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Re: Request for Comments re Guidance on Competitor Collaborations to Promote Certainty and Competition, Docket No. ATR-2026-0001

Dear Acting Assistant Attorney General Assefi and Chairman Ferguson,

The undersigned national real estate organizations respectfully submit this comment to the U.S. Department of Justice's Antitrust Division's ("DOJ") and the Federal Trade Commission's ("FTC;" collectively, the "Agencies") joint inquiry as to further guidance on competitor collaborations. Our organizations represent America's rental housing providers, suppliers and technology partners – who are on the front lines helping address the nation's housing affordability challenges. One-third of all Americans call a rental property home where, increasingly, technology solutions are being leveraged to improve housing affordability, improve the resident experience and support more efficient operations.

We appreciate the Agencies' inquiry. As noted in statements by the DOJ's Acting Assistant Attorney General Omeed Assefi and the FTC's Chairman Andrew Ferguson, the withdrawal of several competitor collaboration guidelines in 2023 and 2024 has left American businesses without clear "rules of the road" regarding procompetitive competitor collaborations which "are not only permissible but also encouraged in a complex and dynamic economic environment."

We seek updated guidance regarding information sharing among competitors, including for purposes of industry benchmarking. Benchmarking is a valuable, procompetitive exercise that allows firms to measure their performance, processes, products and services to identify opportunities for further efficiencies and innovation, benefiting businesses and consumers alike. Clear guidance from the Agencies on how to engage in procompetitive benchmarking exercises will provide American businesses, including our organizations and our members, with the certainty they need to compete effectively in today's technology and data-driven economy. It will

also aid in the Agencies' efforts to enforce clear boundaries between procompetitive collaborations and collusive conduct causing anticompetitive harm. We also request that the Agencies' guidance on competitor collaborations recognize that the "rule of reason" legal standard applies to algorithmic pricing software because its use can be highly procompetitive.

Courts Have Long Recognized the Procompetitive Benefits of Information Sharing

As early as 1925, the U.S. Supreme Court has recognized the procompetitive benefits of gathering and disseminating information that "tends to stabilize trade and industry, to produce fairer price levels and to avoid the waste which inevitably attends the unintelligent conduct of economic enterprise." *Maple Flooring Mfrs.' Ass'n v. U.S.*, 268 U.S. 563, 582-83 (1925). In *Maple Flooring*, the Court held that the defendant trade association "which openly and fairly gather[ed] information" as to cost, volume and price of products sold or purchased by the association's members – without any agreement to fix prices or limit production – did not violate the antitrust laws. Indeed, information exchanges among competitors for legitimate purposes – with appropriate safeguards – can "increase economic efficiency and render markets more, rather than less, competitive." *E.g., U.S. v. U.S. Gypsum Co.*, 438 U.S. 422, 441 n.16 (1978).

The nature of the information exchanged is key to assessing competitive effects. Generally, competitively sensitive information as to past (rather than current or future) prices or costs, aggregated to avoid disclosing transaction-specific data, which is widely disseminated and publicly available, minimizes the potential for anticompetitive harm. *Todd v. Exxon Corp.*, 275 F.3d 191, 211-13 (2d Cir. 2001).

These principles ensure that the procompetitive benefits of information exchanges for benchmarking outweigh any potential anticompetitive harm. Benchmarking, which allows firms to compare their performance metrics, cost structures or operational practices against industry-wide or peer-group data, provides substantial procompetitive benefits. It allows firms to identify opportunities within their operations for cost savings and increased efficiencies, to calibrate spending against industry standards and to set competitive budgets and financial goals based on evidence-based market data rather than mere guesswork. Benchmarking also minimizes the problem of information asymmetry between large and small firms, allowing smaller firms access to more and better data which otherwise may only be available to large firms.[1] Similarly, consumers can make more informed decisions with access to benchmarking reports.

With sufficient procedural safeguards discussed below to minimize the potential for anticompetitive harm, benchmarking serves as a powerful tool for evidence-based decision-making in our increasingly data-driven economy.

[1] Associations are uniquely positioned to sponsor and conduct independent benchmarking studies accessible to small firms that may not otherwise have access to such research.

The FTC and DOJ Guidance Should Provide that the "Rule of Reason" Standard Governs Consideration of Algorithmic Pricing Software

Courts and federal antitrust enforcers have recognized that algorithmic pricing software can be highly procompetitive – driving efficiency, sharpening price competition and delivering substantial benefits to consumers and the broader economy. *Gibson v. Cendyn Grp., LLC*, 148 F.4th 1069, 1083 (9th Cir. 2025); *In re RealPage, Inc., Rental Software Antitrust Litig. (No. II)*, 709 F. Supp. 3d 478, 519 (M.D. Tenn. 2023); *United States v. RealPage, Inc.*, No. 1:24-cv-00710, Dkt. 47 ¶ 163 & Dkt. 191 at 18-19 (M.D.N.C.); Note by the United States, *Algorithms and Collusion*, 127th OECD Competition Comm. (2017) ¶ 4. Because using algorithmic pricing software can be highly procompetitive, the "rule of reason" standard should govern any antitrust inquiry and thus the antitrust guidance should clarify that the Agencies and courts need to carefully consider the specific facts in any particular case. Applying the *per se* rule or any truncated analysis risks condemning conduct that benefits consumers and the competitive process. Government enforcers (and courts) should instead conduct a rigorous, fact-specific assessment of the software at issue, how customers use the software in practice and whether the use of the software has had any demonstrable anticompetitive effect in a properly defined and relevant market.

By carefully and rigorously considering these and other relevant factors under the rule of reason, government enforcers and courts can distinguish genuinely anticompetitive conduct from the legitimate, procompetitive use of algorithmic pricing software – and thereby avoid condemning innovative software that delivers significant efficiencies and benefits to businesses, consumers and society.

The Agencies Should Reinstate Previous "Antitrust Safety Zone" for Information Exchanges

We respectfully submit that the "antitrust safety zone" for competitor information exchanges set forth in the 1996 Statements of Antitrust Enforcement Policy in Health Care (since withdrawn by the prior administration in 2023) be reinstated as part of the Agencies' new guidance and applied to a broader set of industries. This safety zone, consistent with the legal principles discussed above, served as reliable guidance not just for the health care industry but to other industries as well on how to structure lawful, procompetitive information exchanges.

Specifically, the Agencies should make clear that they will not challenge exchanges of competitively sensitive information satisfying the following conditions:

(1) the information exchange is managed by a neutral third party;

(2) participants' data is at least three months old; and

(3) aggregated data is based on at least five participants, with no individual participant representing more than 25% on a weighted basis of the aggregated data, and all information is sufficiently anonymized and aggregated to not allow identification of specific participant's data.

First, the use of a neutral third party, such as a trade association, to independently collect, aggregate and disseminate participants' data minimizes the risk of misusing the information to facilitate collusion among competitors.

Second, requiring data to be at least three months old is consistent with general antitrust principles that exchanging current or forward-looking data carries more risk of anticompetitive harm than exchanging historical or "stale" data.

Third, requiring data to be sufficiently anonymized and aggregated to prevent identification of specific participant's data further minimizes the risk of anticompetitive harm.

These requirements ensure that the nature and scope of information exchanged does not exceed what is reasonably necessary to serve legitimate procompetitive purposes such as enabling firms to identify internal opportunities for further efficiencies and cost-savings as compared to industry-wide standards.

Finally, any exchanges falling outside the safety zone should be evaluated under the rule of reason standard which balances case-specific facts to assess whether the procompetitive rationale and benefits of the exchange are outweighed by anticompetitive harm. Information exchanges can take many forms, involve new technologies and different kinds of information, as well as different goals and effects, all of which calls for a nuanced analysis that balances all of the relevant facts and evidence.

Reinstatement of this Antitrust Safety Zone is Necessary to Provide a Level of Certainty for American Businesses to Engage in Procompetitive Benchmarking

Withdrawal of this safety zone has created significant uncertainty as to whether and to what extent information exchanges among competitors are appropriate. This uncertainty has only increased with technological advancements, including algorithms and generative AI.

For example, the role of competitor information in revenue management or algorithmic pricing software in the rental housing industry has been the subject of antitrust challenge by federal and state antitrust enforcement agencies, as well as class action plaintiffs, in recent years. *E.g., In re RealPage, Inc., Rental Software Antitrust Litigation (No. II)*, No. 3:23-md-03071 (M.D. Tenn.); *United States v. RealPage, Inc.*, No. 1:24-cv-00710 (M.D.N.C.); *District of Columbia v. RealPage Inc.*, No. 2023-CAB-006762 (D.C. Super. Ct.). Litigation diverts valuable resources housing providers would otherwise devote to serving their residents and leads to a patchwork of individualized and potentially inconsistent settlements or legal precedent which only increases uncertainty.

We urge the Agencies to reinstate the antitrust safety zone for information exchanges and apply it to the rental housing industry so that American businesses, including rental housing providers, can engage in procompetitive exercises like benchmarking with more certainty. We should encourage American businesses and the trade associations that support them to leverage data in procompetitive ways that drive innovation and efficiencies for the benefit of American consumers and residents of rental housing.

Thank you for the opportunity to share our views, and we look forward to working with you in the issuance of updated guidance regarding competitor collaborations.

Sincerely,

Council for Affordable and Rural Housing

Manufactured Housing Institute

National Affordable Housing Management Association

National Apartment Association

National Leased Housing Association

National Multifamily Housing Council

Real Estate Technology & Transformation Center