Is Nothing Fundamentally Different about Big Tech

Many, but not all, argue that Big Tech operates in markets that are fundamentally different from traditional markets. Take, for example, the U.K. Furman Report, which states that "traditional competition tools" are insufficient to police anticompetitive conduct in digital markets.[3] This belief is founded in large part upon the twin assumptions that "[i]n many cases, digital markets are subject to 'tipping' in which a winner takes most of the market" and that "competition for the market cannot be counted on, by itself, to solve the problems associated with market tipping and 'winner take most.'"[4] Consequently, the Report recommends the imposition of special rules for digital markets, including the creation of a special regulator, a

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[1] *See* AUSTRALIAN COMPETITION & CONSUMER COMM'N, DIGITAL PLATFORMS INQUIRY – FINAL REPORT, July 26, 2019, *available at* https://www.accc.gov.au/publications/digital-platforms-inquiry-final-report; JACQUES CRÉMER ET AL., ADVISORS TO THE EUROPEAN COMMISSION, COMPETITION POLICY FOR THE DIGITAL ERA – FINAL REPORT, Apr. 4, 2019, *available at* https://ec.europa.eu/competition/publications/reports/kd0419345enn.pdf; Press Release, Japan Fair Trade Comm'n, Request for Public Comments on "Guidelines Concerning Abuse of a Superior Bargaining Position under the Antimonopoly Act on the Transactions between Digital Platform Operators and Consumers that provide Personal Information, etc.," Aug. 29, 2019, *available at* https://www.jftc.go.jp/en/pressreleases/yearly-2019/August/190829.html; JASON FURMAN ET AL., UNLOCKING DIGITAL COMPETITION: REPORT OF THE DIGITAL COMPETITION EXPERT PANEL, Mar. 2019 [hereinafter FURMAN REPORT], *available at* https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/785547/unlocking_digital_competition_furman_review_web.pdf

[2] *See, e.g.*, Univ. of Chi. Booth Sch. of Bus., Stigler Ctr. for the Study of the Econ. and the State, Report of the Committee for the Study of Digital Platforms, Market Structure and Antitrust Subcommittee, July 1, 2019, *available at* https://research.chicagobooth.edu/-/media/research/stigler/pdfs/market-structure-report.pdf.

[3] FURMAN REPORT, *supra* note 1, at 2.

[4] *Id.* at 3-4.

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 its very first recommendation that "[t]here is no need to revise the antitrust laws to apply different rules to industries in which innovation, intellectual property, and technological change are central features."[8]

I agree with the D.C. Circuit and the AMC that antitrust is sufficiently flexible to meet the current challenge.

B. No Special Antitrust Rules 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 welfare. As I have said before, the FTC's antitrust and

[5] *Id.* at 5-6.
[6] *See* United States v. Microsoft Corp., 253 F.3d 34, 50 (D.C. Cir. 2001) (en banc) (per curiam).
[7] *Id.*
[8] ANTITRUST MODERNIZATION COMMISSION, REPORT AND RECOMMENDATION 9 (Apr. 2007), *available at* https://govinfo.library.unt.edu/amc/report_recommendation/amc_final_report.pdf.

privacy mandates developed separately, and today remain separate.[9] U.S. law does not allow us to consider privacy as a stand-alone value in antitrust cases, although there are instances in which privacy policies may be evaluated as a form of non-price competition. We therefore cannot follow the approach the German Bundeskartellamt took in its Facebook decision,[10] which a German appellate court has since suspended after expressing "serious doubts" about the legal basis for the decision.[11]

It also means no special rules for particular assets like "Big Data."[12] Matters like Nielsen/Arbitron demonstrate that the Commission has ample experience evaluating mergers that involve data as an input.[13] And our successful challenge of the CCC/Mitchell merger shows that we also have plenty of experience evaluating mergers in which the relevant product itself (there, "estimatics" data products) is data.[14] In short, I see little about Big Data that is inherently different from the types of markets and types of cases that we have seen before. Therefore, there is little reason to create special antitrust rules for mergers and conduct cases that implicate its use.

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[9] *See* Christine S. Wilson, All Industries in the Same Boat: Staying the Course on the High Seas of High Tech 4-7, Address at the CCIA Conference on Competition, Data, and Innovation in the Digital Economy, Mar. 28, 2019, *available at* https://www.ftc.gov/system/files/documents/public_statements/1512148/wilson_remarks_ccia_3-28-19.pdf [hereinafter Staying the Course].

[10] *See* Bundeskartellamt, Case Summary: Facebook, Exploitative business terms pursuant to Section 19(1) GWB for inadequate data processing, Ref. No. B6-22/16 (Feb. 15, 2019) (summarizing the decision dated Feb. 6, 2019), *available at* https://www.bundeskartellamt.de/SharedDocs/Entscheidung/EN/Fallberichte/Missbrauchsaufsicht/2019/B6-22-16.pdf?__blob=publicationFile&v=4.

[11] Sara Germano, *Facebook Wins Appeal Against German Data-Collection Ban*, WALL ST. J., Aug. 26, 2019, *available at* https://www.wsj.com/articles/facebook-wins-appeal-against-german-data-collection-ban-11566835967.

[12] *See* Staying the Course, *supra* note 9, at 8-9.

[13] *See Nielsen Holdings N.V.*, No. C-4439, Feb. 24, 2014 (Decision & Order) (ordering the divestiture of software and associated data inputs).

[14] *See* Press Release, FTC Granted Preliminary Injunction Preventing CCC's Merger with Mitchell (Mar. 9, 2009), *available at* https://www.ftc.gov/news-events/press-releases/2009/03/ftc-granted-preliminary-injunction-preventingcccs-merger; Press Release, FTC Challenges Verisk Analytic's Inc.'s Proposed Acquisition of EagleView Technology Corporation, Dec. 16, 2014, *available at* https://www.ftc.gov/news-events/pressreleases/2014/12/ftc-challenges-verisk-analytics-incs-proposed-acquisition.

Nor we should create special remedy rules for Big Tech.[15] We should resist proposals, like the one advanced by Senator Warren, that would "break up" Big Tech by legislative fiat.[16] Rather, we should retain the traditional legal requirement that the government convince an impartial judge (i) that the defendant has committed an antitrust violation and (ii) that breaking up the firm would best remedy the legal violation and restore competition. And we must think very carefully about the remedy *before* we bring any enforcement action, particularly for a Section 2 case. In that assessment, we must compare a structural remedy with the likely state of competition under other scenarios, including what we think would happen if we did not take any action. Some markets, particularly dynamic markets, may evolve in ways that erode monopoly power far faster than can a federal case.

Beyond antitrust, we should also be wary of recent proposals to create new sectoral regulations that go far beyond the traditional bounds of antitrust.[17] Many have proposed, including in the pages of the *Financial Times* and the *Columbia Law Review*,[18] that we should impose railroad-style regulations on Big Tech. Likewise, Senator Warren envisions new statutes requiring digital platforms to engage in "fair, reasonable, and non-discriminatory dealing with

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[15] *See* Staying the Course, *supra* note 9, at 8-9.

[16] Elizabeth Warren, *Here's How We Can Break Up Big Tech*, MEDIUM, Mar. 8, 2019, https://medium.com/@teamwarren/heres-how-we-can-break-up-big-tech-9ad9e0da324c ("Companies with an annual global revenue of $25 billion or more and that offer to the public an online marketplace, an exchange, or a platform for connecting third parties would be designated as 'platform utilities.' These companies would be prohibited from owning both the platform utility and any participants on that platform. Platform utilities would be required to meet a standard of fair, reasonable, and nondiscriminatory dealing with users. Platform utilities would not be allowed to transfer or share data with third parties.").

[17] *See* Christine S. Wilson, Remembering Regulatory Misadventures: Taking a Page from Edmund Burke to Inform Our Approach to Big Tech, Address at the British Institute of International and Comparative Law, June 28, 2019 [hereinafter Regulatory Misadventures], *available at* https://www.ftc.gov/system/files/documents/public_statements/1531816/wilson_remarks_biicl_6-28-19.pdf.

[18] *See id.*at 16 (citing Rana Foroohar, *Big Tech is America's New "Railroad Problem,"* FINANCIAL TIMES, June 16, 2019, https://www.ft.com/content/ec3cbe78-8dc7-11e9-a1c1-51bf8f989972; Lina M. Khan, *The Separation of Platforms and Commerce*, 119 COLUM. L. REV. (2019), available at https://columbialawreview.org/content/the-separation-of-platforms-and-commerce/)

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 and the disbandment of both the ICC and the CAB.[23] Prices fell, output increased, and innovation quickened once these stifling regimes fell away.[24]

C. The Path Ahead

Although Big Tech may not be particularly unusual, it still deserves close scrutiny under traditional antitrust rules. Although we cannot comment on ongoing investigations, suffice it to say that we have long scrutinized this industry and we will continue to do so. And the Commission will not hesitate to bring cases if we have reason to believe that large technology companies – or small ones, for that matter – have violated our antitrust laws.

The same is true of privacy violations. As I mentioned a moment ago, the Commission has been very active this year, extracting a $5 billion settlement from Facebook and a $170

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[19] Elizabeth Warren, Here's How We Can Break Up Big Tech, MEDIUM, Mar. 8, 2019, https://medium.com/@teamwarren/heres-how-we-can-break-up-big-tech-9ad9e0da324c ("A century ago, in the Gilded Age, waves of mergers led to the creation of some of the biggest companies in American history – from Standard Oil and JPMorgan to the railroads and AT&T. . . . Instead of nationalizing these industries – as other countries did – Americans in the Progressive Era decided to ensure that these networks would not abuse their power by charging higher prices, offering worse quality, reducing innovation, and favoring some over others. We required a structural separation between the network and other businesses, and also demanded that the network offer fair and non-discriminatory service. In this tradition, my administration would restore competition to the tech sector by taking two major steps…. First, by passing legislation that requires large tech platforms to be designated as "Platform Utilities" and broken apart from any participant on that platform….Platform utilities would be required to meet a standard of fair, reasonable, and nondiscriminatory dealing with users.").

[20] *Id.*

[21] *See* Regulatory Misadventures, *supra* note 17, at 4-13 (describing the arc of the ICC and CAB).

[22] *See id.* at 11 (ICC), 13 (CAB).

[23] *See id.* at 9-10 (ICC), 12-13 (CAB).

[24] *See id.* at 10-11 (ICC, 12-13 (CAB).

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

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[25] Centers for Medicare and Medicaid Services, National Health Expenditure Projections 2018-2027: Forecast Summary, https://www.cms.gov/Research-Statistics-Data-and-Systems/Statistics-Trends-and-Reports/NationalHealthExpendData/Downloads/ForecastSummary.pdf ("Health spending is projected to grow 0.8 percentage point faster than Gross Domestic Product (GDP) per year over the 2018-27 period; as a result, the health share of GDP is expected to rise from 17.9 percent in 2017 to 19.4 percent by 2027.").

[26] *Id.*

[27] *Id.* ("Under current law, national health spending is projected to grow at an average rate of 5.5 percent per year for 2018-27 and to reach nearly $6.0 trillion by 2027. . . [A]s a result, the health share of GDP is expected to rise from 17.9 percent in 2017 to 19.4 percent by 2027.").

[28] Carl M. Cannon, New Poll Shows Health Care Is Voters' Top Concern, May 15, 2019, https://www.realclearpolitics.com/real_clear_opinion_research/new_poll_shows_health_care_is_voters_top_concern.html

[29] Gallup, In Depth: Healthcare System, https://news.gallup.com/poll/4708/healthcare-system.aspx (infographic #4, April 2019 data (most recent available observation); infographic #8, 2019 data (most recent available observation)).

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 50 percent of all pharmaceutical patent litigation settlements in fiscal years 2006 and 2007 to less than 1 percent – one settlement out of 232 – in fiscal year 2016.[33] Although problematic new agreements are now rare, the Commission continues to litigate older settlements and clarify the

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[30] *See* FTC v. Advocate Health Care Network, 841 F.3d 460 (7th Cir. 2016); FTC v. Penn State Hershey Med. Ctr., 838 F.3d 327 (3d Cir. 2016).

[31] FTC v. Sanford Health, 926 F.3d 959 (8th Cir. 2019); Saint Alphonsus Med. Ctr.-Nampa Inc. v. St. Luke's Health Sys., Ltd., 778 F.3d 775 (9th Cir. 2015).

[32] FTC v. Actavis, Inc., 570 U.S. 136, 158 (2013) ("In sum, a reverse payment, where large and unjustified, can bring with it the risk of significant anticompetitive effects; one who makes such a payment may be unable to explain and to justify it; such a firm or individual may well possess market power derived from the patent; a court, by examining the size of the payment, may well be able to assess its likely anticompetitive effects along with its potential justifications without litigating the validity of the patent; and parties may well find ways to settle patent disputes without the use of reverse payments. In our view, these considerations, taken together, outweigh the single strong consideration—the desirability of settlements—that led the Eleventh Circuit to provide near-automatic antitrust immunity to reverse payment settlements.").

[33] Jamie Towie & Brad Albert, FTC Bureau of Competition, Then, Now, and Down the Road: Trends in Pharmaceutical Patent Settlements after *FTC v. Actavis*, May 28, 2019, https://www.ftc.gov/news-events/blogs/competition-matters/2019/05/then-now-down-road-trends-pharmaceutical-patent ("After some courts largely inoculated most reverse payments from antitrust review in 2005, the use of reverse payments skyrocketed. In 2004, none of the final settlements included reverse payments. In FY 2006 and FY 2007, 40-50% of all final settlements filed with the FTC contained reverse payments."); *id.* ("Parties can—and do—settle patent litigation without the brand company paying its potential generic competitor. Of the 232 final settlements received in FY 2016, only one contained … the most commonly challenged forms of reverse payments.").

law. To that end, our recent *Impax* case was the first opportunity since *Actavis* for the Commission to clarify and operationalize that ruling.[34]

Of course, the Commission has brought many cases in other segments of the health care industry.[35] In April of this year, the Commission brought a monopolization case against Surescripts, the dominant provider in two electronic prescription markets.[36] This June the Commission required the divestiture of assets in Nevada as part of a consent agreement allowing health insurer UnitedHealth Group to acquire DaVita Medical Group, a network of physician practice groups.[37] And in July the Commission settled allegations that the pharmaceutical company Reckitt Benckiser monopolized the market for certain opioid addition treatments by engaging in a "product hopping" strategy that allowed it to thwart the entry of lower-cost generic drugs.[38] Reckitt Benckiser agreed to pay $50 million as part of the settlement.[39]

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[34] *Impax Labs., Inc.*, No. 9373, Mar. 28, 2019, *available at* https://www.ftc.gov/system/files/documents/cases/d09373_impax_laboratories_opinion_of_the_commission_-_public_redacted_version_redacted_0.pdf

[35] Indeed, this paragraph covers only a few of the Commission's recent cases. *See also*, *e.g.*, Press Release, FTC Requires Divestitures and Imposes Conditions on Boston Scientific Corp.'s Acquisition of BTG plc, Aug. 7, 2019, https://www.ftc.gov/news-events/press-releases/2019/08/ftc-requires-divestitures-imposes-conditions-boston-scientific; Press Release, FTC Requires Fresenius Medical Care AG & KGaA and NxStage Medical, Inc. to Divest Bloodline Tubing Assets to B. Braun Medical, Inc. as a Condition of Merger, Feb. 19, 2019, https://www.ftc.gov/news-events/press-releases/2019/02/ftc-requires-fresenius-medical-care-ag-kgaa-nxstage-medical-inc; Press Release, FTC, Last Remaining Defendant Settles FTC Suit that Led to Landmark Supreme Court Ruling on Drug Company "Reverse Payments," Feb. 28, 2019, https://www.ftc.gov/news-events/press-releases/2019/02/last-remaining-defendant-settles-ftc-suit-led-landmark-supreme; Press Release, FTC Enters Global Settlement to Resolve Reverse-Payment Charges against Teva, Feb. 19, 2019, https://www.ftc.gov/news-events/press-releases/2019/02/ftc-enters-global-settlement-resolve-reverse-payment-charges.

[36] *See* Press Release, FTC Charges Surescripts with Illegal Monopolization of E-Prescription Markets, Apr. 24, 2019, https://www.ftc.gov/news-events/press-releases/2019/04/ftc-charges-surescripts-illegal-monopolization-e-prescription.

[37] *See* Press Release, FTC Imposes Conditions on UnitedHealth Group's Proposed Acquisition of DaVita Medical Group, June 19, 2019, https://www.ftc.gov/news-events/press-releases/2019/06/ftc-imposes-conditions-unitedhealth-groups-proposed-acquisition.

[38] *See* Press Release, Reckitt Benckiser Group plc to Pay $50 Million to Consumers, Settling FTC Charges that the Company Illegally Maintained a Monopoly over the Opioid Addiction Treatment Suboxone, July 11, 2019, https://www.ftc.gov/news-events/press-releases/2019/07/reckitt-benckiser-group-plc-pay-50-million-consumers-settling-ftc.

[39] *Id.*

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 industry. This effort is most visible in Executive Order 13813, which President Trump issued during his first year in office. Among other things, the Order directs the Administration to "re-inject competition into health care markets by lowering barriers to entry, limiting excessive concentration, and preventing abuses of market power."[41]

For all of these reasons, I intend to devote a significant portion of my time over the coming year to the health care industry. Internally, I have already met with the management of our divisions that handle health care matters. They have many interesting leads. And the FTC has worked with other federal agencies to identify steps that can be taken in this arena.

For example, pursuant to the Executive Order I mentioned a moment ago, in 2018 the Department of Health and Human Services (HHS), in collaboration with the Department of the

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[40] In addition to the cases mentioned earlier, the Commission also advocates for competition before other state and federal government entities. *See, e.g.*, FTC, A Health Check on COPAs: Assessing the Impact of Certificates of Public Advantage in Healthcare Markets, Conference at the Constitution Center, June 18, 2019, https://www.ftc.gov/news-events/events-calendar/health-check-copas-assessing-impact-certificates-public-advantage FTC Staff Comment to the U.S. Department of Health & Human Services, *in re* 21st Century Cures Act: Interoperability, Information Blocking, and the ONC Health IT Certification Program Proposed Rules, RIN 0955-AA01, May 2019, *available at* https://www.ftc.gov/system/files/documents/advocacy_documents/ftc-staff-comment-department-health-human-services-regarding-21st-century-cures-act-interoperability/v190002_hhs_onc_info_blocking_staff_comment_5-30-19.pdf; FTC, Statement of the Federal Trade Commission to the Alaska Senate Committee on Health & Social Services on Certificate of Need Laws and SB 1, Mar. 2019, *available at* https://www.ftc.gov/policy/advocacy/advocacy-filings/2019/03/statement-federal-trade-commission-alaska-senate-committee

[41] Exec. Order No. 13,813 § I(c)(2), 82 Fed. Reg. 48,385, 48,385-86 (Oct. 12, 2017).

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

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[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], *available at* https://www.hhs.gov/sites/default/files/Reforming-Americas-Healthcare-System-Through-Choice-and-Competition.pdf

[43] *Id.* at 30-41 (for example, recommending that state governments reduce scope-of-practice requirements and increase licensure reciprocity).

[44] *Id.* at 50-63 (for example, recommending the repeal of "certificate of need" laws).

[45] *Id.* at 63-93 (for example, recommending the repeal of "any-willing-provider" laws).

[46] *Id.* at 94-105.

[47] Martin Gaynor, Farzad Mostashari, & Paul B. Ginsburg, Making Health Care Markets Work: Competition Policy for Health Care; Actionable Policy Proposals for the Executive Branch, Congress, and the States, Apr. 2017, *available at* https://www.brookings.edu/wp-content/uploads/2017/04/gaynor-et-al-final-report-v11.pdf.

[48] *Id.* at iii.

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, and various health care software firms. The Commission has already been heavily involved in many of these efforts, often through competition advocacy, and it should maintain this focus. The industry is simply too important, both to our economy and to our citizens, to do otherwise.

IV. CONCLUSION

In conclusion, there is substantial debate in the antitrust world today about the role Big Tech should play in our lives and our markets. We have been scrutinizing, and should continue to scrutinize, the large tech firms to ensure that they are not engaging in anticompetitive conduct

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[49] Scott Gottlieb, *Don't Give Up on Biosimilars—Congress Can Give Them a Boost*, WALL ST. J., Aug. 25, 2019, *available at* https://www.wsj.com/articles/dont-give-up-on-biosimilarscongress-can-give-them-a-boost-11566755042

[50] Scott Gottlieb, Remarks as prepared for delivery at the Brooking Institution on the release of the FDA's Biosimilars Action Plan, July 18, 2018, https://www.fda.gov/news-events/press-announcements/remarks-fda-commissioner-scott-gottlieb-md-prepared-delivery-brookings-institution-release-fdas ("While less than 2 percent of Americans use biologics, they represent 40 percent of total spending on prescription drugs."); *see* Wayne Winegarden, Pacific Research Institute, Incenting Competition to Reduce Drug Spending: The Biosimilar Opportunity, at 6, July 2019, *available at* https://medecon.org/wp-content/uploads/2019/07/BiosimilarsCompetition_F.pdf ("Annual average net spending on biologic medicines have grown 10.7 percent a year between 2014 and 2018, according to IQVIA, resulting in total spending increasing from $83.6 billion in 2014 to $125.5 billion in 2018.").

[51] Gottlieb, *supra* note 49.

[52] *Id.* ("Congress can make straightforward changes to speed the development and use of cost-saving biosimilars. First, it can pass a law mandating that brand companies sell their biologic drugs at a fair market price to biosimilar manufacturers seeking to develop copies. . . . Second, Congress can stop branded drug companies from using "rebates" to squelch competition from biosimilars. . . . Third, the U.S. must invest more heavily in educating doctors about the safety and effectiveness of biosimilars and the value that they can deliver to patients and the health-care system.").

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, with particularly notable successes protecting competition among health care providers and pharmaceutical firms. But the Commission cannot rest on its laurels, as the industry continues to increase as percentage of our economy, but still "too often fails to deliver the value it should."[53] While we must redouble our efforts and cast a wider net, I believe we are up to the challenge.

[53] JOINT AGENCY HEALTH CARE REPORT, *supra* note 42, cover letter, at 4.