MERGER ANTITRUST LAW

Unit 3: A Brief History of Antitrust Law

(with special attention to merger antitrust law)

Class 3

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Goals of Merger Antitrust Law

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SEPARATION OF POWERS, PROSECUTORIAL DISCRETION, AND THE "COMMON LAW" NATURE OF ANTITRUST LAW

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Separation of Powers, Prosecutorial Discretion, and the "Common Law" Nature of Antitrust Law

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A number of critics of the Reagan administration's antitrust policy appear to consider it the duty of the Antitrust Division to prosecute every type of conduct susceptible to challenge under existing judicial precedents construing the antitrust laws, and in doubtful cases uniformly to press for a resolution that would lead to a finding of illegality. While seldom articulated in this extreme form, assumptions along these lines seem to underlie much of the recent criticism that has been leveled against the way in which I have attempted to discharge my responsibilities as Assistant Attorney General in charge of the Antitrust Division.

In this Article I shall argue that such a conception of the functions of the Antitrust Division is wrong. Its adoption as the guiding standard for the Division's operations would require the Division to shoulder obligations that, given its limited resources, it could not possibly discharge in an effective manner, and which it need not shoulder in view of the availability of other enforcement vehicles, particularly private rights of action. More fundamentally, this standard would ignore the legislative purposes underlying the antitrust laws and lead in many situations to economically and socially indefensibile results. In contrast with this standard, I will argue that an exercise of discretion informed by the competitive effects of business conduct and the potential precedential implications of resultant judicial decisions is the approach mandated by the Constitution and antitrust jurisprudence.

The point of departure in any analysis of prosecutorial discretion is to locate its source and scope. Consequently, I will examine first the "common law" approach to antitrust law adopted by Congress and the roles of the judicial branch, the executive branch, and private litigants. Once I have identified the outside bounds of prosecutorial discretion, I will consider the implications of the separation of powers and the com-

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mon-law approach for the proper exercise of this discretion, including allocation of the Division's limited resources in antitrust law enforcement. Finally, I will review several applications in current Division policy.

I. The Common-Law Approach to Antitrust Law

At the turn of the century, Congress created the general statutory framework for government intervention in the marketplace,[1] a framework that remains largely unchanged today.[2] Its cornerstone is the Sherman Act, whose substantive prohibitions make unlawful every "contract, combination . . . or conspiracy, in restraint of trade"[3] and conduct to "monopolize, or attempt to monopolize . . . any part of . . . trade."[4] Closely aligned with these provisions is section 7 of the Clayton Act, which provides that "no person . . . shall acquire . . . any part of the stock . . . or assets of another person . . . where in any line of commerce . . . in any section of the country, the effect . . . may be substantially to lessen competition, or to tend to create a monopoly."[5]

These provisions contain the kernel of antitrust law.[6] They are

1. Regulated markets, such as public utilities, are the one exception. Despite their popularity as a topic of discussion, however, they remain a relatively small part of the United States economy. For example, transportation, communications, public utilities, banking, and insurance—the industries subject to substantial economic regulation—accounted for less than 12% of the value added to national income in 1979. *See* U.S. DEP'T OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES 426 (1981). It is also true that the bulk of activity within these industries is subject to antitrust scrutiny of one form or another.

2. Of course, there have been a number of amendments to the basic acts as well as the passage of new statutes. Among the most notable of the substantive changes are the passage of the Robinson-Patman Act, ch. 592, § 1, 49 Stat. 1526 (1936) (current version at 15 U.S.C. § 13 (1976)); the Miller-Tydings Act, ch. 690, 50 Stat. 693 (1937), and its subsequent repeal, Pub. L. 94-145, 89 Stat. 801 (1975); and the Celler-Kefauver Act, ch. 1184, 64 Stat. 1125 (1950) (current version at 15 U.S.C. § 18 (1976)). However, none of these changes altered the philosophy underlying the original antitrust enactments.

3. Sherman Act § 1, 15 U.S.C. § 1 (1976).

4. *Id.* § 2, 15 U.S.C. § 2 (1976).

5. 15 U.S.C. § 18 (1976 & Supp. V 1981).

6. Two other provisions often discussed in the context of substantive antitrust law are § 5 of the Federal Trade Commission Act, 15 U.S.C. § 45 (1976), and the Robinson-Patman Act, ch. 592, § 1, 49 Stat. 1526 (1936) (current version at 15 U.S.C. § 13 (1976)). While the Supreme Court has held that the antitrust reach of § 5 is not bound by the Sherman and Clayton Acts, FTC v. Sperry & Hutchinson Co., 405 U.S. 233 (1972), in practice both the Commission and reviewing courts use conventional antitrust analysis when applying the section. *See, e.g.,* E.I. du Pont de Nemours & Co., 96 F.T.C. 653 (1980); Brunswick Corp., 94 F.T.C. 1174 (1979), *aff'd sub nom.* Yamaha Motor Co. v. FTC, 657 F.2d 971 (8th Cir. 1981); Borden, Inc., 92 F.T.C. 669 (1978), *aff'd*, 674 F.2d 498 (6th Cir. 1982); Beatrice Foods Co., 67 F.T.C. 473 (1965). Moreover, enforcement jurisdiction over § 5 is vested solely in the Federal Trade Commission. This section is, therefore, largely irrelevant to the duties of the head of the Antitrust Division. The Robinson-Patman Act, on the other hand, recognizes as unlawful conduct that injures competitors, regardless of its effects on competition, and as a result is not regarded as a true "antitrust" law. *Cf.* Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 488 (1977) (antitrust laws enacted for "protection of *com-*

broadly phrased—almost constitutional in quality—embracing fundamental concepts with a simplicity virtually unknown in modern legislative enactments.[7] In failing to provide more guidance, the framers of our antitrust laws did not abdicate their responsibility any more than did the Framers of the Constitution. The antitrust laws were written with awareness of the diversity of business conduct and with the knowledge that the detailed statutes which would prohibit socially undesirable conduct would lack the flexibility needed to encourage (and at times even permit) desirable conduct. To provide this flexibility, Congress adopted what is in essence enabling legislation that has permitted a common-law refinement of antitrust law through an evolution guided by only the most general statutory directions.[8]

A. *The Role of the Judiciary*

By adopting a common-law approach, Congress in effect delegated much of its lawmaking power to the judicial branch.[9] Three attributes of the basic statutes reflect the breadth of this delegation. First, the jurisdictional reach of the antitrust laws, at least that of the Sherman Act, is as far-reaching as constitutionally permitted.[10] This allows

petition, not *competitors*" (emphasis in original) (quoting Brown Shoe Co. v. United States, 370 U.S. 294, 320 (1962)).

7. The constitutional quality of the antitrust laws has been recognized by the Supreme Court. *See* Appalachian Coal, Inc. v. United States, 288 U.S. 344, 360 (1933) (antitrust laws described as having "a generality and adaptability comparable to that found to be desirable in constitutional provisions").

8. As the Supreme Court observed in National Soc'y of Professional Eng'rs v. United States:

> Congress . . . did not intend the text of the Sherman Act to delineate the full meaning of the statute or its applications in concrete situations. The legislative history makes it perfectly clear that it expected the courts to give shape to the statute's broad mandate by drawing on common-law tradition.

435 U.S. 679, 688 (1978) (footnote omitted).

9. I use the term "delegated" advisedly. Governance by legal norms begins with abstract principles of justice and proceeds along a continuum of increasingly factual specificity until a particular situation is completely identified. Under the doctrine of separation of powers, we recognize the creation of the abstract principles to be within the province of the legislative branch (subject, of course, to various constitutional constraints such as those contained in the Bill of Rights), while the application of these principles to particular facts and named persons belongs to the judicial branch. While the doctrine of separation of powers locates the responsibilities for the extremes of the continuum, it does not provide a clean division of the interior responsibilities between the two branches. Rather, the doctrine confers upon the legislative branch considerable discretion over the degree of the factual specification of its enactments, and leaves to the judiciary the residual. In this sense, Congress "delegates" its lawmaking power to the judicial branch to the extent its enactments require interpretation before they can be applied to particular facts. *See generally* Pound, *Courts and Legislation*, 7 AM. POL. SCI. REV. 361 (1915), *reprinted in* SCIENCE OF LEGAL METHODS 202 (1969).

10. United States v. South-Eastern Underwriters Ass'n, 322 U.S. 533, 558-59 (1944). *See* McLain v. Real Estate Bd., Inc., 444 U.S. 232, 241-42 (1980). The courts initially interpreted the Clayton Act's "in commerce" language to provide narrower jurisdictional scope than the Sherman Act. *See* Gulf Oil Corp. v. Copp Paving Co., 419 U.S. 186, 201-02 (1974). Section 7 was amended

the courts to scrutinize the full range of business conduct. Second, the substantive terms within the statutes are either of common-law origin or otherwise readily susceptible to judicial interpretation.[11] Taken on their face, the antitrust provisions could have reached almost all business decisions, whether entered unilaterally or multilaterally, directed toward internal operations or external dealings, or intended for present or future effect. Third, Congress provided little if any extrastatutory guidance to direct interpretation of the basic antitrust provisions.[12] The legislative histories of the antitrust statutes provide only the most basic description of the goals Congress sought to promote—competition and free enterprise—and little indication of how these goals can best be fostered by the judiciary.[13]

Confronted with an expansive, open-ended set of statutory prohibitions and little congressional guidance for their interpretation, the courts have had to distill a more operational conception of the public interest underlying the antitrust laws before applying statutory construction to secure the fundamental legislative goals. They have been forced to develop an understanding of the various types of business behavior as they measure them against this conception of the public interest. They also have had to discover the limits of the extent to which judicial regulation of business conduct can promote the public interest better than unregulated behavior.

Questions regarding the objectives of the law, the measure by which to test conduct against these objectives, and the ability of gov-

in 1980 to make its jurisdiction coextensive with that of the Sherman Act. Pub. L. No. 96-349, § 6(a), 94 Stat. 1157 (1980).

11. For a discussion, see, e.g., W. LETWIN, LAW AND ECONOMIC POLICY IN AMERICA 96 (1965); H. THORELLI, THE FEDERAL ANTITRUST POLICY 181-84 (1954); Dewey, *The Common-Law Background of Antitrust Policy*, 41 VA. L. REV. 759 (1955)

12. It is true that at least some of the legislators thought they were merely enacting the existing common law of restraints of trade. *See, e.g.,* 21 CONG. REC. 2456, 2457, 2563 (remarks of Sen. Sherman); *id.* at 3146, 3152 (remarks of Sen. Hoar). But the common-law precedents at that time did not form a coherent body of doctrine to assist in construing the new antitrust laws; rather, they differed in significant and sometimes contradictory ways from jurisdiction to jurisdiction and often within the same jurisdiction. *See* Dewey, *supra* note 11; Letwin, *The English Common Law Concerning Monopolies*, 21 U. CHI. L. REV. 355 (1954). To make matters even less clear, the drafters appear to have misunderstood the focus of the common law to be restriction on competition, a somewhat different notion than restriction or exclusion of competitors. *See* Bork, *Legislative Intent and the Policy of the Sherman Act*, 9 J.L. & ECON. 7, 36-38 (1966). Both of these factors cast doubt on the reliability of the body of law the framers stated they were seeking to codify as a source of aid in statutory construction.

13. Senator Sherman candidly stated during the course of debate over the Sherman Act:

> I admit that it is difficult to define in legal language the precise line between lawful and unlawful combinations. This must be left for the courts to determine in each particular case. All that we, as lawmakers, can do is to declare general principles, and we can be assured that the courts will apply them so as to carry out the meaning of the law . . . .

21 CONG. REC. 2460 (1890) (remarks of Sen. Sherman).

ernment intervention to further these objectives, are basic to all lawmaking processes. What distinguishes the common-law approach from the legislature's statutory approach is the manner in which these questions are answered and the stability of the answers once given. The press of business, coupled with the constitutional and institutional rules governing legislative action, often prevent Congress from actively supervising the implementation of statutes once they are passed. Instead, the typical statutory approach is to define comprehensive answers to the basic questions of lawmaking at the time of enactment and to modify these answers only if dissatisfaction becomes intense. Consequently, the evolution of statutory law is characterized by long periods of stability occasionally interrupted by relatively basic changes.[14]

By contrast, the common-law approach avoids immediate answers to basic lawmaking questions. Instead, questions are raised and answered narrowly as individual cases are brought to the courts. By the critical use of stare decisis, more comprehensive answers to the basic questions gradually evolve as more cases are decided. As Munroe Smith described the process:

> The rules and principles of case-law have never been treated as final truths but as working hypotheses, continually retested in those great laboratories of the law, the courts of justice. Every new case is an experiment; and if the accepted rule which seems applicable yields a result which is felt to be unjust, the rule is reconsidered. It may not be modified at once, for the attempt to do absolute justice in every single case would make the development and maintenance of general rules impossible; but if a rule continues to work injustice, it will eventually be reformulated.

14. This simple model of legislative supervision is, of course, subject to numerous refinements and qualifications. In many circumstances, legislative control may be exercised through means other than the fine-tuning of its substantive enactments. When the implementation of a statute is exclusively in the hands of the executive branch or an independent regulatory agency, effective control may be exercised through the authorization and appropriations process, or even more informally through oversight hearings and legislative liaison. These alternatives concentrate considerable power in congressional committees, if not individual senators and representatives, and control by the Hill may often be exercised without the need for full congressional action. *See generally* R. FENNO, CONGRESSMEN IN COMMITTEES (1973); R. FENNO, THE POWER OF THE PURSE (1966); M. FIORINA, CONGRESS: KEYSTONE OF THE WASHINGTON ESTABLISHMENT (1977); A. WILDAVSKY, THE POLITICS OF THE BUDGETARY PROCESS (1964); Fiorina, *Legislative Choice of Regulatory Forms: Legal Process or Administrative Process?*, 39 PUBLIC CHOICE 33 (1982); Weingast & Moran, Bureaucratic Discretion or Control: Regulatory Policymaking by the Federal Trade Commission (1982) (Working Paper 72, Center for the Study of American Business, Washington University); Weingast, *Regulation, Reregulation, and Deregulation: The Political Foundations of Agency Clientele Relationships*, 44 LAW & CONTEMP. PROBS. 147 (1981). However, where implementation of the law depends significantly on private actions and interpretations by an independent judiciary, effective legislative control turns on the ability to amend quickly the substantive law in response to deviations from the congressionally desired course. This requires actions by both Houses and approval by (or override of the veto of) the President, and consequently is typically too cumbersome to permit effective legislative control.

> The principles themselves are continually retested; for if the rules derived from a principle do not work well, the principle itself must ultimately be re-examined.[15]

By its very nature, the common-law approach assumes that judicial mistakes will be made, or at least that incomplete answers will be given to the more general questions raised by the case. While the common-law approach lacks the certainty of the statutory approach, it permits the law to adapt to new learning without the trauma of refashioning more general rules that afflict statutory law. The need for a process of incremental change was particularly acute in antitrust at the turn of the century, when there was great pressure to control perceived abuses by business but little understanding of what the government could and ought to do to promote competition and free enterprise.

The common-law process of answering basic lawmaking questions was in full bloom by 1897 with the debate between Justices Peckham and White in *United States v. Trans-Missouri Freight Association*[16] over the scope of conduct to be declared unlawful under the Sherman Act. The government had brought a bill to enjoin the Trans-Missouri Freight Association and its eighteen member railroads from jointly establishing rates and other terms of service upon competitive traffic. The lower courts had found no violation of the Sherman Act since there was no suggestion that the defendants had violated the Interstate Commerce Act's requirement that rail rates be "reasonable and just." Justice Peckham, leading a five-to-four majority, held that dismissal of the bill was error. In his view, the Sherman Act prohibited *every* restraint of trade,[17] and the Association's price-fixing arrangement was such a restraint notwithstanding the assumed reasonableness of the rates.[18] Justice White, relying on his reading of the common law, urged in a dissent joined by the three remaining Justices that only "unreasonable" restraints should be unlawful,[19] and, since the rates fixed by the defendants were assumed reasonable, dismissal of the bill was proper.[20] The following year in *United States v. Joint-Traffic Association*,[21] the Court examined another railroad price-fixing agreement indistinguish-

15. M. SMITH, JURISPRUDENCE 21 (1909), *quoted in* B. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 23 (1921).
16. 166 U.S. 290 (1897).
17. *Id.* at 312, 328.
18. *Id.* at 328-32.
19. *Id.* at 351-52, 355 (White, J., dissenting).
20. *Id.* at 343-44.
21. 171 U.S. 505 (1898).

able in principle from that in *Trans-Missouri*.[22] Justice Peckham, again speaking for a five-to-four majority,[23] refined his earlier views, indicating that while "every" restraint of trade was unlawful, *restraint of trade* under the Sherman Act was not co-extensive with restraint of trade under common law.[24] Rather, the act reached only those "contracts whose direct and immediate effect is a restraint upon interstate commerce."[25]

Justice Harlan joined the debate with his opinion in *Northern Securities Co. v. United States*,[26] insisting that "*every* combination or conspiracy which would extinguish competition between otherwise [competitors] . . . engaged in *interstate trade or commerce*, and which would *in that way* restrain *such* trade or commerce, is made illegal by the act."[27] Since the challenged combination involved a merger between two prior competing railroads, both of which transported passengers and freight interstate,[28] Justice Harlan would have held the combination illegal.[29] Justice Holmes disagreed. In his dissent (notably joined by Justices White *and* Peckham, together with Chief Justice Fuller),[30] Justice Holmes argued that the Sherman Act did not reach complete fusions of interests, even between previously competing entities, in part because the mere formation of such combinations could not

22. *Id.* at 562-65.

23. Justice White and three other justices dissented, although they filed no dissenting opinion.

24. For example, Justice Peckham indicated that a noncompetition covenant binding the seller of a business in his individual capacity was "a contract not within the meaning of the act," 171 U.S. at 568, although it was clearly regarded as a restraint of trade at common law. *See* Mitchell v. Reynolds, 1 P. Wms. 181, 24 Eng. Rep. 347 (1711); Dyer's Case, Y.B. Pasch., 2 Hen. V f.5, pl. 26 (1415). *See also* H. THORELLI, THE FEDERAL ANTITRUST POLICY 17-20 (1955). This redefinition of "restraint of trade" was anticipated in *Trans-Missouri*. *See* 166 U.S. at 329.

25. 171 U.S. at 568. Justice Peckham further explained:

> [t]o treat the act as condemning all agreements under which, as a result, the cost of conducting an interstate commercial business may be increased, would enlarge the application of the act far beyond the fair meaning of the language used. The effect upon interstate commerce must not be indirect or incidental only. An agreement entered into for the purpose of promoting the legitimate business of an individual or corporation, with no purpose to thereby affect or restrain interstate commerce, and which does not directly restrain such commerce, is not, as we think, covered by the act, although the agreement may indirectly and remotely affect that commerce.

Id.

26. 193 U.S. 197 (1904).

27. *Id.* at 331 (emphasis in original).

28. *Id.* at 320.

29. Justice Harlan wrote for four justices; Justice Brewer's concurrence in a separate opinion provided the majority for holding the merger unlawful.

30. Justice White also wrote a dissenting opinion, joined by the three other dissenters, arguing that the formation of a holding company and the acquisition of shares of other corporations—the form of the merger in this case—did not meet the interstate commerce requirement of the Sherman Act. 193 U.S. at 364 (White, J., dissenting).

exclude third parties from competing with the combination.[31] Otherwise, given Justice Peckham's interpretation in *Trans-Missouri* and *Joint Traffic* with which Holmes agreed,[32] the Sherman Act would make unlawful *every* integration of competing interests and require the atomization of economic endeavor.[33]

The judicial view shifted once again in 1911 with the decision in *Standard Oil Co. v. United States*,[34] in which Chief Justice White obtained a majority of the Court and attempted still another restatement of the fundamentals of antitrust law. While Chief Justice White found "every conceivable contract or combination" to be subject to Sherman Act scrutiny,[35] not all such contracts of combinations were unlawful, even if they resulted in a restraint of trade. Rather, the act prohibited only those contracts or combinations which effected "undue" restraints when measured against a "rule of reason,"[36] a test which looked to the nature of the "contracts or agreements, their necessary effect, and the character of the parties."[37] In *United States v. American Tobacco Company*,[38] a case decided two weeks after *Standard Oil*, Chief Justice White elaborated that under the rule of reason

> the words "restraint of trade" . . . only embraced acts or contracts or agreements or combinations which operated to the prejudice of the public interests by unduly restricting competition or unduly obstructing the due course of trade or which, either because of their inherent nature or effect or because of the evident purpose of the acts, etc., injuriously restrained trade.[39]

Chief Justice White had come full circle from his dissent in *Trans-Missouri*. Restraints of trade were to be judged by the "reasonableness" of their character in relation to competition, not their degree as he had originally urged. In reaching this conclusion, Chief Justice White was able to formulate an interpretation of the Sherman Act which retained its essential flexibility to respond to new business practices and new insights regarding the competitive conseqences of business conduct—a quality absent in the articulations of Justices Peckham, Harlan, and Holmes.

This short digression illustrates the conceptual quagmire faced by

31. *Id.* at 408 (Holmes, J., dissenting).
32. *Id.* at 405.
33. *Id.* at 410-11.
34. 221 U.S. 1 (1911).
35. *Id.* at 59-60.
36. *Id.* at 62.
37. *Id.* at 65.
38. 221 U.S. 106 (1911).
39. *Id.* at 179.

those who sought to regulate competitive business behavior at the turn of the century and the need for a common-law approach to antitrust law.[40] This need remains apparent today as the law continues to evolve.

For example, in *Standard Oil* Chief Justice White, in finding that Standard Oil Company had violated the Sherman Act, stressed that the company had acquired its dominant share of the market through merger rather than internal growth, and that it had engaged in a variety of predatory practices against competitors.[41] By 1945, however, in *United States v. Aluminum Co. of America*,[42] Judge Hand was able to find that Alcoa had violated section 2 of the Sherman Act when its dominant market share had not been "thrust upon" it, even though it had achieved its size largely through internal growth and was not accused of predatory conduct.[43] Thirty years later, the tide once again had shifted, and the law required a showing of anticompetitive conduct as a prerequisite to monopolization.[44]

Merger antitrust law provides another example of the continuing evolution of antitrust law. In the 1960s the Supreme Court tightened considerably the market-share standards to which horizontal mergers would be held.[45] Later, however, the Court abandoned its almost religious devotion to market-share analysis and found lawful a horizontal merger that would have been presumptively illegal under prior cases because the defendant had demonstrated that the acquisition threatened no substantial lessening of competition.[46]

In addition, the Court has overruled its earlier decision that non-

40. The early history of the Sherman Act is analyzed with great care and insight in Bork, *The Rule of Reason and the Per Se Concept: Price Fixing and Market Division*, 74 YALE L.J. 775, 785-79 (1965).

41. 221 U.S. at 75-76. A question has been raised whether Standard Oil did in fact engaged in predatory pricing. *See* McGee, *Predatory Price-Cutting: The* Standard Oil *(N.J.) Case*, 1 J.L. & ECON. 137 (1958).

42. 148 F.2d 416 (2d Cir. 1945).

43. *Id.* at 430-31.

44. *See, e.g.,* United States v. Grinnell Corp., 384 U.S. 563, 570-71 (1966); Berkey Photo, Inc. v. Eastman Kodak Co., 603 F.2d 263, 273-75 (2d Cir. 1979), *cert. denied*, 444 U.S. 1093 (1980). On facts strikingly similar to those in *Alcoa*, the Federal Trade Commission declined to find unlawful the successful expansion strategy adopted by duPont in the titanium pigments business. *In re* E.I. duPont de Nemours & Company, 96 F.T.C. 653, 705 (1980).

45. In 1962 the Supreme Court indicated it would refuse to sanction a horizontal acquisition of as much as 5% in a market characterized by minimal or no entry barriers. Brown Shoe Co. v. United States, 370 U.S. 294 (1962). Four years later the Court appeared to have lowered the threshold market share to no greater than 4.5%. United States v. Pabst Brewing Co., 384 U.S. 546, 550 (1966). That same year the Court struck down a horizontal merger between two grocery chains in which the surviving firm had only 1.4% of the grocery stores and 7.5% of the grocery sales in a relevant market characterized by a significant trend toward concentration and an increase of acquisitions of small companies by large chains. United States v. Von's Grocery Co., 384 U.S. 270 (1966).

46. United States v. General Dynamics Corp., 415 U.S. 486 (1974).

price vertical restraints (such as territorial sales restrictions) were per se unlawful, and ruled instead that such restraints must be analyzed under the rule of reason.[47] The Court has also found that the legality of the sale of blanket licenses for musical compositions by a clearinghouse of composers and publishing houses, an arrangement which under existing precedent seemed to be per se unlawful, is to be examined under the rule of reason.[48]

These examples illustrate both the evolving nature of antitrust law and the fact that the evolution does not always proceed in one direction. Neither this evolution nor its lack of direction should be surprising. It is exactly what the framers of the antitrust laws intended. An adaptive approach to antitrust law is necessary both because of the diversity and rapidly changing nature of the business conduct to be scrutinized, and because of the continuing progress of economic theory in explaining why firms pursue certain strategies and the competitive consequences of their behavior. As the courts gain experience through scrutiny of challenged conduct and as economic theory continues to provide a more complete understanding of business conduct, it is inevitable that mistakes will be exposed in some of the past applications of antitrust law.[49] Moreover, given this nation's complex economic history since the late 1800s and the political and intellectual forces that this history has encompassed, it is likely that the distribution of mis-

47. Continental T.V., Inc. v. GTE Sylvania, Inc., 433 U.S. 36 (1977), *overruling* United States v. Arnold, Schwinn & Co., 388 U.S. 365 (1967). On remand the contractual restriction on the locations where the plaintiff could sell defendant's television sets was upheld under rule of reason analysis. Continental T.V., Inc. v. GTE Sylvania, Inc., 1982-2 Trade Cas. (CCH) ¶ 64,962 (9th Cir. 1982).

48. Broadcast Music, Inc. v. Columbia Broadcasting Sys., Inc., 441 U.S. 1 (1979). On remand, the clearinghouse arrangement was upheld with respect to blanket licensing of music performing rights for use in television network programming. Broadcast Music, Inc. v. Columbia Broadcasting Sys., 620 F.2d 930 (2d Cir. 1980), *cert. denied*, 450 U.S. 970 (1981). However, in a related case against the clearinghouse brought by independent television stations, the district court found the arrangement unlawful under the rule of reason with respect to the blanket licensing of performing rights for use in non-network programming. Buffalo Broadcasting Co. v. ASCAP, 1982-2 Trade Cas. (CCH) ¶ 64,898 (S.D.N.Y. 1982).

49. Chief Justice White recognized the same evolutionary forces in the early English law of restraint of trade:

> From the development of more accurate economic conceptions and the changes in conditions of society it came to be recognized that the acts prohibited by the engrossing, forestalling, etc., statutes did not have the harmful tendency which they were presumed to have when the legislation concerning them was enacted, and therefore did not justify the presumption which had previously been deduced from them, but, on the contrary such acts tended to fructify and develop trade. See the statutes of 12th George III, ch. 71, enacted in 1772, and statute of 7 and 8 Victoria, ch. 24, enacted in 1844, repealing the prohibitions against engrossing, forestalling, etc., upon the express ground that the prohibited acts had come to be considered as favorable to the development of and not in restraint of trade.

Standard Oil co. v. United States, 221 U.S. 1, 55 (1911).

takes is not continually skewed in the direction of either a too expansive or too limited law of competition. Errors could be, and were, made on both sides. Even so, in my opinion the antitrust law of today is a major improvement on prior law and far superior to anything that could have resulted from more prescriptive statutory approaches. The common-law approach to antitrust law, if it has not served us well, has served us better than would the available alternatives.

This is not to say that the evolution of antitrust law has reached its apogee. Some areas of antitrust law exhibit substantial doctrinal confusion, if not plain error. Confusion is inevitable as courts apply rules to fact situations different from those in which the rules were developed.[50] More fundamentally, the confusion reflects the still evolving character of the answers to the basic questions in antitrust law. After close to a century of antitrust jurisprudence, a vigorous debate continues over the proper means of furthering the original congressional goals of competition and free enterprise.[51] As a result, uncertainty remains over the measure against which the social desirability (and hence legality) of various types of business conduct should be tested.[52] More-

50. Perhaps the best example of this confusion lies in the attempts by lower courts and the Federal Trade Commission to apply the rules regarding unilateral and multilateral conduct enunciated in United States v. Colgate & Co., 250 U.S. 300 (1919), and United States v. Parke, Davis & Co., 362 U.S. 29 (1960). *Compare, e.g.,* Battle v. Lubrizol Corp., 673 F.2d 984, 991-92 (8th Cir. 1982) (concluding that complaint-and-termination evidence alone is sufficient to infer agreement), *and* Spray-Rite Service Corp. v. Monsanto Co., 684 F.2d 1226, 1238-40 (7th Cir. 1982) (same), *with* Roesch Inc. v. Star Cooler Corp., 671 F.2d 1168, 1172 (8th Cir. 1982) (concluding that mere complaint-and-termination evidence is insufficient to support an inference of conspiracy), *and* Edward J. Sweeny & Sons Inc. v. Texaco, Inc., 637 F.2d 105, 110, 116 (3d Cir. 1981) (same).

51. *See, e.g.,* M. GREEN, B. MOORE, JR. & F. WASSERSTEIN, THE CLOSED ENTERPRISE SYSTEM (1971); Austin, *A Priori Mechanical Jurisprudence in Antitrust*, 53 MINN. L. REV. 739 (1969); Austin, *The Emergence of Societal Antitrust*, 47 N.Y.U. L. REV. 903 (1972); Bork & Bowman, *The Goals of Antitrust: A Dialogue on Policy*, 65 COLUM. L. REV. 363, 377, 401, 417, 422 (1965); Brodley, *Massive Industrial Size, Classical Economics and the Search for Humanistic Value*, 24 STAN. L. REV. 1155 (1972); Dewey, *The Economic Theory of Antitrust: Science or Religion?*, 50 VA. L. REV. 413 (1964); Elzinga, *The Goals of Antitrust: Other Than Competition and Efficiency, What Else Counts?*, 125 U. PA. L. REV. 1191 (1977); Flynn, *Antitrust Jurisprudence: A Symposium on the Economic, Political and Social Goals of Antitrust Policy*, 125 U. PA. L. REV. 1182 (1977); Fox, *The Modernization of Antitrust: A New Equilibrium*, 66 CORNELL L. REV. 1140 (1981); Hart, *The Quality of Life and the Antitrust Laws: A View from Capitol Hill*, 40 ANTITRUST L.J. 302 (1971); Kauper, *The "Warren Court" and the Antitrust Laws: Of Economics, Populism, and Cynicism*, 67 MICH. L. REV. 325 (1968); Lande, *The Goals of the Antitrust Laws*, 33 HASTINGS L.J. — (1982) (forthcoming); Leff, *Economic Analysis of Law: Some Realism About Nominalism*, 60 VA. L. REV. 451 (1974); Pitofsky, *The Political Content of Antitrust*, 127 U. PA. L. REV. 1051 (1979); Sullivan, *Economics and More Humanistic Disciplines: What Are the Sources of Wisdom for Antitrust?*, 125 U. PA. L. REV. 1214 (1977); Sullivan, *Antitrust, Microeconomics, and Politics: Reflections on Some Recent Relationships*, 68 CALIF. L. REV. 1 (1980); Note, *Antitrust Enforcement Against Organized Crime*, 70 COLUM. L. REV. 307 (1970). *See also, e.g., Symposium on Efficiency as a Legal Concern*, 8 HOFSTRA L. REV. 485 (1980).

52. This source of confusion, for example, probably lies behind the split among the circuits on whether an employee discharged or otherwise punished by his employer for refusing to assist in an antitrust violation has standing to challenge the violation. *Compare* Ostrofe v. Crocker Co.,

over, while economic theory has made enormous strides toward understanding business behavior, it still falls far short of enabling us to test many kinds of business conduct against the public interest (whatever its measure).[53] Finally, there is considerable disagreement over the extent to which government intervention in the marketplace can successfully regulate socially undesirable conduct to further the public interest.[54]

As the courts refine antitrust law by incorporating new insights and resolving old confusions, they act much like Congress (at least in principle) when it updates statutory law. But the courts cannot act alone in this process. Unlike Congress, the courts have only limited discretion in fashioning their lawmaking agenda. The Constitution limits the exercise of judicial power to "cases" and "controversies."[55] The courts are not free to render advisory opinions[56] or to reach out and select the issues they wish to hear.[57] The law's course of development is bounded by the nature of the cases brought before the courts.[58]

670 F.2d 1378 (9th Cir. 1982) (recognizing standing), *with In re* Industrial Gas Antitrust Litig., 681 F.2d 514 (7th Cir. 1982) (denying standing).

53. The law of predatory pricing amply illustrates the inadequacy of current economic theory. Despite the efforts of numerous analysts, there is little agreement about the existence, characteristics, or welfare economics of the putative phenomenon. The inability of current economic theory to resolve this lack of agreement is reflected in the difficulty the courts have in finding a unified framework in which to examine allegations of predatory pricing. *See, e.g.,* Utah Pie v. Continental Baking Co., 386 U.S. 685, 698 (1966); William Inglis & Sons Baking Co. v. ITT Continental Baking Co., 668 F.2d 1014 (9th Cir. 1981); Chillicothe Sand & Gravel Co. v. Martin Marietta Corp., 615 F.2d 427 (7th Cir. 1980); Janich Bros., Inc. v. American Distilling Co., 570 F.2d 848 (9th Cir. 1977), *cert. denied*, 439 U.S. 829 (1978); Pacific Eng. & Prod. Co. v. Kerr-McGee Corp., 551 F.2d 790 (10th Cir.), *cert. denied*, 434 U.S. 879 (1977); Hanson v. Shell Oil Co., 541 F.2d 1352 (9th Cir. 1976), *cert. denied*, 429 U.S. 1074 (1977); United States v. Empire Gas Corp., 537 F.2d 296 (8th Cir. 1976), *cert. denied*, 429 U.S. 1122 (1977). *See generally* Hurwitz & Kovacic, *Judicial Analysis of Predation: The Emerging Trends*, 35 VAND. L. REV. 63 (1982); Zerbe & Cooper, *An Empirical and Theoretical Comparison of Alternative Predation Rules*, 61 TEXAS L. REV. — (1982) (forthcoming).

54. Compare, for example, the various proposals for regulatory reform contained in S. BREYER, REGULATION AND ITS REFORM (1982); L. LAVE, THE STRATEGY OF SOCIAL REGULATION (1981); P. MACAVOY, THE REGULATED INDUSTRIES AND THE ECONOMY (1979); R. NOLL, REFORMING REGULATION (1971); R. POOLE, INSTEAD OF REGULATION: ALTERNATIVES TO FEDERAL REGULATORY AGENCIES (1981); L. WHITE, REFORMING REGULATION (1981).

55. U.S. CONST. art. III, § 2. The case or controversy requirement serves the dual purpose of limiting the business of federal courts to questions presented in adversary context and in a form historically viewed as capable of resolution to the judicial process and of assuring that federal courts will not intrude into areas committed to other branches of government. Flast v. Cohen, 392 U.S. 83, 95 (1968).

56. United States v. Freuhauf, 365 U.S. 146 (1961); Muskrat v. United States, 219 U.S. 346 (1911). See generally H. HART & H. WECHSLER, THE FEDERAL COURTS AND THE FEDERAL SYSTEM 64-70 (2d ed. 1973), and materials cited therein.

57. This rule is subject to some qualification. Once a proceeding has been initiated, a court has some leeway to suggest that the litigants raise certain questions or, where appropriate, to raise the questions sua sponte. Even so, the court's ability to consider questions it would like to address is severely constrained since it cannot raise such questions except in rare instances in the proceedings before it.

58. Nor have the courts always decided the issues brought to them for adjudication. A

Moreover, for the most part judges do not play an inquisitorial role in adjudication. They depend instead on the litigants to present relevant evidence and the arguments necessary for an informed decision. Consequently, the agenda of antitrust issues presented to the courts and the evidence and arguments necessary to an informed decision depend upon the litigants, particularly the executive branch in its role as the nation's chief enforcer of the antitrust laws.

B. *The Role of the Executive Branch*

The Constitution provides that the President, and by implication subordinate officers of the President to whom authority has been properly delegated, "shall take Care that the Laws be faithfully executed."[59] This allocation of power and responsibility empowers the President, through the executive branch and particularly the Office of the Attorney General, to enforce acts of Congress and treaties of the United States and to prosecute offenses against the United States.[60] In enacting the antitrust laws, Congress made violations of antitrust law offenses against the United States[61] as well as quasi-tort offenses against

number of doctrines permit the courts to avoid answering questions presented to them. *See, e.g.*, Sierra Club v. Morton, 405 U.S. 727 (1972) (standing); Flast v. Cohen, 392 U.S. 83 (1968) (standing); Frothingham v. Mellon, 262 U.S. 447 (1923) (standing); United Pub. Workers v. Mitchell, 330 U.S. 75 (1947) (ripeness); DeFunis v. Odegaard, 416 U.S. 312 (1974) (mootness); Golden v. Zwickler, 394 U.S. 103 (1969) (mootness); Baker v. Carr, 369 U.S. 186 (1962) (political question); Colegrove v. Green, 328 U.S. 549 (1946) (political question); Luther v. Borden, 48 U.S. (7 How.) 1 (1839) (political question); Federal Radio Comm'n v. General Elec. Co., 281 U.S. 464 (1930) (administrative question).

59. U.S. CONST. art. II, § 3.

60. *See* Ponzi v. Fessenden, 258 U.S. 254, 262 (1922); United States v. San Jacinto Tin Co., 125 U.S. 273, 278-79 (1888); The Confiscation Cases, 74 U.S. (7 Wall.) 454, 456-57 (1868). In addition, at least one commentator has found in the faithful execution clause the power to enforce judicial decrees obtained by the government. Comment, *Constitutional Law—Executive Powers—Use of Troops to Enforce Federal Laws*, 56 MICH. L. REV. 249 (1957). The clause has been interpreted more generally to embrace any obligation that can be inferred from the Constitution or is "derived from the general code of his [the President's] duties under the laws of the United States." W. TAFT, OUR CHIEF MAGISTRATE AND HIS POWERS 88-89 (1916). *See* 2 W.C. ANTIEAU, MODERN CONSTITUTIONAL LAW: THE STATES AND THE FEDERAL GOVERNMENT § 13:27 (1969).

The President's power under the faithful execution clause may be supplemented by the executive power clause, which provides that "[t]he executive Power shall be vested in a President of the United States." U.S. CONST. art. II, § 1, cl. 1. However, it is questionable whether this clause confers any substantive power beyond that conferred by the faithful execution clause. *See* Myers v. United States, 272 U.S. 52, 117 (1926) ("The vesting of the executive power in the President was essentially a grant of power to execute the laws.").

61. The statutes authorize the federal government to prosecute antitrust violations by bringing criminal actions for violations of the Sherman Act, 15 U.S.C. §§ 1-3 (1976), or injunctive actions for violations of the Sherman Act, 15 U.S.C. § 4 (1976), and the Clayton Act, 15 U.S.C. § 25 (1976). In addition, whenever the United States itself is injured as a result of an antitrust violation, it may institute a civil proceeding to recover actual damages. Clayton Act § 4A, 15 U.S.C. § 15a (1976).

BROWN SHOE CO. v. UNITED STATES
370 U.S. 294 (1962)
(EXCERPT ON THE CELLER–KEFAUVER ACT OF 1950)*

MR. CHIEF JUSTICE WARREN delivered the opinion of the Court.

I.

This suit was initiated in November 1955 when the Government filed a civil action in the United States District Court for the Eastern District of Missouri alleging that a contemplated merger between the G. R. Kinney Company, Inc. (Kinney), and the Brown Shoe Company, Inc. (Brown), through an exchange of Kinney for Brown stock, would violate § 7 of the Clayton Act, 15 U. S. C. § 18. The Act, as amended, provides in pertinent part:

> "No corporation engaged in commerce shall acquire, directly or indirectly, the wb.ole or any part of the stock or other share capital . . . ·of another corporation engaged also in commerce, where in any line of commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly."

The complaint sought injunctive relief under § 15 of the Clayton Act, 15 U.S.C. § 25, to restrain consummation of the merger.

A motion by the Government for a preliminary injunction *pendente lite* was denied, and the companies were permitted to merge provided, however, that their businesses be operated separately and that their assets be kept separately identifiable. The merger was then effected on May 1, 1956.

In the District Court, the Government contended that the effect of the merger of Brown—the third largest seller of shoes by dollar volume in the United States, a leading manufacturer of men's, women's, and children's shoes, and a retailer with over 1,230 owned, operated or controlled retail outlets—and Kinney—the eighth largest company, by dollar volume, among those primarily engaged in selling shoes, itself a large manufacturer of shoes, and a retailer with over 350 retail outlets—"may be substantially to lessen competition or to tend to create a monopoly" by eliminating actual or potential competition in the production of shoes for the national wholesale shoe market and in the sale of shoes at retail in the Nation, by foreclosing competition from "a market represented by Kinney's retail outlets whose annual sales exceed $42,000,000," and by enhancing Brown's competitive advantage over other producers, distributors and sellers of shoes. The Government argued that the "line of commerce" affected by this merger is "footwear," or alternatively, that the "line[s]" are "men's," "women's," and "children's" shoes, separately considered, and that the "section of the country," within which the anticompetitive effect of the merger is to be judged, is the

* Most footnotes and internal citations have been omitted without indication.

Nation as a whole, or alternatively, each separate city or city and its immediate surrounding area in which the parties sell shoes at retail.

In the District Court, Brown contended that the merger would be shown not to endanger competition if the "line[s] of commerce" and the "section[s] of the country" were properly determined. Brown urged that not only were the age and sex of the intended customers to be considered in determining the relevant line of commerce, but that differences in grade of material, quality of workmanship, price, and customer use of shoes resulted in establishing different lines of commerce. While agreeing with the Government that, with regard to manufacturing, the relevant geographic market for assessing the effect of the merger upon competition is the country as a whole, Brown contended that with regard to retailing, the market must vary with economic reality from the central business district of a large city to a "standard metropolitan area" for a smaller community. Brown further contended that, both at the manufacturing level and at the retail level, the shoe industry enjoyed healthy competition and that the vigor of this competition would not, in any event, be diminished by the proposed merger because Kinney manufactured less than 0.5% and retailed less than 2% of the Nation's shoes.

[The district court rendered judgment for the government and ordered Brown to divest all of the stock, assets, and interests in held in Kinney. Brown Shoe took a direct appeal under the Expediting Act.]

. . .

III.
LEGISLATIVE HISTORY.

This case is one of the first to come before us in which the Government's complaint is based upon allegations that the appellant has violated § 7 of the Clayton Act, as that section was amended in 1950. The amendments adopted in 1950 culminated extensive efforts over a number of years, on the parts of both the Federal Trade Commission and some members of Congress, to secure revision of a section of the antitrust laws considered by many observers to be ineffective in its then existing form. Sixteen bills to amend § 7 during the period 1943 to 1949 alone were introduced for consideration by the Congress, and full public hearings on proposed amendments were held in three separate sessions. In the light of this extensive legislative attention to the measure, and the broad, general language finally selected by Congress for the expression of its will, we think it appropriate to review the history of the amended Act in determining whether the judgment of the court below was consistent with the intent of the legislature.

As enacted in 1914, § 7 of the original Clayton Act prohibited the acquisition by one corporation of the stock of another corporation when such acquisition would result in a substantial lessening of competition between the acquiring and the acquired companies, or tend to create a monopoly in any line of commerce. The Act did not, by its explicit terms, or as construed by this Court, bar the acquisition by one corporation of the assets of another. Nor did it appear to preclude the acquisition of stock in any corporation other than a direct competitor. Although proponents of the 1950

amendments to the Act suggested that the terminology employed in these provisions was the result of accident or an unawareness that the acquisition of assets could be as inimical to competition as stock acquisition, a review of the legislative history of the original Clayton Act fails to support such views. The possibility of asset acquisition was discussed but was not considered important to an Act then conceived to be directed primarily at the development of holding companies and at the secret acquisition of competitors through the purchase of all or parts of such competitors' stock.

It was, however, not long before the Federal Trade Commission recognized deficiencies in the Act as first enacted. Its Annual Reports frequently suggested amendments, principally along two lines: first, to "plug the loophole" exempting asset acquisitions from coverage under the Act, and second, to require companies proposing a merger to give the Commission prior notification of their plans. The Final Report of the Temporary National Economic Committee also recommended changes focusing on these two proposals. Hearings were held on some bills incorporating either or both of these changes but, prior to the amendments adopted in 1950, none reached the floor of Congress for plenary consideration. Although the bill that was eventually to become amended § 7 was confined to embracing within the Act's terms the acquisition of assets as well as stock, in the course of the hearings conducted in both the Eightieth and Eighty-first Congresses, a more far-reaching examination of the purposes and provisions of § 7 was undertaken. A review of the legislative history of these amendments provides no unmistakably clear indication of the precise standards the Congress wished the Federal Trade Commission and the courts to apply in judging the legality of particular mergers. However, sufficient expressions of a consistent point of view may be found in the hearings, committee reports of both the House and Senate and in floor debate to provide those charged with enforcing the Act with a usable frame of reference within which to evaluate any given merger.

The dominant theme pervading congressional consideration of the 1950 amendments was a fear of what was considered to be a rising tide of economic concentration in the American economy. Apprehension in this regard was bolstered by the publication in 1948 of the Federal Trade Commission's study on corporate mergers. Statistics from this and other current studies were cited as evidence of the danger to the American economy in unchecked corporate expansions through mergers. Other considerations cited in support of the bill were the desirability of retaining "local control" over industry and the protection of small businesses. Throughout the recorded discussion may be found examples of Congress' fear not only of accelerated concentration of economic power on economic grounds, but also of the threat to other values a trend toward concentration was thought to pose.

What were some of the factors, relevant to a judgment as to the validity of a given merger, specifically discussed by Congress in redrafting § 7?

First, there is no doubt that Congress did wish to "plug the loophole" and to inch1de within the coverage of the Act the acquisition of assets no less than the acquisition of stock.

Second, by the deletion of the "acquiring-acquired" language in the original text, it hoped to make plain that § 7 applied not only to mergers between actual competitors,

but also to vertical and conglomerate mergers whose effect may tend to lessen competition in any line of commerce in any section of the country.

Third, it is apparent that a keystone in the erection of a barrier to what Congress saw was the rising tide of economic concentration, was its provision of authority for arresting mergers at a time when the trend to a lessening of competition in a line of commerce was still in its incipiency. Congress saw the process of concentration in American business as a dynamic force; it sought to assure the Federal Trade Commission and the courts the power to brake this force at its outset and before it gathered momentum.

Fourth, and closely related to the third, Congress rejected, as inappropriate to the problem it sought to remedy, the application to § 7 cases of the standards for judging the legality of business combinations adopted by the courts in dealing with cases arising under the Sherman Act, and which may have been applied to some early cases arising under original § 7.

Fifth, at the same time that it sought to create an effective tool for preventing all mergers having demonstrable anticompetitive effects, Congress recognized the stimulation to competition that might flow from particular mergers. When concern as to the Act's breadth was expressed, supporters of the amendments indicated that it would not impede, for example,. a merger between two small companies to enable the combination to compete more effectively with larger corporations dominating the relevant market, nor a merger between a corporation which is financially healthy and a failing one which no longer can be a vital competitive factor in the market. The deletion of the word "community" in the original Act's description of the relevant geographic market is another illustration of Congress' desire to indicate that its concern was with the adverse effects of a given merger on competition only in an economically significant "section" of the country. Taken as a whole, the legislative history illuminates congressional concern with the protection of competition, not competitors, and its desire to restrain mergers only to the extent that such combinations may tend to lessen competition.

Sixth, Congress neither adopted nor rejected specifically any particular tests for measuring the relevant markets, either as defined in terms of product or in terms of geographic locus of competition, within which the anticompetitive effects of a merger were to be judged. Nor did it adopt a definition of the word "substantially," whether in quantitative terms of sales or assets or market shares or in designated qualitative terms, by which a merger's effects on competition were to be measured.

Seventh, while providing no definite quantitative or qualitative tests by which enforcement agencies could gauge the effects of a given merger to determine whether it may "substantially" lessen competition or tend toward monopoly, Congress indicated plainly that a merger had to be functionally viewed, in the context of its particular industry. That is, whether the consolidation was to take place in an industry that was fragmented rather than concentrated, that had seen a recent trend toward domination by a few leaders or had remained fairly consistent in its distribution of market shares among the participating companies, that had experienced easy access to markets by suppliers and easy access to suppliers by buyers or had witnessed

foreclosure of business, that had witnessed the ready entry of new competition or the erection of barriers to prospective entrants, all were aspects, varying in importance with the merger under consideration, which would properly be taken into account.

Eighth, Congress used the words "may be substantially to lessen competition" (emphasis supplied), to indicate that its concern was with probabilities, not certainties. Statutes existed for dealing with clear-cut menaces to competition; no statute was sought for dealing with ephemeral possibilities. Mergers with a probable anticompetitive effect were to be proscribed by this Act.

It is against this background that we return to the case before us.

. . .

A Note on the Expediting Act

Brown, having lost in the district court, brought a direct appeal to the Supreme Court under the Expediting Act.[1] Congress considered antitrust cases too important to go through the courts of appeal before reaching the Supreme Court and so in 1903 enacted the Expediting Act to enable a direct appeal to the Supreme Court from the district court in cases brought by the United States. The Expediting Act did not apply to purely private cases. As a result, there are relatively few court of appeals decisions in antitrust cases between 1903 and 1974, when the Expediting Act was substantially amended.

Until 1891, cases within the appellate jurisdiction of the Supreme Court were heard as a matter of right, that is, the Court had no choice but to hear and decide any appeal properly before it. In the Judiciary Act of 1891,[2] however, Congress created the courts of appeal and transferred most routine direct appeals to them. The decisions of the courts of appeal usually would be final, although Congress provided the Supreme Court with the power to review court of appeal decisions by way of a discretionary writ of certiorari.

Antitrust cases, however, were treated differently. In 1903, with the revitalization of antitrust enforcement under President Theodore Roosevelt, Congress passed the Expediting Act.[3] The Expediting Act addressed two subjects: the expedition of government suits in equity at the trial level and the appellate review of decisions in government antitrust cases.

Section 1 provided that in suits in equity brought by the government under the Sherman Act, the Interstate Commerce Act, or any like act, where the attorney general filed a certificate with the clerk of the district court that the case was of "general public importance," the court would give the case precedence over other types of cases and would be assigned for hearing at the earliest practicable date before a panel of not less than three judges.[4] Moreover, if the judges on the panel were divided in their opinions

1. Act of Feb. 11, 1903, ch. 544, 32 Stat. 823 (1903).
2. Judiciary Act of 1891, ch. 517, 26 Stat. 826 (1891) (also known as the Evarts Act and the Circuit Courts of Appeals Act).
3. Act of Feb. 11, 1903, ch. 544, 32 Stat. 823 (1903).
4. Act of Feb. 11, 1903, ch. 544, § 1, 32 Stat. 823 (1903) (current version at 15 U.S.C. § 28).

as to the proper disposition of the case, the case was automatically certified to the Supreme Court for appeal.[5] In 1974, the act was amended to eliminate the requirement for a three-judge district court upon the request of the attorney general, which was rarely used anyway, but retained the expediting requirement.[6] This provision was repealed without fanfare in 1984.[7]

Section 2 of the original Expediting Act also provided that in every suit in equity brought by the government under the Sherman Act, the Interstate Commerce Act, or any similar act, whether or not the Attorney General certified the case to be of "general public importance," an appeal from the final decree of the trial court would lie only to the Supreme Court and bypass the court of appeals.[8] Although the act spoke only in terms of final judgments, the Court interpreted it to apply equally to interlocutory appeals and to give exclusive appellate jurisdiction over these appeals to the Supreme Court.[9]

The direct appeal provision of the Expediting Act was substantially amended in 1974 by the Antitrust Procedures and Penalties Act.[10] The amendment redirected appeals from final judgments in government civil cases from the Supreme Court to the courts of appeal in the usual course, with the opportunity for Supreme Court review through a discretionary writ of certiorari.[11] The amendment did preserve a direct appeal to the Supreme Court in the exceptional case where, upon application by a party, the district judge enters an order stating "immediate consideration by the Supreme Court is of general importance in the administration of justice" and the Supreme Court decides in its discretion to hear the appeal.[12] The only case in which the Supreme Court has taken a direct appeal since the 1974 amendment was in the government's case to break up AT&T in the early 1980s.[13] The government also asked for and obtained from the district court in the *Microsoft* case a certification order for a direct appeal to the Supreme Court, but the Court declined to accept the appeal and remanded to the Court of Appeals for the District of Columbia.[14]

5. *Id*.

6. Antitrust Procedures and Penalties Act § 4, Pub. L. No. 93-528, § 4, 88 Stat. 1708 (1974).

7. Pub. L. No. 98–620, § 402(11), 98 Stat. 3358 (1984).

8. Act of Feb. 11, 1903, ch. 544, § 2, 32 Stat. 823 (1903).

9. *See* Tidewater Oil Co. v. United States, 409 U.S. 151, 154-56 (1972).

10. Pub. L. No. 93-528, 88 Stat. 1706 (1974) (codified as amended in scattered sections of 15 U.S.C.).

11. *Id*. at § 5 (codified at 15 U.S.C. § 29(a)).

12. *Id*. at § 5 (codified at 15 U.S.C. § 29(b)).

13. *See United States v. Western Elec. Co.*, No. 82-0192, 1982 WL 1931 (D.D.C. Nov. 10, 1982) (entering certification order for direct appeal of the modified final judgment). The Supreme Court accepted the direct appeal and affirmed the district court's judgment. *Maryland v. United States*, 460 U.S. 1001 (1983).

14. *Microsoft Corp. v. United States*, 530 U.S. 1301 (2000), *denying direct appeal from* 97 F. Supp. 2d 59 (D.D.C. 2000). Justice Breyer dissented and would have accepted the case.

1982 MERGER GUIDELINES

I. PURPOSE AND UNDERLYING POLICY ASSUMPTIONS

These Guidelines state in outline form the present enforcement policy of the U.S. Department of Justice ("Department") concerning acquisitions and mergers ("mergers") subject to section 7 of the Clayton Act[1] or to section 1 of the Sherman Act.[2] They describe the general principles and specific standards normally used by the Department an analyzing mergers.[3] By stating its policy as simply and clearly as possible, the Department hopes to reduce the uncertainty associated with enforcement of the antitrust laws in this area.

Although the Guidelines should improve the predictability of the Departments merger enforcement policy, it is not possible to remove the exercise of judgment from the evaluation of mergers under the antitrust laws. Difficult factual questions arise under the standards stated below, and the Department necessarily will base its decision on the data that are practicably available in each case. Moreover, the standards represent generalizations to which some exceptions are inevitable. In appropriate cases, the Department will challenge mergers that are competitively objectionable under the general principles of the Guidelines regardless of whether they are covered by the specific standards. Finally, the Guidelines are designed primarily to indicate when the Department is likely to challenge mergers, not how it will conduct the litigation of cases that it decides to bring. Although

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[1]15 U.S.C.A. § 18 (1981). Mergers subject to section 7 are prohibited if their effect "may be substantially to lessen competition, or to tend to create a monopoly."

[2]15 U.S.C.A. § 1 (1981). Mergers subject to section 1 are prohibited if they constitute a "contract, combination... or conspiracy in restraint of trade."

[3]They replace a set of Guidelines issued by the Department in 1968, and are subject to further revision in light of subsequent judicial decisions or economic studies. Although changes in enforcement policy may precede the issuance of amended Guidelines, the Department will attempt to conform the Guidelines to such changes as soon as possible.

relevant in the latter context, the factors contemplated in the standards do not exhaust the range of evidence that the Department may introduce in court.[4]

The unifying theme of the Guidelines is that mergers should not be permitted to create or enhance "market power" or to facilitate its exercise. A sole seller (a "monopolist") of a product with no good substitutes can maintain a selling price that is above the level that would prevail if the market were competitive. Where only a few firms account for most of the sales of a product, those firms can in some circumstances coordinate, explicitly or implicitly, their actions in order to approximate the performance of a monopolist. This ability of one or more firms profitably to maintain prices above competitive levels for a significant period of time is termed "market power." Sellers with market power also may eliminate rivalry on variables other than price. In either case, the result is a transfer of wealth from buyers to sellers and a misallocation of resources.[5]

Although they sometimes harm competition, mergers generally play an important role in a free enterprise economy. They can penalize ineffective management and facilitate the efficient flow of investment capital and the redeployment of existing productive assets. While challenging competitively harmful mergers, the Department seeks to avoid unnecessary interference with that larger universe of mergers that are either competitively beneficial or neutral. In attempting to mediate between these dual concerns, however, the Guidelines reflect the congressional intent that merger enforcement should interdict competitive problems in their incipiency.

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[4]Parties seeking more specific advance guidance concerning the Department's enforcement intentions with respect to any particular merger should consider using the Business Review Procedure. 28 C.F.R. § 50.6.

[5]"Market power" also encompasses the ability of a single buyer or group of buyers to depress the price paid for a product to a level that is below the competitive price. Market power by buyers has wealth transfer and resource misallocation effects analogous to those associated with market power by sellers.

Horizontal Merger Guidelines

U.S. Department of Justice

and the

Federal Trade Commission

Issued: August 19, 2010

1. Overview

These Guidelines outline the principal analytical techniques, practices, and the enforcement policy of the Department of Justice and the Federal Trade Commission (the "Agencies") with respect to mergers and acquisitions involving actual or potential competitors ("horizontal mergers") under the federal antitrust laws.[1] The relevant statutory provisions include Section 7 of the Clayton Act, 15 U.S.C. § 18, Sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1, 2, and Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45. Most particularly, Section 7 of the Clayton Act prohibits mergers if "in any line of commerce or in any activity affecting commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly."

The Agencies seek to identify and challenge competitively harmful mergers while avoiding unnecessary interference with mergers that are either competitively beneficial or neutral. Most merger analysis is necessarily predictive, requiring an assessment of what will likely happen if a merger proceeds as compared to what will likely happen if it does not. Given this inherent need for prediction, these Guidelines reflect the congressional intent that merger enforcement should interdict competitive problems in their incipiency and that certainty about anticompetitive effect is seldom possible and not required for a merger to be illegal.

These Guidelines describe the principal analytical techniques and the main types of evidence on which the Agencies usually rely to predict whether a horizontal merger may substantially lessen competition. They are not intended to describe how the Agencies analyze cases other than horizontal mergers. These Guidelines are intended to assist the business community and antitrust practitioners by increasing the transparency of the analytical process underlying the Agencies' enforcement decisions. They may also assist the courts in developing an appropriate framework for interpreting and applying the antitrust laws in the horizontal merger context.

These Guidelines should be read with the awareness that merger analysis does not consist of uniform application of a single methodology. Rather, it is a fact-specific process through which the Agencies, guided by their extensive experience, apply a range of analytical tools to the reasonably available and reliable evidence to evaluate competitive concerns in a limited period of time. Where these Guidelines provide examples, they are illustrative and do not exhaust the applications of the relevant principle.[2]

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[1] These Guidelines replace the Horizontal Merger Guidelines issued in 1992, revised in 1997. They reflect the ongoing accumulation of experience at the Agencies. The Commentary on the Horizontal Merger Guidelines issued by the Agencies in 2006 remains a valuable supplement to these Guidelines. These Guidelines may be revised from time to time as necessary to reflect significant changes in enforcement policy, to clarify existing policy, or to reflect new learning. These Guidelines do not cover vertical or other types of non-horizontal acquisitions.

[2] These Guidelines are not intended to describe how the Agencies will conduct the litigation of cases they decide to bring. Although relevant in that context, these Guidelines neither dictate nor exhaust the range of evidence the Agencies may introduce in litigation.

The unifying theme of these Guidelines is that mergers should not be permitted to create, enhance, or entrench market power or to facilitate its exercise. For simplicity of exposition, these Guidelines generally refer to all of these effects as enhancing market power. A merger enhances market power if it is likely to encourage one or more firms to raise price, reduce output, diminish innovation, or otherwise harm customers as a result of diminished competitive constraints or incentives. In evaluating how a merger will likely change a firm's behavior, the Agencies focus primarily on how the merger affects conduct that would be most profitable for the firm.

A merger can enhance market power simply by eliminating competition between the merging parties. This effect can arise even if the merger causes no changes in the way other firms behave. Adverse competitive effects arising in this manner are referred to as "unilateral effects." A merger also can enhance market power by increasing the risk of coordinated, accommodating, or interdependent behavior among rivals. Adverse competitive effects arising in this manner are referred to as "coordinated effects." In any given case, either or both types of effects may be present, and the distinction between them may be blurred.

These Guidelines principally describe how the Agencies analyze mergers between rival suppliers that may enhance their market power as sellers. Enhancement of market power by sellers often elevates the prices charged to customers. For simplicity of exposition, these Guidelines generally discuss the analysis in terms of such price effects. Enhanced market power can also be manifested in non-price terms and conditions that adversely affect customers, including reduced product quality, reduced product variety, reduced service, or diminished innovation. Such non-price effects may coexist with price effects, or can arise in their absence. When the Agencies investigate whether a merger may lead to a substantial lessening of non-price competition, they employ an approach analogous to that used to evaluate price competition. Enhanced market power may also make it more likely that the merged entity can profitably and effectively engage in exclusionary conduct. Regardless of how enhanced market power likely would be manifested, the Agencies normally evaluate mergers based on their impact on customers. The Agencies examine effects on either or both of the direct customers and the final consumers. The Agencies presume, absent convincing evidence to the contrary, that adverse effects on direct customers also cause adverse effects on final consumers.

Enhancement of market power by buyers, sometimes called "monopsony power," has adverse effects comparable to enhancement of market power by sellers. The Agencies employ an analogous framework to analyze mergers between rival purchasers that may enhance their market power as buyers. See Section 12.

Merger Guidelines

U.S. Department of Justice and the Federal Trade Commission

I. Overview

These Merger Guidelines explain how the Department of Justice and the Federal Trade Commission (the "Agencies") identify potentially illegal mergers. They are designed to help the public, business community, practitioners, and courts understand the factors and frameworks the Agencies consider when investigating mergers.

The Agencies enforce the federal antitrust laws, specifically Sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1, 2; Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45; and Sections 3, 7, and 8 of the Clayton Act[1], 15 U.S.C. §§ 14, 18, 19. Congress has charged the Agencies with administering these statutes as part of a national policy to promote open and fair competition, including by preventing mergers and acquisitions that would violate these laws.

Section 7 of the Clayton Act is the antitrust law that most directly addresses mergers and acquisitions.[2] Section 7 prohibits mergers and acquisitions where "in any line of commerce or in any activity affecting commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly."[3] Section 7 is a preventative statute that reflects the "mandate of Congress that tendencies toward concentration

[1] As amended under the Celler-Kefauver Antimerger Act of 1950, Public Law 81-899, 64 Stat. 1125, and the Hart-Scott-Rodino Antitrust Improvements Act of 1976, 15 U.S.C. § 18a.
[2] Mergers may also violate, *inter alia*, Sections 1 and 2 of the Sherman Act or Section 5 of the FTC Act.
[3] 15 U.S.C. § 18.

in industry are to be curbed in their incipiency."[4]

The Clayton Act requires the Agencies to assess the risk to competition from mergers. As the Supreme Court has explained, "Section 7 itself creates a relatively expansive definition of antitrust liability: To show that a merger is unlawful, a plaintiff need only prove that its effect '*may be* substantially to lessen competition.'"[5] This is because "[t]he grand design of…Section 7, as to stock acquisitions [and] the acquisition of assets, was to arrest incipient threats to competition which the [more broadly applicable] Sherman Act did not ordinarily reach."[6] Accordingly, in analyzing a proposed merger, the Agencies do not seek to predict the future or the precise effects of a merger with certainty. Rather, the Agencies assess the risk that the merger may lessen competition substantially or tend to create a monopoly based on the totality of the evidence available at the time of the investigation.

Across the economy, competition plays out in many ways and on a variety of dimensions. In recognition of this fact, "Congress indicated plainly that a merger had to be functionally viewed, in the context of its particular industry."[7] The Agencies therefore begin their merger analysis with the question: how does competition present itself in this market and might this merger risk lessening that competition substantially now or in the future?

The Agencies apply the following Guidelines to help answer this question. In some cases, "it is possible…to simplify the test of illegality" by focusing on discrete facts that, when present, suggest a merger is "so inherently likely to lessen competition substantially that it must be enjoined in the absence of evidence clearly showing that the merger is not likely to have such anticompetitive effects."[8]

Guidelines 1-8 identify several frameworks that the Agencies use to assess the risk that a merger's effect may be substantially to lessen competition or to tend to create a monopoly. Guidelines 9-12 explain issues that often arise when the Agencies apply those frameworks in several common settings. Guideline 13 explains how the Agencies consider mergers and acquisitions that raise competitive concerns not addressed by the other Guidelines.

These Guidelines are not mutually exclusive, as a single transaction can have multiple effects or trigger concern in multiple ways. To promote efficient review, for any given transaction the Agencies may limit their analysis to any one Guideline or subset of Guidelines that most readily demonstrates the risks to competition from the transaction.

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[4] *Brown Shoe Co. v. United States*, 370 U.S. 294, 346 (1962) ("*Brown Shoe*").
[5] *California v. Am. Stores Co.*, 495 U.S. 271, 284 (1990) (quoting 15 U.S.C. § 18 with emphasis) (citing *Brown Shoe*, 370 U.S. at 323).
[6] *United States v. Penn-Olin Chemical Co.*, 378 U.S. 158, 170-71 (1964).
[7] *United States v. Gen. Dynamics Corp.*, 415 U.S. 486, 498 (1974) (quoting *Brown Shoe*, 370 U.S. at 321-22) ("*Gen. Dynamics*").
[8] *United States v. Phila. Nat'l Bank*, 374 U.S. 321, 362-63 (1963) (*Phila. Nat'l Bank*).

Guideline 1: Mergers Should Not Significantly Increase Concentration in Highly Concentrated Markets.[9] Concentration refers to the number and relative size of rivals competing to offer a product or service to a group of customers. The Agencies examine whether a merger between competitors would significantly increase concentration and result in a highly concentrated market. If so, the Agencies presume that a merger may substantially lessen competition based on market structure alone.

Guideline 2: Mergers Should Not Eliminate Substantial Competition between Firms.[10] The Agencies examine whether competition between the merging parties is substantial, since their merger will necessarily eliminate competition between them.

Guideline 3: Mergers Should Not Increase the Risk of Coordination.[11] The Agencies examine whether a merger increases the risk of anticompetitive coordination. A market that is highly concentrated or has seen prior anticompetitive coordination is inherently vulnerable and the Agencies will presume that the merger may substantially lessen competition. In a market that is not yet highly concentrated, the Agencies investigate whether facts suggest a greater risk of coordination than market structure alone would suggest.

Guideline 4: Mergers Should Not Eliminate a Potential Entrant in a Concentrated Market.[12] The Agencies examine whether, in a concentrated market, a merger would (a) eliminate a potential entrant or (b) eliminate current competitive pressure from a perceived potential entrant.

Guideline 5: Mergers Should Not Substantially Lessen Competition by Creating a Firm That Controls Products or Services That Its Rivals May Use to Compete.[13] When a merger involves products or services rivals use to compete, the Agencies examine whether the merged firm can control access to those products or services to substantially lessen competition and whether they have the incentive to do so.

Guideline 6: Vertical Mergers Should Not Create Market Structures That Foreclose Competition.[14] The Agencies examine how a merger would restructure a vertical supply or distribution chain. At or near a 50% share, market structure alone indicates the merger may substantially lessen competition. Below that level, the Agencies examine whether the merger would create a "clog on competition…which deprives rivals of a fair opportunity to compete."[15]

Guideline 7: Mergers Should Not Entrench or Extend a Dominant Position.[16] The Agencies examine whether one of the merging firms already has a dominant position that the merger may reinforce. They also examine whether the merger may extend that dominant position to substantially lessen competition or tend to create a monopoly in another market.

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[9] *See, e.g., Phila. Nat'l Bank*, 374 U.S. at 363, *modified by Gen. Dynamics*, 415 U.S. at 498 (see Section IV).
[10] *See, e.g., ProMedica Health System, Inc. v. FTC*, 749 F.3d 559, 568-70 (6th Cir. 2014), *cert. denied*, 575 U.S. 996 (2015).
[11] *See, e.g., Hospital Corp. of America v. FTC*, 807 F.2d 1381, 1387-89 (7th Cir. 1986) (Posner, J.).
[12] *See, e.g., United States v. Marine Bancorp.*, 418 U.S. 602, 623-26 (1974).
[13] *See United States v. AT&T*, 916 F.3d 1029, 1035-36 (D.C. Cir. 2019).
[14] *See, e.g., Ford Motor Co. v. United States*, 405 U.S. 562 (1972).
[15] *Brown Shoe*, 370 U.S. at 324.
[16] *See, e.g., FTC v. Procter & Gamble Co.*, 386 U.S. 568, 577-78 (1967).

Guideline 8: Mergers Should Not Further a Trend Toward Concentration.[17] If a merger occurs during a trend toward concentration, the Agencies examine whether further consolidation may substantially lessen competition or tend to create a monopoly.

Guideline 9: When a Merger is Part of a Series of Multiple Acquisitions, the Agencies May Examine the Whole Series.[18] If an individual transaction is part of a firm's pattern or strategy of multiple acquisitions, the Agencies consider the cumulative effect of the pattern or strategy.

Guideline 10: When a Merger Involves a Multi-Sided Platform, the Agencies Examine Competition Between Platforms, on a Platform, or to Displace a Platform. Multi-sided platforms have characteristics that can exacerbate or accelerate competition problems. The Agencies consider the distinctive characteristics of multi-sided platforms carefully when applying the other Guidelines.

Guideline 11: When a Merger Involves Competing Buyers, the Agencies Examine Whether It May Substantially Lessen Competition for Workers or Other Sellers.[19] Section 7 protects competition among buyers and prohibits mergers that may substantially lessen competition in any relevant market. The Agencies therefore apply these Guidelines to assess whether a merger between buyers, including employers, may substantially lessen competition or tend to create a monopoly.

Guideline 12: When an Acquisition Involves Partial Ownership or Minority Interests, the Agencies Examine Its Impact on Competition.[20] Acquisitions of partial control or common ownership may in some situations substantially lessen competition.

Guideline 13: Mergers Should Not Otherwise Substantially Lessen Competition or Tend to Create a Monopoly. The Guidelines are not exhaustive of the ways that a merger may substantially lessen competition or tend to create a monopoly.

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These Guidelines consolidate, revise, and replace the various versions of Merger Guidelines issued by the Agencies since the Department of Justice's first Merger Guidelines in 1968. This revision builds on the learning and experience reflected in those prior Guidelines and successive revisions. These Guidelines reflect the collected experience of the Agencies over many years of merger review in a changing economy.

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[17] *See, e.g., Gen. Dynamics*, 415 U.S. at 497-98; *United States v. Pabst Brewing Co.*, 384 U.S. 546, 552–53 (1966).
[18] *See* H.R. Rep. No. 1191, 81st Cong., 2d Sess. 12-13 (1950).
[19] *See, e.g.*, *Mandeville Island Farms v. Am. Crystal Sugar Co.*, 334 U.S. 219, 235 (1948).
[20] *See, e.g.*, *Denver & Rio Grande v. United States*, 387 U.S. 485, 504 (1967).

The Call for Antitrust Reform

164 Cong. Rec. S2854-S2856 (daily ed. May 23, 2018) (statement of Sen. Klobuchar)

The PRESIDING OFFICER (Mrs. HYDE-SMITH). The Senator from Minnesota.

ANTITRUST ENFORCEMENT

Ms. KLOBUCHAR. Madam President, I come to the Senate floor today to discuss what I consider an often overlooked issue that is of central importance to the well-being of American consumers and our Nation's economic strength, and that is antitrust enforcement.

Before I was a Senator, I was a prosecutor for 8 years, and before that, I was a lawyer in private practice. Early in my legal career, my main client when I was a brandnew lawyer was MCI. At the time, MCI was a young, innovative telecom company that was determined to disrupt the telecom industry by competing with first long-distance carriers and then local monopoly carriers. It was exciting for me to represent a company like that. They had a lot of scrappy lawyers who viewed themselves as fighting for consumers to give them some alternatives and lower prices.

I remember that at one of my regulatory hearings, I actually quoted the first words Alexander Graham Bell said over the telephone: "Come here, Watson, I need you." But in the Wild West world of MCI, when they were getting ready to relay the first-ever communication between St. Louis and Chicago—which seems odd to the younger pages here—at the time, Bell companies dominated all telecoms, and we only had those old-style telephones and only one company in an area that offered service. So MCI came in to compete by building their own line between St. Louis and Chicago. One of their investors, Irwin Hirsh, memorialized this great moment, and instead of saying "Come here, Watson, I need you," he said, "I'll be damned. It actually works."

But make no mistake—without antitrust law, MCI would never have worked. We would have had no competitors. We would have been stuck in the old Bell operating company world. MCI took on Bell operating company and AT&T and ultimately broke up that monopoly. This breakup lowered long-distance prices for consumers across the country and ushered in an era of amazing innovation and revolutionized the telecom industry and, yes, brought down those long-distance prices.

Antitrust may not always make front-page headlines these days, but antitrust enforcement is as important now as it has ever been. It remains vital to the welfare of our country, and we ignore it at our own peril.

People often ask me, what does antitrust law have to do with our economy? The answer I always give is, everything. Let me repeat that. Antitrust has everything to do with our broader economy. That is becoming clearer to the American public. People intuitively understand that there is too much industry consolidation in this country. They understand that is not necessarily good for them whether they are a Democrat or a Republican or an Independent. They understand that the benefits of big corporate mergers go largely to the merged companies and their investors and not to the public.

This highlights the fact that antitrust is not just a subject for competition policy circles or law school classroom discussion or the business section of the newspaper; antitrust policy touches people across our country, and they are beginning to see how important it is to their lives.

Two-thirds of Americans have come to believe that the economy unfairly favors powerful interests. Even as our economy stabilizes and grows stronger, it is easy to see why people feel that way.

Every year, I go to all 87 counties in my State. Everywhere I go, people tell me that while the job situation has improved since the downturn over the last decade—and, in fact, we need workers for a lot of the jobs that are open in our economy—they are still struggling with the cost of living.

In my State, we are fortunate to have a strong economy, but the cost of living is by no means low, and that is true all over the United States. For some, it is rent payments. For others, it is mortgages. For others, it is prescription drugs—and that is actually for almost everyone—and mobile phone service. To many people who dream of starting their own business, that is hard to do when those costs are so high.

Anticompetitive mergers and excessive concentration can increase these cost burdens. They may lead these cost burdens, whether it is in the agriculture industry or the cable industry or certainly the pharmaceutical industry, where we see monopoly power over certain kinds of drugs, where we see pharmaceuticals basically, in the words of the President of the United States while he was campaigning, "able to get away with murder." Yet, what are we doing about it? Well, the people would like us to do something about it. They are increasingly realizing that antitrust has everything to do with the prices they pay for goods and services and with the health of our global economy.

These are not novel ideas. Think back to trust-busting. Think back to Teddy Roosevelt. Think back to this American entrepreneurial spirit of small companies and individuals being able to compete against each other. That is what our economy is all about in America. When companies are allowed to compete and people are allowed to get into a business, businesses can offer higher quality goods for the lowest possible price.

The point I want to emphasize is this: Talking about antitrust in a narrow way is outdated and oversimplified. Antitrust enforcement affects more than price and output. We now have evidence that competition fosters small business growth, reduces inequality, and increases innovation. In short, tackling concentrations of power is a linchpin to a healthy economy and a civil society.

With respect to business growth, evidence suggests that it is nearly impossible for new firms to penetrate highly concentrated markets, so ensuring competitive markets is one clear way to help entrepreneurs and small businesses succeed. We all know how important small business growth is to our economy.

Research also suggests that concentration increases income inequality. Firms with market power raise prices, which takes money from consumers and puts it in the pockets of the few. Concentration also blunts incentives to innovate. Why would someone innovate if they know they can just keep the product they have, not invest in R&D, not invest in innovation, because they have the only product on the market because no one is competing with them for something better? When there are 8 or 10 competitors, they will try everything to get a leg up on their competition by lowering prices and finding new products that people want. When there are only one or two firms, there is little incentive to make product improvements, develop new products, or certainly bring down those prices.

We have to recognize the broader benefits of antitrust enforcement—especially today, when we are living in a wave of consolidation across industries. Since 2008, American firms have engaged in more than $10 trillion in acquisitions. The last few years have seen a steady increase in mergers reviewed by the Federal Trade Commission and the Justice Department's Antitrust Division. But it is not just the number of deals. I recall former Assistant Attorney General for Antitrust Bill Baer, a lifelong antitrust lawyer, saying that his agency was reviewing deals that raised such serious antitrust concerns that they should have never made it out of the boardroom.

As former chair and ranking member of the Antitrust Subcommittee, I have raised concerns about several megamerger proposals over the last few years.

Look at the Comcast-Time Warner merger proposal. As I pointed out at a hearing in the Judiciary Committee, if the merger had been approved, the combined company would have controlled 60 percent of the country's high-speed and broadband customers.

Look at the failed merger between Norfolk Southern Railway and Canadian Pacific—something I took on immediately after it was announced. Even without the merger, 90 percent of freight traffic is still handled by only four railroads. As I pointed out then, this is the same number of railroads on the Monopoly board. Four is what we are down to after having literally 63 of these major railroads years and years ago, then going down to 9, and now we are at only 4.

When a State has a lot of rural areas like mine has—we are fifth in the country for ag, and I think of the Presiding Officer's State—customers or farmers or small businesses that are at the very end of that freight rail line are called captive customers because they are only served in reality by one railroad. They see their rates go up, and they have no other choices. The more numbers are reduced, the more difficult it becomes for people to get good rates so they are able to get their goods to market. It is easier when you are in a highly concentrated market, but it is very hard when you are not.

These examples are part of a larger pattern of horizontal consolidation and vertical integration. Those are words you hear only in law school classes or maybe see in the business section of the paper, but that is what is happening.

We all know about AT&T's bid to buy Time Warner and the Justice Department lawsuit to block the deal, but that is not all. Sinclair Broadcast Group is trying to buy Tribune Media. Bayer is trying to buy Monsanto. CVS is trying to acquire Aetna.

Most recently, T-Mobile signed an agreement to buy Sprint, which would combine two of only four major cell phone carriers in the United States. Again, I note that number of four—the number on the Monopoly board—which would go down further to three. In fact, T-Mobile has been playing a major disrupting role—I mean disruption that is good in terms of bringing down prices. We have all seen the ads with what they are offering. This merger would merge two of those phone companies, and we would be down to only three. More than three-quarters of American adults now own smartphones, including many who depend on these devices for their primary connection to the internet. Many of them don't even have local phone service. Now we will bring their choices for major carriers down to three if this deal goes through.

Last October, in anticipation of this transaction, and weeks ago, after it was announced, I sent letters with a number of my colleagues raising antitrust concerns and urging the Justice Department and the Federal Communications Commission to investigate this potential transaction. Today, Senator LEE and I are announcing that we are going to hold a hearing to look at these issues very carefully and very seriously in a bipartisan way in the Antitrust Subcommittee next month.

Often, in connection with large mergers, the merging parties and the investment community promise millions, sometimes billions of dollars in efficiencies and cost savings. But after closing, do consumers actually see the promised lower prices or the improved quality? I think the American people deserve an answer to that question. To address these issues, we need aggressive antitrust enforcement.

Let's talk about that. Unfortunately, current levels of Federal antitrust enforcement activity are not where they need to be. I take my responsibilities on the Antitrust Subcommittee seriously, and Chairman LEE and I have done a lot of important work together on the subcommittee over the past few years. Also, we are both committed to the professionalism and the independence of the Federal Trade Commission and the Antitrust Division.

Antitrust and competition are not Republican or Democratic issues; they are consumer issues. We can all agree that robust competition is essential to our free market economy. In light of this consensus, the enormous economic consequences of lax antitrust enforcement, and the current merger wave, these issues require our urgent attention.

Let me explain.

Our economy, in terms of nominal GDP, has increased by 30 percent between 2010 and 2017, and annual merger filings have almost doubled during that time. At the same time, our antitrust agencies' budgets have been held flat. As a result, agencies are only able to litigate cases involving the most highly concentrated markets. This limits the attention they pay to closer or more difficult cases.

Despite these constraints, agencies are doing what they can, but we need to do more. Giving agencies the resources to pursue the harder cases will pay real dividends to our economy. When I say resources, I also mean the legal tools necessary to protect competition.

When it comes to mergers, the protections in the Clayton Act—that is the antitrust law—have slowly been eroded. Over time, we have seen a systemic underenforcement of our competition laws. The result has been even larger mergers and more concentrated industries, and American consumers are taking notice. We need to give our agencies the legal tools to push back.

That is why I have introduced two major antitrust bills over the last year. The first will give our antitrust agencies the resources they need to protect competition. Now, this is not coming off the backs of taxpayers because, as I have already explained, they are already having to foot the bill for a lot of these mergers in terms of higher prices. This bill would, in fact, update merger filing fees for the first time since 2001. Think of how many years that is and how the competitive landscape and the merger landscape have changed during those 17 years. This bill would lower the burden on small and medium-sized businesses for their filing fees and ensure that larger deals, where we are seeing all of these activities—these billion-dollar deals where they hire so many lawyers that there are more lawyers on those deals than there are Senators' desks in this room—have fees on businesses that would raise enough revenues so taxpayers could foot less of the bill for merger review. I am not talking about an across-the-board business tax. I am talking about higher fees on those businesses—major businesses, huge businesses—that are seeking to merge and reap the benefits. If their lawyers can get all kinds of bonuses for getting the deals through, at least the taxpayers should be getting the bonus of being able to know that someone is looking out for them in reviewing these deals.

Effective enforcement also depends on feedback. As the size of mergers have grown, so have the complexities

of merger settlements. A question for modern enforcement is whether some proposed mergers are simply too big to fix. Agencies can make better enforcement decisions if they understand what has worked in the past.

So my bill gives the agencies the tools to assess whether merger consent decrees have in fact been successful. Have all those promises we hear at the hearings or we see in writing or we read about in the business pages really come to fruition?

In addition, we need a better understanding of the effects of market consolidation on our economy. That is why we need to study the effects of mergers on wages, employment, innovation, and new business formation. We also must give our antitrust agencies and courts the legal tools necessary to protect competition.

That is why my second bill, the Consolidation Prevention and Competition Promotion Act, would restore the Clayton Act's original purpose of promoting competition by updating our legal standards so our legal standards are as sophisticated as the companies that are proposing these mergers and the kinds of mergers they are proposing.

My bill clarifies that we can prevent mergers that reduce choice, foreclose competition through vertical consolidation, stifle innovation, or create monopsony. OK, that is a great word you would hear in law school classrooms, but what does it mean? Well, it means where a buyer has the power to reduce wages or prices.

It also creates a more stringent legal standard to stop harmful consolidation and shifts the burden for megamergers so the parties involved in the deal have to prove the merger does not harm competition. So what we are talking about here is when a big company buys another and then has that power to make it so that the other competitors aren't really going to be able to compete with the company that they bought, because this huge company might have the ability to bring down prices or do things temporarily to the point that they get other people out of the market or they hurt the others to the extent that you then don't have real competition, and that is what they are doing.

Let me be clear. Big by itself is not necessarily bad, and large mergers do not always harm consumers. My home State of Minnesota now has 19 Fortune 500 companies, and we all benefit from the fact that the largest and most successful companies in the world are American companies.

If we want the success to continue, our new businesses must have the same opportunities to grow as the businesses that came before them. Target, one of my favorite companies based in my State, started as a dry goods store in a small pedestrian mall that is now a big one in Minnesota, way, way back. That is a true story. And 3M, a big company out of my State, started as a sandpaper company. OK, so we have to make sure these small companies continue to grow and are able to compete, but that is not going to happen if we shove them out.

Our new businesses must have those same opportunities. Promoting competition and preventing excessive industry consolidation is the way we encourage this country's next big idea. Take Trader Joe's, JetBlue, and Starbucks. These companies started small, but they were able to get a foothold in the market and succeed because our antitrust laws prevented large, established competitors from limiting their growth. As a result, the American people get better products and services.

These bills will simply ensure that the next American business success story is possible. They will allow entrepreneurs and innovators to succeed in open, competitive markets.

We can do this, and we should do this. It doesn't take a miracle. It just takes people acknowledging what has made our economy strong in America. Antitrust law and policy are not always front and center in our debates, but they should be. The proposals in these bills will improve the lives of businesses and people across the country.

Protecting competition speaks to the basic principles of opportunity and fairness. It speaks to the simple notion that companies with the best ideas and the most innovative products will have a chance to rise to the top based on their own merits, and the reality is that these principles are at risk. We are currently experiencing a dramatic increase in both the number and size of mergers. As our markets and technologies evolve, our agencies and courts are less able to address this increased concentration and the really big guys like it that way.

That is why we have to stand up in this Chamber for the American people. We cannot wait any longer. We need vigorous antitrust enforcement. We need to improve the tools and the resources that those who are trying, at least, to put a modicum of enforcement in place are able to exercise. Our economy depends on it.

Madam President, I yield the floor.

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II

117TH CONGRESS
1ST SESSION

S. 225

To reform the antitrust laws to better protect competition in the American economy, to amend the Clayton Act to modify the standard for an unlawful acquisition, to deter anticompetitive exclusionary conduct that harms competition and consumers, to enhance the ability of the Department of Justice and the Federal Trade Commission to enforce the antitrust laws, and for other purposes.

IN THE SENATE OF THE UNITED STATES

FEBRUARY 4, 2021

Ms. KLOBUCHAR (for herself, Mr. BLUMENTHAL, Mr. BOOKER, Mr. MARKEY, and Mr. SCHATZ) introduced the following bill; which was read twice and referred to the Committee on the Judiciary

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A BILL

To reform the antitrust laws to better protect competition in the American economy, to amend the Clayton Act to modify the standard for an unlawful acquisition, to deter anticompetitive exclusionary conduct that harms competition and consumers, to enhance the ability of the Department of Justice and the Federal Trade Commission to enforce the antitrust laws, and for other purposes.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*

1 **SECTION 1. SHORT TITLE.**

2 This Act may be cited as the "Competition and Anti-
3 trust Law Enforcement Reform Act of 2021".

4 **SEC. 2. FINDINGS AND PURPOSES.**

5 (a) FINDINGS.—Congress finds that—

6 (1) competitive markets, in which multiple
7 firms compete to buy and sell products and services,
8 are critical to ensuring economic opportunity for all
9 people in the United States and providing resilience
10 to the economy during unpredictable times;

11 (2) when companies compete, businesses offer
12 the highest quality and choice of goods and services
13 for the lowest possible prices to consumers and other
14 businesses;

15 (3) competition fosters small business growth,
16 reduces economic inequality, and spurs innovation
17 and job creation;

18 (4) in the United States economy today, the
19 presence and exercise of market power is substantial
20 and growing;

21 (5) the presence and exercise of market power
22 makes it more difficult for people in the United
23 States to start their own businesses, depresses
24 wages, and increases economic inequality, with par-
25 ticularly damaging effects on historically disadvan-
26 taged communities;

1 (6) market power and undue market concentra-
2 tion contribute to the consolidation of political
3 power, undermining the health of democracy in the
4 United States;
5 (7) the anticompetitive effects of monopoly
6 power or buyer market power include higher prices,
7 lower quality, lessened choice, reduced innovation,
8 foreclosure of competitors, and increased entry bar-
9 riers;
10 (8) monopsony power or seller market power al-
11 lows a firm to force suppliers of goods or services to
12 accept below market prices or to force workers to ac-
13 cept below market wages, resulting in lower quality
14 products and services, reduced opportunities for sup-
15 pliers and workers, reduced availability of products
16 and services for consumers, reduced innovation, fore-
17 closure of competitors, and increased entry barriers;
18 (9) horizontal consolidation, vertical consolida-
19 tion, and conglomerate mergers all have potential to
20 increase market power and cause anticompetitive
21 harm;
22 (10) extensive consolidation is reducing com-
23 petition and threatens to place the American dream
24 further out of reach for many consumers in the
25 United States;

1 (11) since 2008, firms in the United States
2 have engaged in over $10,000,000,000,000 in merg-
3 ers and acquisitions;
4 (12) the acquisition of nascent or potential ri-
5 vals by dominant firms can present significant long-
6 term threats to competition and innovation;
7 (13) the acquisition, by one of its competitors,
8 of a maverick firm that plays a disruptive role in the
9 market—by using an innovative business model or
10 technology, offering lower prices or new, different
11 products or services products, or by other means
12 that benefit consumers—can present a threat to
13 competition;
14 (14) section 7 of the Clayton Act (15 U.S.C.
15 18), is the primary line of defense against anti-
16 competitive mergers;
17 (15) in recent years, some court decisions and
18 enforcement policies have limited the vitality of the
19 Clayton Act to prevent harmful consolidation by—
20 (A) discounting previously accepted pre-
21 sumptions that certain acquisitions are anti-
22 competitive;
23 (B) focusing inordinately on the effect of
24 an acquisition on price in the short term, to the

1 exclusion of other potential anticompetitive ef-
2 fects;
3 (C) underestimating the dangers that hori-
4 zontal, vertical, and conglomerate mergers will
5 lower quality, reduce choice, impede innovation,
6 exclude competitors, increase entry barriers, or
7 create buyer power, including monopsony
8 power; and
9 (D) requiring the government to prove
10 harmful effects of a proposed merger to a near
11 certainty;
12 (16) anticompetitive exclusionary conduct con-
13 stitutes a particularly harmful exercise of market
14 power and a substantial threat to the United States
15 economy;
16 (17) when dominant sellers exercise market
17 power, they harm buyers by overcharging them, re-
18 ducing product or service quality, limiting their
19 choices, and impairing innovation;
20 (18) when dominant buyers exercise market
21 power, they harm suppliers by underpaying them,
22 limiting their business opportunities, and impairing
23 innovation;
24 (19) when dominant employers exercise market
25 power, they harm workers by paying them low

1 wages, reducing their benefits, and limiting their fu-
2 ture employment opportunities;
3 (20) nascent or potential rivals—even those
4 that are unprofitable or inefficient—can be an im-
5 portant source of competitive discipline for dominant
6 firms;
7 (21) antitrust enforcement against anticompeti-
8 tive exclusionary conduct has been impeded when
9 courts have declined to rigorously examine the facts
10 in favor of relying on inaccurate economic assump-
11 tions that are inconsistent with contemporary eco-
12 nomic learning, such as presuming that market
13 power is not durable and can be expected to self-cor-
14 rect, that monopolies can drive as much or more in-
15 novation than a competitive market, that above-cost
16 pricing cannot harm competition, and other flawed
17 assumptions;
18 (22) the courts of the United States have im-
19 properly implied immunity from the antitrust laws
20 based on Federal regulatory statutes, even limiting
21 the application of statutory antitrust savings clauses
22 passed by Congress;
23 (23) the civil remedies currently available to
24 cure violations of the Sherman Antitrust Act, includ-
25 ing injunctions, equitable monetary relief, and pri-

1 vate damages, have not proven sufficient, on their
2 own, to deter anticompetitive conduct;
3 (24) in some cases, effective deterrence requires
4 the imposition of civil penalties, alone or in combina-
5 tion with existing remedies, including structural re-
6 lief, behavioral relief, private damages, and equitable
7 monetary relief, including disgorgement and restitu-
8 tion; and
9 (25) Federal antitrust enforcement budgets
10 have failed to keep pace with the growth of the econ-
11 omy and increasing demands on agency resources,
12 significantly undermining the ability of the Federal
13 antitrust agencies to fulfill their law enforcement
14 missions and contributing to the rise of market
15 power in the American economy.
16 (b) PURPOSES.—The purposes of this Act are to—
17 (1) enhance competition throughout the Amer-
18 ican economy by strengthening antitrust enforce-
19 ment by the Department of Justice, the Federal
20 Trade Commission, the State enforcement agencies,
21 and private parties;
22 (2) revise the legal standard under section 7 of
23 the Clayton Act to better enable enforcers to arrest
24 the likely anticompetitive effects of harmful mergers
25 in their incipiency, as Congress intended, by clari-

1 fying that the potential effects that may justify pro-
2 hibiting a merger under the Clayton Act include
3 lower quality, reduced choice, reduced innovation,
4 the exclusion of competitors, or increased entry bar-
5 riers, in addition to increased price to buyers or re-
6 duced price to sellers;
7 (3) amend the Clayton Act to clarify that an
8 acquisition that tends to create a monopsony violates
9 the Clayton Act;
10 (4) establish simple, cost-effective decision rules
11 that require the parties to certain acquisitions that
12 either significantly increase concentration or are ex-
13 tremely large bear the burden of establishing that
14 the acquisition will not materially harm competition;
15 (5) prohibit and deter exclusionary conduct that
16 harms competition, particularly by dominant firms;
17 (6) enable the Department of Justice and the
18 Federal Trade Commission to seek civil monetary
19 penalties, in addition to existing remedies, for viola-
20 tions of the Sherman Act;
21 (7) give the Department of Justice and the
22 Federal Trade Commission additional financial re-
23 sources and enforcement tools to craft remedies for
24 individual violations that are effective to deter future

1 unlawful conduct and proportionate to the gravity of
2 the violation;
3 (8) provide further protections for those who
4 provide evidence of anticompetitive conduct to gov-
5 ernment enforcers and potential financial rewards
6 for whistleblowers who provide information to the
7 government that leads to a criminal fine; and
8 (9) grant successful antitrust plaintiffs the
9 right to obtain prejudgment interest on damages
10 awards to further deter anticompetitive conduct and
11 more fully compensate injured parties.

12 **SEC. 3. DEFINITION.**

13 In this Act the term "antitrust laws"—
14 (1) has the meaning given the term in the first
15 section of the Clayton Act (15 U.S.C. 12); and
16 (2) includes—
17 (A) section 5 of the Federal Trade Com-
18 mission Act (15 U.S.C. 45) to the extent that
19 such section applies to unfair methods of com-
20 petition; and
21 (B) this Act and the amendments made by
22 this Act.

1 **SEC. 4. UNLAWFUL ACQUISITIONS.**

2 (a) MARKET POWER.—Section 1(a) of the Clayton
3 Act (15 U.S.C. 12(a)) is amended by adding at the end
4 the following:

5 "the term 'market power' in this Act means the
6 ability of a person, or a group of persons acting in
7 concert, to profitably impose terms or conditions on
8 counterparties, including terms regarding price,
9 quantity, product or service quality, or other terms
10 affecting the value of consideration exchanged in the
11 transaction, that are more favorable to the person or
12 group of persons imposing them than what the per-
13 son or group of persons could obtain in a competi-
14 tive market.".

15 (b) UNLAWFUL ACQUISITIONS.—Section 7 of the
16 Clayton Act (15 U.S.C. 18) is amended—

17 (1) in the first and second undesignated para-
18 graphs, by striking "substantially to lessen" each
19 place that term appears and inserting "to create an
20 appreciable risk of materially lessening";

21 (2) by inserting "or a monopsony" after "mo-
22 nopoly" each place that term appears; and

23 (3) by adding at the end the following:

24 "In a case brought by the United States, the Federal
25 Trade Commission, or a State attorney general, a court
26 shall determine that the effect of an acquisition described

1 in this section may be to create an appreciable risk of ma-
2 terially lessening competition or to tend to create a monop-
3 oly or a monopsony, in or affecting commerce, if—

4 "(1) the acquisition would lead to a significant
5 increase in market concentration in any relevant
6 market;

7 "(2)(A) the acquiring person has a market
8 share of greater than 50 percent or otherwise has
9 significant market power, as a seller or a buyer, in
10 any relevant market, and as a result of the acquisi-
11 tion, the acquiring person would obtain control over
12 entities or assets that compete or have a reasonable
13 probability of competing with the acquiring person
14 in the same relevant market; or

15 "(B) as a result of the acquisition, the acquir-
16 ing person would obtain control over entities or as-
17 sets that have a market share of greater than 50
18 percent or otherwise have significant market power,
19 as a seller or a buyer, in any relevant market, and
20 the acquiring person competes or has a reasonable
21 probability of competing with the entities or assets
22 over which it would obtain control, as result of the
23 acquisition, in the same relevant market;

24 "(3) the acquisition would lead to the combina-
25 tion of entities or assets that compete or have a rea-

1 sonable probability of competing in a relevant mar-
2 ket, and either the acquiring person or the entities
3 or assets over which it would obtain control pre-
4 vents, limits, or disrupts coordinated interaction
5 among competitors in a relevant market or has a
6 reasonable probability of doing so;
7 "(4) the acquisition—
8 "(A) would likely enable the acquiring per-
9 son to unilaterally and profitably exercise mar-
10 ket power or materially increase its ability to do
11 so; or
12 "(B) would materially increase the prob-
13 ability of coordinated interaction among com-
14 petitors in any relevant market; or
15 "(5)(A) the acquisition is not a transaction that
16 is described in section 7A(c); and
17 "(B)(i) as a result of such acquisition, the ac-
18 quiring person would hold an aggregate total
19 amount of the voting securities and assets of the ac-
20 quired person in excess of $5,000,000,000 (as ad-
21 justed and published for each fiscal year beginning
22 after September 30, 2022, in the same manner as
23 provided in section 8(a)(5) to reflect the percentage
24 change in the gross national product for such fiscal

1 year compared to the gross national product for the
2 year ending September 30, 2021); or
3 "(ii)(I) the person acquiring or the person being
4 acquired has assets, net annual sales, or a market
5 capitalization greater than $100,000,000,000 (as so
6 adjusted and published); and
7 "(II) as a result of such acquisition, the acquir-
8 ing person would hold an aggregate total amount of
9 the voting securities and assets of the acquired per-
10 son in excess of $50,000,000 (as so adjusted and
11 published),
12 unless the acquiring or acquired person establish, by
13 a preponderance of the evidence, that the effect of
14 the acquisition will not be to create an appreciable
15 risk of materially lessening competition or tend to
16 create a monopoly or a monopsony. In this para-
17 graph, the term 'materially' means more than a de
18 minimis amount.".

19 **SEC. 5. POST-SETTLEMENT DATA.**

20 Section 7A of the Clayton Act (15 U.S.C. 18a) is
21 amended by adding at the end the following:
22 "(l)(1) Each person who enters into an agreement
23 with the Federal Trade Commission or the United States
24 to resolve a proceeding brought under the antitrust laws
25 or under the Federal Trade Commission Act (15 U.S.C.

1 41 et seq.) regarding an acquisition with respect to which
2 notification is required under this section shall, on an an-
3 nual basis during the 5-year period beginning on the date
4 on which the agreement is entered into, submit to the Fed-
5 eral Trade Commission or the Assistant Attorney General,
6 as applicable, information sufficient for the Federal Trade
7 Commission or the United States, as applicable, to assess
8 the competitive impact of the acquisition, including—

9 "(A) the pricing, availability, and quality of any
10 product or service, or inputs thereto, in any market,
11 that was covered by the agreement;

12 "(B) the source, and the resulting magnitude
13 and extent, of any cost-saving efficiencies or any
14 benefits to consumers or trading partners that were
15 claimed as a benefit of the acquisition and the extent
16 to which any cost savings were passed on to con-
17 sumers or trading partners; and

18 "(C) the effectiveness of any divestitures or any
19 conditions placed on the acquisition in fully restoring
20 competition.

21 "(2) The requirement to provide the information de-
22 scribed in paragraph (1) shall be included in an agreement
23 described in that paragraph.

24 "(3) The Federal Trade Commission, with the con-
25 currence of the Assistant Attorney General, by rule in ac-

1 cordance with section 553 of title 5, United States Code,
2 and consistent with the purposes of this section—
3 "(A) shall require that the information de-
4 scribed in paragraph (1) be in such form and con-
5 tain such documentary material and information rel-
6 evant to an acquisition as is necessary and appro-
7 priate to enable the Federal Trade Commission and
8 the Assistant Attorney General to assess the com-
9 petitive impact of the acquisition under paragraph
10 (1); and
11 "(B) may—
12 "(i) define the terms used in this sub-
13 section;
14 "(ii) exempt, from the requirements of this
15 section, information not relevant in assessing
16 the competitive impact of the acquisition under
17 paragraph (1); and
18 "(iii) prescribe such other rules as may be
19 necessary and appropriate to carry out the pur-
20 poses of this section.".

21 **SEC. 6. FEDERAL TRADE COMMISSION STUDY.**

22 Not later than 2 years after the date of enactment
23 of this Act, the Federal Trade Commission, in consulta-
24 tion with the Securities and Exchange Commission, shall
25 conduct and publish a study, using any compulsory proc-

ess necessary, relying on public data and information if available and sufficient, and incorporating public comment on—

(1) the extent to which an institutional investor or related institutional investors have ownership or control interests in competitors in moderately concentrated or concentrated markets;

(2) the economic impacts of such overlapping ownership or control; and

(3) the mechanisms by which an institutional investor could affect competition among the companies in which it invests and whether such mechanisms are prevalent.

SEC. 7. GAO STUDIES.

(a) IN GENERAL.—Not later than 18 months after the date of enactment of this Act, the Comptroller General of the United States shall—

(1) conduct a study to assess the success of merger remedies required by the Department of Justice or the Federal Trade Commission in consent decrees entered into since 6 years prior to the date of enactment of this Act, including the impact on maintaining competition, a comparison of structural and conduct remedies, and the viability of divested assets; and

(2) conduct a study on the impact of mergers and acquisitions on wages, employment, innovation, and new business formation.

(b) UPDATE.—The Comptroller General of the United States shall—

(1) update the study under paragraph (1) 3 years and 6 years after the date of enactment of this Act based on the information provided under section 7A(l) of the Clayton Act, as added by section 5 of this Act; and

(2) identify specific remedies or alleged merger benefits that require additional information or research.

SEC. 8. OFFICE OF COMPETITION ADVOCATE.

[*Sections 8-9 omitted*]

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12 **SEC. 10. CIVIL PENALTIES FOR SHERMAN ACT VIOLATIONS.**

13 (a) CIVIL PENALTY AMENDMENTS.—

14 (1) SECTION 1 OF THE SHERMAN ACT.—Section
15 1 of the Sherman Antitrust Act (15 U.S.C. 1) is
16 amended—

17 (A) by striking "Every" and inserting "(a)
18 Every"; and

19 (B) by adding at the end the following

20 "(b)(1) Every person who violates this section shall
21 be liable to the United States for a civil penalty of not
22 more than the greater of—

23 "(A) 15 percent of the total United States reve-
24 nues of the person for the previous calendar year; or

1 "(B) 30 percent of the United States revenues
2 of the person in any part of the trade or commerce
3 related to or targeted by the unlawful conduct under
4 this section during the period of the unlawful con-
5 duct.

6 "(2) A civil penalty under this section may be recov-
7 ered in a civil action brought by the United States.".

8 (2) SECTION 2 OF THE SHERMAN ACT.—Section
9 2 of the Sherman Antitrust Act (15 U.S.C. 2) is
10 amended—

11 (A) by striking "Every" and inserting "(a)
12 Every"; and

13 (B) by adding at the end the following

14 "(b)(1) Every person who violates this section shall
15 be liable to the United States for a civil penalty of not
16 more than the greater of—

17 "(A) 15 percent of the total United States reve-
18 nues of the person for the previous calendar year; or

19 "(B) 30 percent of the United States revenues
20 of the person in any part of the trade or commerce
21 related to or targeted by the unlawful conduct under
22 this section during the period of the unlawful con-
23 duct.

24 "(2) A civil penalty under this section may be recov-
25 ered in a civil action brought by the United States.".

1 (3) FEDERAL TRADE COMMISSION ACT.—Section 5 of the Federal Trade Commission Act (15 U.S.C. 45) is amended by adding at the end the following:

5 "(o)(1) The Commission may commence a civil action in a district court of the United States against any person, partnership, or corporation for a violation of subsection (a)(1) respecting an unfair method of competition that constitutes a violation of sections 1 or 2 of the Sherman Act (15 U.S.C. 1, 2) and to recover a civil penalty for such violation.

12 "(2) In an action under paragraph (1), any person, partnership, or corporation found to have violated subsection (a)(1) respecting an unfair method of competition that constitutes a violation of section 1 or 2 of the Sherman Act (15 U.S.C. 1, 2) shall be liable for a civil penalty of not more than the greater of—

18 "(A) 15 percent of the total United States revenues of the person, partnership, or corporation for the previous calendar year; or

21 "(B) 30 percent of the United States revenues of the person, partnership, or corporation in any line of commerce related to or targeted by the unlawful conduct described in paragraph (1) during the period of the unlawful conduct.".

(b) RULE OF CONSTRUCTION.—

(1) CIVIL PENALTIES.—The civil penalties provided in subsection (b) of section 1 of the Sherman Act (15 U.S.C. 1), subsection (b) of section 2 of the Sherman Act (15 U.S.C. 2), and subsection (o) of section 5 of the Federal Trade Commission Act (15 U.S.C. 45), as added by subsection (a) of this section, are in addition to, and not in lieu of, any other remedy provided by Federal law, including under—

(A) section 4 or 16 of the Clayton Act (15 U.S.C. 15, 26); or

(B) section 13(b) of the Federal Trade Commission Act (15 U.S.C. 53(b)).

(2) AUTHORITIES.—Nothing in this paragraph may be construed to affect any authority of the Attorney General or the Federal Trade Commission under any other provision of law.

SEC. 11. JOINT CIVIL PENALTY GUIDELINES.

(a) IN GENERAL.—Not later than 1 year after the date of enactment of this Act, the Attorney General and the Federal Trade Commission shall issue joint guidelines reflecting agency policies for determining the appropriate amount of a civil penalty to be sought under sections 1(b) and 2(b) of the Sherman Act (15 U.S.C. 1, 2), section 26A(f) of the Clayton Act, and sections 5(o) and 5(p) of

1 the Federal Trade Commission Act (15 U.S.C. 45), as
2 added by of this Act, with the goal of promoting trans-
3 parency and crafting remedies for individual violations
4 that are effective in deterring future unlawful conduct and
5 proportionate to the gravity of the violation.

6 (b) CONSIDERATIONS.—In establishing the guidelines
7 described in subsection (a), the Attorney General and the
8 Federal Trade Commission shall consider the relevant fac-
9 tors to be used for calculating an appropriate civil penalty
10 for a particular violation, including—

11 (1) the volume of commerce affected;

12 (2) the duration and severity of the unlawful
13 conduct;

14 (3) the intent of the person undertaking the un-
15 lawful conduct;

16 (4) the extent to which the unlawful conduct
17 was egregious or a clear violation of the law;

18 (5) whether the civil penalty is to be applied in
19 combination with other remedies, including—

20 (A) structural remedies, behavioral condi-
21 tions, or equitable disgorgement; or

22 (B) other remedies available under section
23 4, 4A, 15, or 16 of the Clayton Act (15 U.S.C.
24 15, 15a, 25, 26) or section 13(b) of the Federal
25 Trade Commission Act (15 U.S.C. 53(b));

(6) whether the person has previously engaged in the same or similar anticompetitive conduct; and

(7) whether the person undertook the conduct in violation of a preexisting consent decree or court order.

(c) UPDATES.—The Attorney General and the Federal Trade Commission shall update the joint guidelines issued under subsection (a), as needed to reflect current agency policies and practices, but not less frequently than once every 5 years beginning on the date of enactment of this Act.

(d) PUBLIC NOTICE AND COMMENT.—

(1) GUIDELINES.—Before issuing guidelines under subsection (a) or subsection (c), the Attorney General and the Federal Trade Commission shall publish proposed guidelines in draft form and provide public notice and opportunity for comment for not less than 60 days after the date on which the guidelines are published.

(2) INAPPLICABILITY OF RULEMAKING PROVISIONS.—The provisions of section 553 of title 5, United States Code, shall not apply to the guidelines issued under this section.

1 **SEC. 12. FEDERAL TRADE COMMISSION LITIGATION AU-**
2 **THORITY.**

3 Section 16(a)(2) of the Federal Trade Commission
4 Act (15 U.S.C. 56(a)(2)) is amended—
5 (1) in subparagraph (D), by striking "or" at
6 the end;
7 (2) in subparagraph (E)—
8 (A) by moving the margins 2 ems to the
9 left; and
10 (B) by striking the semicolon and inserting
11 "; or"; and
12 (3) by inserting after subparagraph (E) the fol-
13 lowing:
14 "(F) to recover civil penalties under sec-
15 tion 5(o) of this Act;".

16 **SEC. 13. MARKET DEFINITION.**

17 (a) IN GENERAL.—Establishing liability under the
18 antitrust laws does not require the definition of a relevant
19 market, except when the definition of a relevant market
20 is required, to establish a presumption or to resolve a
21 claim, under a statutory provision that explicitly ref-
22 erences the terms "relevant market", "market concentra-
23 tion", or "market share". Statutory references to the term
24 "line of commerce" shall not constitute an exception to
25 the foregoing rule that establishing liability under the

1 antitrust laws does not require the definition of a relevant
2 market.
3 (b) DIRECT EVIDENCE.—If direct evidence in the
4 record is sufficient to prove actual or likely harm to com-
5 petition, an appreciable risk to competition sufficient to
6 satisfy the applicable statutory standard, or that the effect
7 of an acquisition subject to section 7 of the Clayton Act
8 (15 U.S.C. 18) may be to create an appreciable risk of
9 materially lessening competition or to tend to create a mo-
10 nopoly or a monopsony, neither a court nor the Federal
11 Trade Commission shall require definition of a relevant
12 market in order to evaluate the evidence, to find liability,
13 or to find that a claim has been stated under the antitrust
14 laws.
15 (c) RULE OF CONSTRUCTION.—Nothing in this sec-
16 tion may be construed to prevent a court or the Federal
17 Trade Commission from considering evidence relating to
18 the definition of proposed relevant markets to evaluate the
19 merits of a claim under the antitrust laws.
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23 *[Sections 14-17 omitted]*
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6 **SEC. 18. ADDITIONAL REMEDIES; RULES OF CONSTRUC-**
7 **TION.**

8 (a) ADDITIONAL REMEDIES.—The rights and rem-
9 edies provided under this Act are in addition to, not in
10 lieu of, any other rights and remedies provided by Federal
11 law, including under section 4, 4A, 15, or 16 of the Clay-
12 ton Act (15 U.S.C. 15, 15a, 25, 26) or section 13(b) of
13 the Federal Trade Commission Act (15 U.S.C. 53(b)).

14 (b) RULES OF CONSTRUCTION.—Nothing in this Act
15 may be construed to—

16 (1) impair or limit the applicability of any of
17 the antitrust laws; and

18 (2) prohibit any other remedy provided by Fed-
19 eral law.

○

Readings: The populist antitrust critique

Lina Khan, *The New Brandeis Movement: America's Antimonopoly Debate*, 9 J. Eur. Competition L. & Prac. 131 (2018)[1]

This is a two-page article. It is the best concise summary of the populist critique. It is well-worth the time reading it. On June 15, 2021, Kahn was confirmed for a seat on the Federal Trade Commission, sworn in, and hours later named chair of the Commission.

Tim Wu, *The Utah Statement: Reviving Antimonopoly Traditions for the Era of Big Tech*, OneZero.com (Nov. 18, 2019)

Critics of the Neo-Brandeisian "antimonopoly movement" frequently ask what exactly are the reforms the proponents are advocating. In response, a group of participants at the University of Utah conference in the fall of 2019 on A New Future for Antitrust drafted a statement of principles and proposals.[2] The reporter for the statement was Tim Wu, then a professor at Columbia University Law School and currently Special Assistant to the President for Technology and Competition Policy on the National Economic Council. Lina Khan, now chair of the Federal Trade Commission, was also a member of the drafting group.

The Utah Statement itself follows if you cannot read the post.

[1] If the hyperlink does not work, you can find this by searching the Georgetown Law Library for books, articles, and journals.

[2] The conference website may be found at https://econ.utah.edu/antitrust-conference/.

THE UTAH STATEMENT

Critics of the Neo-Brandeisian "antimonopoly movement" frequently ask what exactly are the reforms the proponents are advocating. In response, a group of participants at the University of Utah conference in the Fall of 2019 on A New Future for Antitrust drafted the following statement.[1] The reporter for the statement was Tim Wu, then and now a professor at Columbia University Law School and, from 2021 to 2023, Special Assistant to the President for Technology and Competition Policy on the National Economic Council.

The Utah Statement[2]
(October 25, 2019)

We believe that:

(1) Subjecting concentrated private power to democratic checks is a matter of constitutional importance;

(2) The protection of fair competition is a means to a thriving and democratic society and an instrument for both the creation of opportunity and the distribution of wealth and power;

(3) Excessive concentration of private economic power breeds antidemocratic political pressures and undermines liberties; and

(4) While antitrust is not an answer to every economic distress, it is a democratically enacted and necessary element in achieving these aims.

In reflection of these principles, we therefore call for the following reforms to current antitrust doctrine and enforcement practice:

A. Doctrine

1. Vertical coercion, vertical restraints, and vertical mergers should enjoy no presumption of benefit to the public;

2. By rule or statute, non-compete agreements should be made presumptively unlawful;

3. The *Trinko* doctrine of implied regulatory preemption should be overruled;

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[1] The conference web site may be found at https://econ.utah.edu/antitrust-conference/.

[2] Tim Wu, *The Utah Statement: Reviving Antimonopoly Traditions for the Era of Big Tech*, OneZero.com (Nov. 18, 2019).

4. The *Brooke Group* test for predatory pricing and Weyerhaeuser test for predatory bidding should be overruled;

5. The *Berkley Photo* standard for establishing monopoly leveraging should be restored;

6. The essential facilities doctrine should be reinvigorated for dominant firms that deny access to critical infrastructural services;

7. Structural presumptions in merger review should be restored;

8. The *LinkLine* doctrine holding that price squeeze allegations fail as standalone Section 2 claims should be overruled;

9. *Noerr-Pennington* should be overruled and replaced by a First Amendment defense and appropriate statutory protections for workers; and

10. The Clayton Act's worker exemption should be extended to all who labor for a living, regardless of statutory employment status, for horizontal coordination, collective bargaining, and collective action in service of either.

B. Method and Enforcement Practice

1. It is not true that "Congress designed the Sherman Act as a 'consumer welfare prescription'";

2. Antitrust rules should be created through case development, agency rule-making, and legislation;

3. The States, the laboratories of economic experimentation, are a critical vanguard of enforcement efforts;

4. Private enforcement is a critical complement to public enforcement;

5. The markets for labor—and in particular problems caused by labor market monopsony—should be subject to robust antitrust enforcement, and enforcers should treat business structures that restrict alternatives for or coerce working Americans as suspect;

6. The broad structural concerns expressed by Congress in its enactment of the 1950 Anti-Merger Act, including due concern for the economic and political dangers of excessive industrial concentration, should drive enforcement of Section 7 of the Clayton Act;

7. Anticompetitive conduct harming one party or class should never be justifiable by offsetting benefits to another party or class. Netting harms and benefits across markets, parties, or classes should not be a method for assessing anticompetitive effects;

8. False negatives should not be preferred over false positives, and the costs of erroneous lack of enforcement should not be discounted or assumed harmless, but given appropriate weight when making enforcement decisions;

9. Structural remedies are to be preferred;

10. Harms demonstrated by clear and convincing evidence or empirical study should never be ignored or discounted based on theories that might predict a lack of harm;

11. Clear and convincing evidence of anti-competitive intent should be taken as a presumptive evidence of harm;

12. Mergers should be subject to both prospective and retrospective analysis and enforcement practice; and

13. The determination by the antitrust agencies of relevant market definitions should receive judicial deference.

PROMOTING COMPETITION IN THE AMERICAN ECONOMY
EXEC. ORDER NO. 14036,
86 Fed. Reg. 36987 (July 14, 2021) (issued July 9, 2021)[1]

By the authority vested in me as President by the Constitution and the laws of the United States of America, and in order to promote the interests of American workers, businesses, and consumers, it is hereby ordered as follows:

Section 1. *Policy*. A fair, open, and competitive marketplace has long been a cornerstone of the American economy, while excessive market concentration threatens basic economic liberties, democratic accountability, and the welfare of workers, farmers, small businesses, startups, and consumers.

The American promise of a broad and sustained prosperity depends on an open and competitive economy. For workers, a competitive marketplace creates more high-quality jobs and the economic freedom to switch jobs or negotiate a higher wage. For small businesses and farmers, it creates more choices among suppliers and major buyers, leading to more takehome income, which they can reinvest in their enterprises. For entrepreneurs, it provides space to experiment, innovate, and pursue the new ideas that have for centuries powered the American economy and improved our quality of life. And for consumers, it means more choices, better service, and lower prices.

Robust competition is critical to preserving America's role as the world's leading economy.

Yet over the last several decades, as industries have consolidated, competition has weakened in too many markets, denying Americans the benefits of an open economy and widening racial, income, and wealth inequality. Federal Government inaction has contributed to these problems, with workers, farmers, small businesses, and consumers paying the price.

Consolidation has increased the power of corporate employers, making it harder for workers to bargain for higher wages and better work conditions. Powerful companies require workers to sign non-compete agreements that restrict their ability to change jobs. And, while many occupational licenses are critical to increasing wages for workers and especially workers of color, some overly restrictive occupational licensing requirements can impede workers' ability to find jobs and to move between States.

Consolidation in the agricultural industry is making it too hard for small family farms to survive. Farmers are squeezed between concentrated market power in the agricultural input industries—seed, fertilizer, feed, and equipment suppliers—and concentrated market power in the channels for selling agricultural products. As a result, farmers' share of the value of their agricultural products has decreased, and

[1] For more, see Executive Office of the President, Fact Sheet: Executive Order on Promoting Competition in the American Economy (July 9, 2021).

poultry farmers, hog farmers, cattle ranchers, and other agricultural workers struggle to retain autonomy and to make sustainable returns.

The American information technology sector has long been an engine of innovation and growth, but today a small number of dominant internet platforms use their power to exclude market entrants, to extract monopoly profits, and to gather intimate personal information that they can exploit for their own advantage. Too many small businesses across the economy depend on those platforms and a few online marketplaces for their survival. And too many local newspapers have shuttered or downsized, in part due to the internet platforms' dominance in advertising markets.

Americans are paying too much for prescription drugs and healthcare services—far more than the prices paid in other countries. Hospital consolidation has left many areas, particularly rural communities, with inadequate or more expensive healthcare options. And too often, patent and other laws have been misused to inhibit or delay—for years and even decades—competition from generic drugs and biosimilars, denying Americans access to lowercost drugs.

In the telecommunications sector, Americans likewise pay too much for broadband, cable television, and other communications services, in part because of a lack of adequate competition. In the financial-services sector, consumers pay steep and often hidden fees because of industry consolidation. Similarly, the global container shipping industry has consolidated into a small number of dominant foreign-owned lines and alliances, which can disadvantage American exporters.

The problem of economic consolidation now spans these sectors and many others, endangering our ability to rebuild and emerge from the coronavirus disease 2019 (COVID–19) pandemic with a vibrant, innovative, and growing economy. Meanwhile, the United States faces new challenges to its economic standing in the world, including unfair competitive pressures from foreign monopolies and firms that are state-owned or state-sponsored, or whose market power is directly supported by foreign governments.

We must act now to reverse these dangerous trends, which constrain the growth and dynamism of our economy, impair the creation of high-quality jobs, and threaten America's economic standing in the world.

This order affirms that it is the policy of my Administration to enforce the antitrust laws to combat the excessive concentration of industry, the abuses of market power, and the harmful effects of monopoly and monopsony— especially as these issues arise in labor markets, agricultural markets, Internet platform industries, healthcare markets (including insurance, hospital, and prescription drug markets), repair markets, and United States markets directly affected by foreign cartel activity.

It is also the policy of my Administration to enforce the antitrust laws to meet the challenges posed by new industries and technologies, including the rise of the dominant Internet platforms, especially as they stem from serial mergers, the acquisition of nascent competitors, the aggregation of data, unfair competition in attention markets, the surveillance of users, and the presence of network effects.

Whereas decades of industry consolidation have often led to excessive market concentration, this order reaffirms that the United States retains the authority to challenge transactions whose previous consummation was in violation of the Sherman

Antitrust Act (26 Stat. 209, 15 U.S.C. 1 et seq.) (Sherman Act), the Clayton Antitrust Act (Public Law 63–212, 38 Stat. 730, 15 U.S.C. 12 *et seq*.) (Clayton Act), or other laws. *See* 15 U.S.C. 18; *Standard Oil Co. v. United States*, 221 U.S. 1 (1911).

This order reasserts as United States policy that the answer to the rising power of foreign monopolies and cartels is not the tolerance of domestic monopolization, but rather the promotion of competition and innovation by firms small and large, at home and worldwide.

. . .

Sec. 2. *The Statutory Basis of a Whole-of-Government Competition Policy.* (a) The antitrust laws, including the Sherman Act, the Clayton Act, and the Federal Trade Commission Act (Public Law 63–203, 38 Stat. 717, 15 U.S.C. 41 et seq.), are a first line of defense against the monopolization of the American economy.

(b) The antitrust laws reflect an underlying policy favoring competition that transcends those particular enactments. As the Supreme Court has stated, for instance, the Sherman Act "rests on the premise that the unrestrained interaction of competitive forces will yield the best allocation of our economic resources, the lowest prices, the highest quality and the greatest material progress, while at the same time providing an environment conducive to the preservation of our democratic political and social institutions." *Northern Pac. Ry. Co. v. United States*, 356 U.S. 1, 4 (1958).

. . .

Sec. 5. *Further Agency Responsibilities*. (a) The heads of all agencies shall consider using their authorities to further the policies set forth in section 1 of this order, with particular attention to:

(i) the influence of any of their respective regulations, particularly any licensing regulations, on concentration and competition in the industries under their jurisdiction; and

(ii) the potential for their procurement or other spending to improve the competitiveness of small businesses and businesses with fair labor practices.

(b) The Attorney General, the Chair of the FTC, and the heads of other agencies with authority to enforce the Clayton Act are encouraged to enforce the antitrust laws fairly and vigorously.

(c) To address the consolidation of industry in many markets across the economy, as described in section 1 of this order, the Attorney General and the Chair of the FTC are encouraged to review the horizontal and vertical merger guidelines and consider whether to revise those guidelines.

. . .

(h) To address persistent and recurrent practices that inhibit competition, the Chair of the FTC, in the Chair's discretion, is also encouraged to consider working with the rest of the Commission to exercise the FTC's statutory rulemaking authority, as appropriate and consistent with applicable law, in areas such as:

(i) unfair data collection and surveillance practices that may damage competition, consumer autonomy, and consumer privacy;

(ii) unfair anticompetitive restrictions on third-party repair or self-repair of items, such as the restrictions imposed by powerful manufacturers that prevent farmers from repairing their own equipment;
(iii) unfair anticompetitive conduct or agreements in the prescription drug industries, such as agreements to delay the market entry of generic drugs or biosimilars;
(iv) unfair competition in major Internet marketplaces;
(v) unfair occupational licensing restrictions;
(vi) unfair tying practices or exclusionary practices in the brokerage or listing of real estate; and
(vii) any other unfair industry-specific practices that substantially inhibit competition.

. . .

Sec. 6. *General Provisions*. (a) This order shall be implemented consistent with applicable law and subject to the availability of appropriations.

(b) Where not already specified, independent agencies are encouraged to comply with the requirements of this order.

(c) Nothing in this order shall be construed to impair or otherwise affect:
(i) the authority granted by law to an executive department or agency, or the head thereof; or
(ii) the functions of the Director of the Office of Management and Budget relating to budgetary, administrative, or legislative proposals.

(d) This order is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person.

/s/ J.R. Biden, Jr.

THE WHITE HOUSE
July 9, 2021

JUSTICE NEWS

Assistant Attorney General Jonathan Kanter Delivers Keynote at the University of Chicago Stigler Center

Chicago, IL ~ Thursday, April 21, 2022

Antitrust Enforcement: The Road to Recovery

Remarks as Prepared for Delivery

I. Introduction

It is wonderful to be back at the Stigler Center. Five years ago, I attended the Center's inaugural antitrust and competition conference. That first conference asked an important question: "Is There a Concentration Problem in America?" In retrospect, that particular conference functioned as a critical inflection point in the conversation regarding corporate concentration and the state of antitrust enforcement — a conversation that we are still having today, but against the backdrop of a dramatically different enforcement and political environment.

I have vivid memories of attending a lunchtime keynote, much like this one, where Judge Richard Posner quipped with a degree of seriousness and a bit of humor: "antitrust is dead, isn't it?"[1] It was a provocative statement, to be sure, but a fair question. Judge Posner was saying the quiet part out loud. Indeed, the purpose of the conference was, in many ways, to assess whether antitrust enforcement still had a pulse and whether it could be nursed back to health.

It turns out that antitrust was not actually dead. If anything, the patient was on the table for open heart surgery.

I am pleased to report that the patient is alive and well, and the prognosis is good. Antitrust enforcement is on the mend, cared for and supported by a broad, bipartisan coalition devoted to its rehabilitation and full recovery.

We are not completely out of the woods yet though. Now we have the distinct challenge — and opportunity — of charting the path forward.

The good news is: that which does not kill us makes us stronger. And I am here to declare that the era of lax enforcement is over, and the new era of vigorous and effective antitrust law enforcement has begun. But the path will not be easy or linear.

II. Five Point Plan for Antitrust Law Enforcement Amidst a Competition Crisis

With the remainder of my time today, I would like to outline what I see as five pillars of an effective civil antitrust enforcement regime. Although I am heartened by the productive discussions taking place in Congress to clarify our antitrust laws, Americans cannot afford to wait for new legislation to combat our competition crisis. These five pillars, which are by no means exhaustive, focus on enforcing the laws we already have — as Congress wrote them and as courts have interpreted them for decades.

First, recognize that the purpose of antitrust law is to protect competition.

Second, change the language of antitrust so it empowers all Americans to participate.

Third, adapt antitrust to address market realities rather than relying on static models and assumptions.

Fourth, revive enforcement of Section 2 of the Sherman Act.

Fifth, litigate cases to decisions so that the law can develop.

Each of these five pillars are worthy of longer discussion, so today I will just summarize briefly in the interest of time.

1. **The Purpose of Antitrust Is to Protect Competition**

The first pillar is to recognize that the purpose of antitrust law is to protect competition. "The heart of our national economic policy," the Supreme Court said in *Standard Oil v. FTC*, "long has been faith in the value of competition."[2]

Yet somewhere along the way, the antitrust community lost its North Star. Over time, antitrust enforcement turned into a mathematical exercise focused on measuring welfare tradeoffs rather than trusting in the benefits of competition. We took up the impossible challenge of quantifying often unquantifiable welfare effects and speculative efficiencies down to the last decimal point. On the basis of those calculations and projections, the antitrust community took it upon themselves to decide who should win and lose rather than allowing competition and competitive markets to govern that determination.

The problem is that standards about measuring welfare tradeoffs turn antitrust into a narrow technical exercise that overlooks the realities of our economy. Antitrust law is about so much more. To paraphrase the Supreme Court in *Northern Pacific*, antitrust promotes material progress, quality, and innovation, "at the same time" that it supports our democracy and preserves a society of choice and opportunity.[3] Antitrust helps make us both prosperous *and* free.

We usually cannot measure and quantify all of those values. But we can promote them the way Congress intended — by protecting competition and the competitive process.

Instead, however, for years scholars and pundits have expended enormous energy debating the meaning of words that do not appear in the statute: the ephemeral "consumer welfare standard."[4] By my count, 831 academic articles have been written invoking the consumer welfare standard, with more than 200 since 2020. It is the academic gift that keeps on giving.

All of this is fine as an intellectual exercise, but there is just one problem — the phrase "consumer welfare standard" does not appear in any statute, legislative history, or common-law precedents. The vibrant debate around the consumer welfare standard is an attempt to interpret words that are not in the law. Instead, the text of the antitrust laws reflects a value judgment by Congress to protect competition.

For generations, Congress has continued to anchor our antitrust laws in a simple but powerful concept: that competition deserves protection. Congress prohibited agreements that restrain trade, mergers that substantially lessen competition and conduct that monopolizes markets. Where the Sherman Act's prohibition on unreasonable restraints of trade was general, the Supreme Court explained that, based on the common law it invoked, it outlawed restraints that were "unreasonably restrictive of competitive conditions."[5]

The Supreme Court describes antitrust law the same way. There are *zero* Supreme Court opinions that use the phrase "consumer welfare standard." Instead, the Supreme Court has repeatedly described the purpose of the antitrust laws as protecting competition. For each of the handful of times the Supreme Court has mentioned that antitrust is a prescription for consumer welfare, it has a dozen times reminded us that the mandate of the law is competition.[6] Even when courts mention the welfare of consumers as a prescription, they do not declare it as the exclusive goal. Indeed, courts have articulated myriad benefits and goals associated with preserving competition and enforcement of the antitrust laws.

Competition is the process of rivalry we all see play out in the markets and participate in every single day as buyers, sellers, workers and innovators.

Focusing on rivalry and competition lets us decide the tough questions in particular cases as markets evolve.

I have seen those that say antitrust does not protect our democracy argue that, even though that was plainly

Congress' intent, acknowledging that value in the law would not be administrable in particular cases. I would say the same for assessing the allocative efficiency impacts of particular cases. We spend millions arguing about models of the economy and how conduct will hypothetically shift outcomes to the fourth decimal point up or down. Plaintiffs and defendants offer experts to present quantitative models. More often than not, courts reject both competing models and do not believe either side. The judges are on to something. Law enforcers and courts are not central planners capable of consistently making those kinds of measurements. Calculating welfare effects is difficult in non-dynamic markets and is increasingly impossible in today's multisided, cross-subsidized, and dynamic markets.

We can, however, more easily assess how conduct or mergers impact competition and the competitive process. That is how the antitrust laws simultaneously serve prosperity and freedom and all their many values — by preserving economic liberty and letting competition operate to organize our economy.

That is not to say promoting competition never raises tough questions and never requires debate and expertise. Of course, there will always be hard issues and hard cases. Focusing on competition, however, ensures that we remain faithful to the underlying purpose of the antitrust laws, which is that a competitive economy yields innumerable benefits for a free, open and democratic society.

Congress has chosen the values we are to preserve, and it has squarely settled on upholding a competitive process in free markets. Our job is to ensure a fair game, not to choose who wins.

The good news is that promoting competition can be administrable and effective. That is why it is the first pillar in addressing the competition crisis. We need to enforce the laws as we find them and vigorously protect competition as Congress demanded.

2. **Change the Language of Antitrust So It Empowers Americans to Participate**

That brings me to my second pillar. For too long we have cloaked the antitrust laws in technocratic language. We must use the language of the people and the markets to empower participation in the Antitrust enterprise.

Our competition crisis affects real people. These people are not numbers in a spreadsheet. They are farmers struggling to find competitive buyers for their livestock. They are travelers who cannot afford a plane ticket home to visit family, or consumers who have little choice in who extracts and exploits their data.

When we issue guidelines and speak only of small but significant non-transitory increases in price, or of how vertical effects derive from the elimination of double marginalization, we exclude these people from the antitrust dialogue. This language boxes the public and the courts out of a critical discourse about how their economy is structured.

The technocratic veil around antitrust has helped mask contortions in the law that undermine its purposes. How else can one rationalize a theory that monopolies and competition can coexist? Or that establishment and maintenance of monopoly power are consistent with antitrust law? Using the language of the law and of real people we can be clear — merger to monopoly always lessens competition.

At the same time, a technocratic approach has made antitrust less accessible, and less democratically accountable. Congress, the courts and the people cannot engage with language that is accessible by a small segment of the population. Shielding the antitrust exercise from the public benefits only those with the money and power to hire experts and purchase access. And it shuts out other forms of expertise and real-world experience.

Finally, our inaccessible antitrust system makes it harder for businesses to understand whether their conduct is lawful. Antitrust is supposed to empower businesses to operate to their fullest potential in an economy free from the threat of monopolists. But businesses cannot act confidently if they do not know the rules or if the rules are so complex that it is impossible to rely on them with any degree of certainty.

Of course, economics remains incredibly important. So do other forms of expertise.

But at the same time, you should not need a graduate degree in economics to understand the law. The challenge before us is to engage in sound reasoning at the same time that we reengage the public with critical decisions that

impact the structure of their economy.

That is why one of my primary goals as Assistant Attorney General is implementing the division's Access to Antitrust Justice initiative — "AT2J." That means listening to the public. That also means writing our guidelines in language that reflects how people understand harm to competition. We recently published an updated leniency policy and extended FAQ that reflect this focus on accessibility. Our ongoing review of the merger guidelines with the FTC is also placing a high priority on accessibility, both by engaging the public more broadly in the debate, and by prioritizing plain language in the revisions.

3. **Address Today's Market Realities, Not Yesterday's**

The third pillar is to focus on the competitive realities of today's markets. The digital revolution has brought about change in our economy rivaling, if not exceeding, that of the Industrial Revolution. We must acknowledge that new market realities demand new approaches to competition enforcement. We need to update our tools to meet the facts, not try to contort the facts to fit out of date tools.

The changes in our economy are not confined to digital markets. The internet revolution, the advent of Big Data, and the new ubiquity of connectivity have transformed our entire economy, from finance to healthcare to energy to retail and so on. Now you order your ticket online in advance, interacting in seconds with a dozen or more interconnected businesses. Across the economy, businesses are harvesting more data, gatekeepers are growing in strength and automated decision-making is changing business paradigms. Just as our economy evolves, so must the tools that we use to understand it.

That will often mean focusing first on the facts when we examine competitive realities, as opposed to beginning with assumptions embedded in out of date models or cases. We need to start with how competition really works in a market, then extrapolate to whether competition would be harmed or a monopoly created or maintained.

It will also mean reassessing whether precedents are outdated because they reflect embedded assumptions about how markets work that no longer hold true. As Justice Gorsuch recently explained in *NCAA v. Alston*, analysis of competitive effects follows market realities, and so "[i]f those market realities change, so may the legal analysis." [7] While enforcers and the courts must respect Congress' core command that the antitrust laws should be applied to protect competition, how we do that must evolve as competitive realities do.[8]

Antitrust enforcers must therefore think critically about where their practices, and the cases, reflect outdated assumptions.

Take *Brooke Group*.[9] There, the Supreme Court recognized a safe harbor for above-cost pricing, even where such pricing is exclusionary, based upon what it characterized as "the general implausibility of predatory pricing."[10]

A growing body of evidence suggests that above-cost pricing strategies can in fact be a rational strategy for anticompetitive exclusion, particularly in modern digital markets.[11] We need to think about whether an assumption of general implausibility still holds in modern markets when companies often prioritize long-term growth of share price over short-term profitability. Strategies that may have once seemed implausible or irrational can yield eye-popping wealth for executives that earn more from their shareholding than from salaries or bonuses.

Another example is the refusal to deal paradigm set forth in *Trinko* and *Aspen*.[12] Modern online platforms are cooperatives. They are fundamentally participatory in a way telephone lines and ski lifts never were. Yet *Trinko* relies on basic understandings about how networks are built and whose investment incentives are most important. If the nature of the networks changes, other parts of the analysis should probably follow.

There are more examples than I have time to go through today.

That is the third pillar: we need to focus on markets as they exist today. If conduct harms competition, the models and tools need to be adapted, not the other way around.

4. **Vigorously Enforce Section 2 of the Sherman Act**

The fourth pillar of my plan is to vigorously enforce Section 2 of the Sherman Act.

Section 2 prohibits monopolization, but when we met here five years ago it was probably the best illustration of Judge Posner's question. With no significant cases in nearly twenty years at that point, Section 2 was very near death.

Senator Sherman warned that "if the concentrated powers of [a monopoly] are entrusted to a single man, it is a kingly prerogative, inconsistent with our form of government." Yet we now know many such people who enjoy power over key markets. Notwithstanding the original goals of the law, we saw the emergence of monarchs over the new industries of the digital revolution.

Senator Sherman wrote the antitrust laws as a prescription. We must vigorously enforce the Sherman Act to prevent the unlawful acquisition, maintenance and extension of monopoly power.

That means we must assess conduct on its merits, and based on the entire course of conduct involved. We need to use all our tools and understanding to assess how monopolies have arisen and how they are maintained. We must challenge conduct that suppresses or destroys competition.

We also need to take more seriously courses of conduct that maintain monopolies. I gave remarks on this point a couple weeks ago. Monopoly maintenance, in the form of moat-building strategies, helps to prevent the erosion of monopoly positions and thereby harms competition. Enforcers and courts need to do a better job of assessing the overall scheme of monopoly maintenance, including through acquisitions of nascent competitors and the threat of discrimination.

That is the fourth pillar — we must vigorously enforce Section 2 of the Sherman Act. It is a statute tailor made to meet the moment. We will not be afraid to challenge monopolization.

5. **Enforce the Law Through Litigation**

The fifth pillar of my plan is to faithfully discharge the division's affirmative "duty" to "prevent and restrain" antitrust violations.[13] Our duty is to litigate, not settle, unless a remedy fully prevents or restrains the violation. It is no secret that many settlements fail to preserve competition. Even divestitures may not fully preserve competition across all its dimensions in dynamic markets. And too often partial divestitures ship assets to buyers like private equity firms who are incapable or uninterested in using them to their full potential.

At the Department of Justice, we are law enforcers. It is not our role to micromanage corporate decision making under elaborate consent decrees. It is our job to enforce the law. And when we have evidence that a defendant has violated the law, we will litigate to remedy the *entire* harm to competition. That will almost always mean seeking an injunction to stop the anticompetitive conduct or block an anticompetitive merger.

But my emphasis on litigation is not just about institutional competence. It also supports the goal of ensuring the language of antitrust reflects how people think about competition and in ensuring that the law catches up to market realities. If we do not bring cases, the law will stagnate. Even as our economy undergoes revolutionary change, over-reliance on settlement would leave us governed by yesterday's law. We need to bring cases to enable the courts to wrestle with the realities of today's markets and ensure antitrust law is fit for purpose in the modern economy. The failure of antitrust enforcers to enforce Section 2 of the Sherman Act has allowed the law to stagnate.

That is point five: litigate. Congress designed antitrust law to play out in the courts, before judges and juries in an open forum.

III. Conclusion

I want to end by reflecting on my duty. I swore an oath to uphold the laws. Just last week, I appeared before a federal court in Denver where I explained just how seriously I take my obligation to protect the American public under the antitrust laws. Antitrust is a kitchen table issue. The public depends on us to police the channels of commerce against collusion and monopoly. When we fail, families struggle to afford groceries. They earn lower

wages. They lose control of their own private data to dominant platforms. The American Dream slips away.

That is why the Department of Justice must zealously protect competition. With a healthy diet, steady exercise and regular checkups, I have a feeling that the patient will continue to lead a long and healthy life. I look forward to the work ahead.

Thank you.

[1] Stigler Center, *Judge Richard A. Posner in Conversation with Professor Luigi Zingales*, YouTube, at 05:20 (Mar. 28, 2017), https://www.youtube.com/watch?v=JRCm_gJ2EOk.

[2] Standard Oil Co. v. FTC, 340 U.S. 231, 248 (1951).

[3] N. Pac. Ry. Co. v. United States, 356 U.S. 1, 4 (1958).

[4] *See, e.g.*, Symposium, *The Goals of Antitrust*, 81 Fordham L. Rev. 2151 (2013).

[5] Standard Oil Co. of New Jersey v. United States, 221 U.S. 1, 58 (1911).

[6] *Compare, e.g.*, Reiter v. Sonotone Corp., 442 U.S. 330, 343 (1979) (relying on Robert Bork, The Antitrust Paradox (1978), to describe antitrust as a “consumer welfare prescription” without describing it as exclusively so), *with, e.g.*, NCAA v. Alston, 141 S. Ct. 2141, 2147 (2021) (“In the Sherman Act, Congress tasked courts with enforcing a policy of competition . . . .”), N.C. State Bd. of Dental Exam’rs v. FTC, 574 U.S. 494, 502 (2015) (Sherman Act “serves to promote robust competition” and prohibit “practices that undermine the free market”), Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 551 U.S. 877, 895 (2007) (antitrust laws “designed primarily to protect interbrand competition”), State Oil Co. v. Khan, 522 U.S. 3, 15 (1997) (primary purpose of antitrust laws “is to protect interbrand competition”), Spectrum Sports, Inc. v. McQuillan, 506 U.S. 447, 458 (1993) (Sherman Act directed “against conduct which unfairly tends to destroy competition itself”), NCAA v. Bd. of Regents of the Univ. of Okla., 468 U.S. 85, 104 & n.27 (1984) (“Under the Sherman Act the criterion to be used in judging the validity of a restraint on trade is its impact on competition.”), Nat’l Soc’y of Pro. Eng’rs v. United States, 435 U.S. 679, 695 (1978) (Sherman Act reflects “legislative judgment” that “competition is the best method of allocating resources”), Gordon v. N.Y. Stock Exch., Inc., 422 U.S. 659, 689 (1975) (“sole aim of antitrust” is “to protect competition”), United States v. Topco Assocs., Inc., 405 U.S. 596, 610 (1972) (“freedom” guaranteed by antitrust “is the freedom to compete”), FTC v. Proctor & Gamble Co., 386 U.S. 568, 580 (efficiencies are no defense to anticompetitive merger because Congress “struck the balance in favor of protecting competition”), United States v. Von’s Grocery Co., 384 U.S. 270, 274–77 (1966) (purpose of antitrust laws is to “prevent economic concentration” and “protect competition”), United States v. Phila. Nat’l Bank, 374 U.S. 321, 362–63, 371–72 (1963) (“[C]ompetition is our fundamental national economic policy . . . .”), Brown Shoe v. United States, 370 U.S. 294, 315–23 (1962) (Celler-Kefauver Act’s “dominant theme” to combat “rising tide of economic concentration” through competition), N. Pac. Ry. Co. v. United States, 356 U.S. 1, 4 (1958) (“[T]he policy unequivocally laid down by the [Sherman] Act is competition.”), United States v. E. I. du Pont de Nemours & Co., 351 U.S. 377, 385–86 (1956) (Sherman Act achieves “freedom of enterprise from monopoly or restraint”), Standard Oil Co. v. FTC, 340 U.S. 231, 248 (1951) (“The heart of our national economy policy long has been faith in the value of competition.”), Allen Bradley Co. v. Local Union No. 3, Int’l Bhd. of Elec. Workers, 325 U.S. 797, 809 (1945) (“The primary objective of all the Anti-trust legislation has been to preserve business competition and to proscribe business monopoly.”), *and* Bd. of Trade v. United States, 246 U.S. 231, 238 (1918) (restraints legal if they “regulat[e]” or “promote[] competition” but illegal if they “suppress” or “destroy” it). Bork’s selective reading of the legislative history to divine a “consumer welfare standard” has been widely criticized. *See, e.g.*, Lina M. Khan, Note, *Amazon’s Antitrust Paradox*, 126 Yale L.J. 710, 720–21 (2017); Herbert Hovenkamp, The Antitrust Enterprise: Principle and Execution 39–42 (2005).

[7] NCAA v. Alston, 141 S. Ct. 2141, 2158 (2021).

[8] State Oil Co. v. Khan, 522 U.S. 3, 20 (1997).

[9] Brooke Grp. Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209 (1993).

[10] Brooke Grp. Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 223, 227 (1993); *see also* Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 589 (1986) ("[T]here is a consensus among commentators that predatory pricing schemes are rarely tried, and even more rarely successful.").

[11] Jonathan B. Baker, The Antitrust Paradigm: Restoring a Competitive Economy 147 & n.143, 148 & n.144 (collecting research).

[12] Verizon Commc'ns Inc. v. Law Offs. of Curtis V. Trinko, LLP, 540 U.S. 398 (2004); Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585 (1985).

[13] 15 U.S.C. §§ 4, 9, 25.

Speaker:
Assistant Attorney General, Jonathan Kanter

Component(s):
Antitrust Division

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JUSTICE NEWS

Assistant Attorney General Jonathan Kanter Delivers Remarks at New York City Bar Association's Milton Handler Lecture

New York, NY ~ Wednesday, May 18, 2022

I want to express my deepest gratitude to the Antitrust and Trade Regulation Committee of the New York City Bar Association for the invitation to speak with you this evening. It is heartwarming to be among so many good friends and colleagues. I am also honored to be giving tonight's address in honor of its namesake, Milton Handler.

We meet tonight in a moment of great challenge and great opportunity in antitrust. Corporate power has grown to levels that leave our fellow citizens concerned and confused. On a daily basis, I am asked how the laws meant to protect competition went astray, and what we can do to reinvigorate antitrust enforcement and meet our nation's challenges.

I am aware that an academic discussion of antitrust policy may seem esoteric against the backdrop of challenges that are far too real for so many Americans. But the consequences of our enforcement policy are real and significant, especially at a time of crisis and hardship.

Our markets are suffering from a lack of resiliency. Among many other things, the consequences of the pandemic have revealed supply chain fragility. And recent geopolitical conflicts have caused prices at the pump to skyrocket. And, of course, there are shocking shortages of infant formula in grocery stores throughout the country.

These and other events demonstrate why competition is so important. Competitive markets create resiliency. Competitive markets are less susceptible to central points of failure.[1]

But competition is not a switch that we can flip on an off. We cannot just summon competition during a crisis. We must invest in competition for the long term. Indeed, that is why antitrust law exists and competition policy is so important. Decisions that we make in the absence of a crisis will ultimately determine our vulnerability in the presence of a crisis. And, inevitably, an economy built on the fragile foundations of oligopoly and monopoly will leave us more vulnerable.

All of this makes our mission at the Antitrust Division even more urgent. While there are few certainties in today's world, we can rely on a prediction that that the unpredictable will occur. So we must learn from the current structural failures to guide our approach going forward and prepare for the uncertainty that lies ahead.

In my view, we are living through the error costs of underenforcement, and we owe it to our future to learn from those mistakes and take action to correct our path.

Tonight, I would like to expand on an approach to moving civil antitrust enforcement forward that I described in remarks last month at the Stigler Center in Chicago.[2] In my remarks, I briefly outlined five key principles necessary to restore a competitive, resilient and dynamic American economy. First, recognize that the goal of antitrust is to protect competition. Second, empower people to participate in the development of antitrust policy by changing the language of antitrust so it is accessible and understandable. Third, continually adapt antitrust to address today's market realities. Fourth, revive Section 2 of the Sherman Act. And fifth, bring and litigate cases to develop and strengthen antitrust law.

Together, these pillars will strengthen civil antitrust enforcement so it works for the 21st century. We will rebuild our economy, in time, on the solid foundation of competition.

I want to use my time this evening to discuss the first pillar in greater depth — recognizing that the goal of antitrust law is to protect competition. That pillar is first in the list because we have to understand our North Star. Antitrust law protects competition and the competitive process in service of both prosperity and freedom. Competition benefits us not only in moments of stability, but also in times of change or crisis that demand resiliency, innovation and responsiveness.

As the Supreme Court said in *Northern Pacific* and reiterated in *Board of Regents* in 1984, the Sherman Act is a "comprehensive charter of economic liberty."[3] It promotes economic benefits "at the same time" that it preserves market structures that are good for our democracy and our society.[4] These goals are, indeed, self-evident and unequivocally flow from a market economy that thrives on healthy competition.

A variety of sometimes-conflicting approaches using the label "consumer welfare standard" have become a distraction. To its defenders, the "consumer welfare standard" is a remarkably flexible term. With every criticism, we get a new definition of consumer welfare that carries the term further from the meaning of the actual words "consumer" and "welfare." At the end of the day, if you ask five antitrust experts what the consumer welfare standard means, you will often get six different answers. To me consumer welfare is a catch phrase, not a standard.

Three aspects of the consumer welfare standard have been the most problematic. First, there are some versions that assert the antitrust laws were never intended to protect our democracy from corporate power, or to promote choice and opportunity for individuals and small businesses. In this view, the antitrust laws are meant to promote wealth and output, but do nothing for the liberty of our nation.

That is not true. The history of the Sherman and Clayton Acts show a profound concern with economic liberty, not merely as an economic concept, but as a concept connected to the freedom of our nation.[5] Competitively healthy markets offer more economic opportunity and less risk of corporate power dominating our democratic and social wellbeing. At the same time, unconcentrated markets with a diversity of firms are more resilient to changes in supply chains and system shocks that can expose the single points of failure in oligopoly markets.

Ignoring the many goals and benefits of antitrust law systematically biases antitrust toward underenforcement.

The second problem with the consumer welfare standard is the idea that, as a practical matter, antitrust cases should be reduced to econometric quantification of the price or output effects of the specific conduct at issue. I call this the "central planning standard."

The idea of the "central planning standard" is that antitrust enforcers or defendants must model and compute the welfare impacts of a specific merger, or of particular conduct under the rule of reason. We have seen this in the shift at the agencies from merger analysis rooted in the legal standards set forth in *Philadelphia National Bank* and other Supreme Court cases, to one that attempts to precisely quantify effects in particular cases.

We have to decide cases using flexible tools that are administrable by the agencies and the courts, and that are predictable to businesses making ex ante decisions. It cannot be that a business trying to understand the legality of its merger must undertake months of analysis to produce a complex simulation model, or that a court must decide an antitrust case by deciding among dueling consultants' white papers reporting on simulations. Congress and the courts use the term competition so often largely because it is a term we use in everyday life.

The third problem is that the consumer welfare standard has a blind spot to workers, farmers, and the many other intended benefits and beneficiaries of a competitive economy. Senator Sherman himself expressed a goal of protecting not only consumers, but also sellers of necessary inputs, such as farmers.[6] We have heard in our recent guidelines listening sessions profound examples of how mergers have harmed individual workers and small business owners by establishing bottlenecks that extract the value of their work. We heard similarly from farmers who can only reach end-consumers through extractive bottlenecks that lower returns to farmers at the same time that they raise prices for consumers.

Although proponents of the standard read the words "consumer welfare prescription," used in *Reiter v. Sonotone*,***[7]*** as adopting a consumer welfare standard, a straightforward reading of the case undercuts that view.

All *Reiter* held was that consumers, as an intended beneficiary of the Sherman Act, should be able to recover treble damages using Section 4 of the Clayton Act. I agree that end consumers are important beneficiaries of antitrust enforcement, but they are not the only beneficiaries. Indeed, *Reiter* quoted *Mandeville Island Farms* in saying "[t]he Act is comprehensive in its terms and coverage, protecting *all* who are made victims of the forbidden practices by whomever they may be perpetrated."[8]

It is a mistake to confuse one of the laws' intended goals with the standard courts are to apply. When "consumer" is narrowly defined or read into the statute, antitrust is blind to real problems it was meant to prevent.

Those are three specific issues with some definitions of the consumer welfare standard. The overarching problem, however, is that it does not reflect the law as passed by Congress and interpreted by the courts.

The legislated goals of the antitrust laws are clear — Congress sought to protect competition and the competitive process.

That is really where the question of the goals of antitrust starts and ends for me. As an Executive Branch official, I am obligated to focus on the law as written by the legislature and interpreted by the judiciary. Their repeated guidance has been to focus on competition.

From at least as early as *Standard Oil* in 1911 to *Alston,* 110 years later, the Supreme Court has consistently measured legality under the Sherman Act based on how conduct impacts competition.[9] Higher prices or lower output can be evidence that conduct harms competition, but the more important question is how conduct affects the process by which firms compete over price — or anything else.[10]

The Clayton Act is even more explicit. In passing Section 7 of the Clayton Act, Congress sought to outlaw mergers based on whether they "may substantially lessen competition or tend to create a monopoly." The words are right there on the page. Congress wanted to halt "a rising tide of economic concentration in the American economy" so that competition, not consolidation, reigned supreme.[11] Rather than require "elaborate proof of market structure, market behavior, or probable anticompetitive effects," Congress told courts to evaluate whether a merger risks substantially lessening competition.[12] If it does, then the merger is illegal.[13]

There is perhaps no better source on this history than Professor Milton Handler himself. Professor Handler contributed to and chronicled the development of antitrust law from the 1920s through the New Deal and the 20th century.[14] He helped presidents and law students understand the importance of antitrust to our national economy and democracy. He also received the Antitrust Division's highest honor — the John Sherman Award — in 1998.[15]

Professor Handler wrote at the centennial of the Sherman Act in 1990 that "the combination of a policy of minimal antitrust enforcement and the glorification of efficiency have reduced antitrust to [a] parlous condition."[16] He wrote that the Sherman Act had been previously understood as "a charter of freedom and the economic equivalent of the Bill of Rights," and urged the restoration of vigorous enforcement "vital for the preservation of the free enterprise system."[17] Professor Handler reflected an academic perspective that was once well understood but somehow has been forgotten.

Congress was right to set competition and the competitive process as our North Star. It is a good standard that leads us to ask the right questions in particular cases.

First, what do I mean by competition? Competition starts with rivalry. As the Supreme Court said in *Philadelphia National Bank*, competition exists "at every level."[18] That includes competition over price, or over whatever consumers provide in exchange for accessing a product or service—whether that's personal information or data. Competition can exist over anything that causes somebody to choose one firm over another.

You cannot have choice without choices. And as Judge Diane Wood put it, "without competitors, there will be no competition."[19] Sometimes competition can come from potential rivals rather than actual ones, but the point remains the same—you cannot have competition without rivals and rivalry.

What do I mean by the competitive process? The competitive process is how rivalry plays out in the market among multiple competitors. It is charging lower prices so customers buy your goods instead of a rival's or paying higher salaries so you attract talent away from a competitor. It is treating employees with respect because you know they can and will leave if you do not. The heart of the competitive process is the guarantee that everyone participating in the open market—consumers, farmers, workers, or anyone else—has the "the free opportunity to select among alternative offers."[20] That freedom to choose drives competition between firms trying to ensure their offer is the one that's chosen.[21]

Without choices, farmers get less competitive buyers for their livestock. Workers get lower wages. Consumers have no choice in who exploits their personal data. Protecting competition and the competitive process is about ensuring people have the power to choose between alternatives.

Focusing on competition and the competitive process protects all the benefits of competition, not just the ones we think we can measure or calculate. Because competition is dynamic. Antitrust enforcers should not decide what values should be promoted at the expense of others or attempt to weigh impacts, our job is simply to promote competition and then let the benefits — whether they are measurable or not — flow from the competitive process.

Even if we could measure and balance these different values, dynamic competition will still surprise us. There is an old saying about innovation, often attributed to Henry Ford, that if Ford had asked customers what they wanted, they would have said a faster horse. I think that carries an important lesson for antitrust enforcers. Even if we can confidently measure something, it may not ultimately matter. We'll get faster horses, not automobiles.

We cannot predict specific outcomes in the future and we should not try, nor is that what the law requires. Rather, we preserve competitive markets, which drive innovation. Competition and uncertainty go hand in hand, as firms uncertain of where or how rivalry will emerge will continuously improve their own products and services to stay ahead of the next evolution. To that end, antitrust is more about protecting what we cannot predict or measure rather than what we can.

Focusing on competition also prevents enforcers from being forced to undertake value judgments that exceed their mandate. The Supreme Court explained in *Philadelphia National Bank* that an anticompetitive merger cannot be saved based on "some ultimate reckoning of social or economic debits and credits." It wrote that:

"A value choice of such magnitude is beyond the ordinary limits of judicial competence, and in any event has been made for us already, by Congress when it enacted the amended Section 7. Congress determined to preserve our traditionally competitive economy. It therefore proscribed anticompetitive mergers, the benign and the malignant alike, fully aware, we must assume, that some price might have to be paid."[22]

Focusing on whether conduct harms competition or the competitive process is also a clear, administrable way of applying the antitrust laws. It is a question courts and the Agencies have developed the tools and experience to analyze over decades.

We can also use real-world evidence, economics, expertise, and common sense to determine whether conduct harms competition. After all, words like "competition" and "competitive" are part of our everyday vocabulary. If somebody tells you that the NL East looks competitive this year, you understand what they mean. There are many strong teams duking it out to win.[23]

I do not presume that focusing on competition will lead to easy answers in every case. At a certain point—in antitrust, and in every area of law—we must exercise judgment. People disagree over what a reasonable person would do in a certain situation. People disagree about how to weigh whether one interest is substantial enough to outweigh another. Exercising judgment in hard cases is an unavoidable part of law.[24] The key is making sure we exercise that judgment in a way that is reliable, administrable, and consistent with the statutes we enforce. Moreover, when we wrestle with hard questions, they should be the right questions. Focusing us on competition sets us up for the right debate.

It should also be clear at this point in our history that focusing on competition is a much more administrable standard

than one that attempts to quantify consumer welfare effects. The consumer welfare standard was originally promised as a solution to the hard cases, but experience has demonstrated just the contrary. Too often, it leads us to focus on estimating data to the third decimal point for statistical models detached from the competitive realities actually playing out in the markets. Instead of making judgments easier in hard cases, the consumer welfare standard has often made even the easy cases hard to judge.

Ironically, this sharply contradicts the intent of Judge Bork, when he argued that even if some members of Congress intended to promote a broad range of values through the antitrust laws, we should focus on price and output effects because it makes antitrust easier to administer.[25] We have seen first-hand, however, how unwieldy and difficult to administer attempting to calculate those effects can be. Cases have become sprawling exercises where companies promise billions in efficiencies and armies of consultants argue over newly-invented and often-untested models that they claim show a transparently problematic merger will benefit consumers.

The irony of the consumer welfare standard is that consumers have been harmed in its name by underenforcement of the antitrust laws. In practice, self-imposed requirements that the agencies demonstrate precise price effects before taking action have systematically biased us toward underenforcement. This results in less competitive markets with less freedom and less efficiency. It means hollowed-out markets susceptible to failure when supply shocks upset delicate systems. The competition crisis we find ourselves in threatens our democracy and our economic liberty at the same time that it has profoundly negative effects on individual consumers.

Today, too many consumers pay supracompetitive markups, find their data extracted and their privacy trampled, and have no alternatives in critical markets for food, healthcare, and other every-day staples. For them, the consumer welfare standard has been a wolf in sheep's clothing. We owe them better.

So, as enforcers, we will remain vigilant and undeterred in our mission to protect competition. This cuts across the entire spectrum of our civil antitrust enforcement program, including the Sherman Act and Clayton Act. This applies to anticompetitive conduct, including monopolization.

Also — lest there be no ambiguity — we will continue to challenge deals that present unacceptable risk to the American public. Indeed, we are already demonstrating our willingness to block anticompetitive transactions in a broad range of critical industries like airlines and healthcare. Companies that test our resolve in these and other areas do so at their own risk and will continue to confront aggressive antitrust enforcement. As one of my predecessors explained, some deals should never leave the boardroom.

It is time we get back to first principles and focus on the policies that Congress was trying to advance in passing the antitrust laws. It is time we make the antitrust laws work for our modern economy, our society, and our fellow citizens.

The first step is recognizing that the antitrust laws are not narrowly focused. They are focused on competition and the competitive process with a range of benefits to consumers, workers, resiliency, and our democracy. Focusing on competition and the competitive process and its myriad attendant benefits makes it easier to empower Americans to understand antitrust policy and participate in its development. It makes it easier to address market realities.

For more than a century, Congress has recognized this. The courts have recognized this. Professor Handler recognized it. So, it is fitting for me to close by saying—it is time we rejoin them and recognize that the goal of antitrust law is to protect competition and the competitive process. In doing so, we protect the underlying values that make our country and democracy a model for the world. Thank you.

[1] *See, e.g.*, U.S. Dep't of Agric., *USDA Agri-Food Supply Chain Assessment: Program and Policy Options for Strengthening Resilience* at 12-17 (2022), https://www.ams.usda.gov/sites/default/files/media/USDAAgriFoodSupplyChainReport.pdf (explaining how consolidation creates "[w]eak links" in agricultural supply chains and proposing solutions to reduce concentration and diversify supply chains); White House, *Fact Sheet: Biden-Harris Administration Announces Supply Chain Disruption Task Force to Address Short-Term Supply Chain Discontinuities* (Jun. 2022) ("Unfair trade practices . . ., just-in-time production, consolidation, and private sector

focus on short-term returns over long-term investment have hollowed out the U.S. industrial base, siphoned innovation from the United States, and stifled wage and productivity growth."); *see also* Fed. Emergency Mgt. Agency, *Supply Chain Resilience Guide* (Apr. 2019) (noting that "[i]ndustry consolidation into a small set of large suppliers" impacts "supply chain resilience").

[2] *See* Jonathan Kanter, *Remarks as Prepared for the Stigler Center at the University of Chicago* (Apr. 21, 2022), https://www.justice.gov/opa/speech/assistant-attorney-general-jonathan-kanter-delivers-keynote-university-chicago-stigler.

[3] *N. Pac. Ry. Co. v. United States*, 356 U.S. 1, 4 (1958); *NCAA v. Bd. of Regents of Univ. of Oklahoma*, 468 U.S. 85, 104 n.27 (1984).

[4] *Id.*

[5] *See, e.g.*, Lina M. Khan, Note, *Amazon's Antitrust Paradox*, 126 Yale L.J. 710, 720–21 (2017); Herbert Hovenkamp, The Antitrust Enterprise: Principle and Execution 39–42 (2005).

[6] 21 Cong. Rec. 2461 (1890) (Statement of Sen. John Sherman) ("[Trusts] operate with a double-edged sword. They increase beyond reason the cost of the necessaries of life and business, and they decrease the cost of the raw material, the farm products of the country.").

[7] 442 U.S. 330, 343 (1979).

[8] *Reiter*, 442 U.S. at 337–38 (emphasis added) (quoting *Mandeville Island Farms v. Am. Crystal Sugar Co.*, 334 U.S. 219, 236 (1948)); *see also PLS.Com, LLC v. Nat'l Ass'n of Realtors*, 32 F.4th 824 (9th Cir. 2022) ("The district court appears to have understood the term 'consumer' to mean something like one 'who buys goods or services for personal, family, or household use, with no intention of resale.' Consumer, Black's Law Dictionary (11th ed. 2019). But our use of the term in the antitrust context has not been so limited. As our opinion in *Glen Holly Entertainment, Inc. v. Tektronix, Inc.*, 352 F.3d 367 (9th Cir. 2003) demonstrates, a business that uses a product as an input to create another product or service is a consumer of that input for antitrust purposes and can allege antitrust injury.").

[9] *Compare Standard Oil Co. of New Jersey v. United States*, 221 U.S. 1, 58 (1911) ("unreasonably restrictive of competitive conditions"), *with NCAA v. Alston*, 141 S. Ct. 2141, 2147 (2021) ("In the Sherman Act, Congress tasked courts with enforcing a policy of competition . . . ."); *see also Bd. of Regents*, 468 U.S. at 104 & n.27 (1984) ("Under the Sherman Act the criterion to be used in judging the validity of a restraint on trade is its impact on competition."); *N.C. State Bd. of Dental Exam'rs v. FTC*, 574 U.S. 494, 502 (2015) (Sherman Act "serves to promote robust competition" and prohibit "practices that undermine the free market"); *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877, 895 (2007) (antitrust laws "designed primarily to protect interbrand competition"); *State Oil Co. v. Khan*, 522 U.S. 3, 15 (1997) (primary purpose of antitrust laws "is to protect interbrand competition"); *Spectrum Sports, Inc. v. McQuillan*, 506 U.S. 447, 458 (1993) (Sherman Act directed "against conduct which unfairly tends to destroy competition itself"); *NCAA v. Bd. of Regents of the Univ. of Okla.*, 468 U.S. 85, 104 & n.27 (1984) ("Under the Sherman Act the criterion to be used in judging the validity of a restraint on trade is its impact on competition."); *Nat'l Soc'y of Pro. Eng'rs v. United States*, 435 U.S. 679, 695 (1978) (Sherman Act reflects "legislative judgment" that "competition is the best method of allocating resources"); *Gordon v. N.Y. Stock Exch., Inc.*, 422 U.S. 659, 689 (1975) ("sole aim of antitrust" is "to protect competition"); *United States v. Topco Assocs., Inc.*, 405 U.S. 596, 610 (1972) ("freedom" guaranteed by antitrust "is the freedom to compete"); *FTC v. Proctor & Gamble Co.*, 386 U.S. 568, 580 (efficiencies are no defense to anticompetitive merger because Congress "struck the balance in favor of protecting competition"), *United States v. Von's Grocery Co.*, 384 U.S. 270, 274–77 (1966) (purpose of antitrust laws is to "prevent economic concentration" and "protect competition"); *United States v. Phila. Nat'l Bank*, 374 U.S. 321, 362–63, 371–72 (1963) ("[C]ompetition is our fundamental national economic policy . . . ."); *Brown Shoe v. United States*, 370 U.S. 294, 315–23 (1962) (Celler-Kefauver Act's "dominant theme" to combat "rising tide of economic concentration" through competition); *N. Pac. Ry. Co. v. United States*, 356 U.S. 1, 4 (1958) ("[T]he policy unequivocally laid down by the [Sherman] Act is competition."); *United States v. E. I. du Pont de Nemours & Co.*, 351 U.S. 377, 385–86 (1956) (Sherman Act achieves "freedom of enterprise from monopoly or restraint"); *Standard Oil Co. v. FTC*, 340 U.S. 231, 248 (1951) ("The heart of our national economy policy long has

been faith in the value of competition."); *Allen Bradley Co. v. Local Union No. 3, Int'l Bhd. of Elec. Workers*, 325 U.S. 797, 809 (1945) ("The primary objective of all the Anti-trust legislation has been to preserve business competition and to proscribe business monopoly."); *Paramount Famous Lasky Corp. v. United States*, 282 U.S. 30, 44 (1930) ("In order to establish violation of the Sherman Anti-Trust Act, it is not necessary to show that the challenged arrangement suppresses all competition between the parties or that the parties themselves are discontented with the arrangement. The interest of the public in the preservation of competition is the primary consideration."); *Bd. of Trade v. United States*, 246 U.S. 231, 238 (1918) (restraints legal if they "regulat[e]" or "promote[] competition" but illegal if they "suppress" or "destroy" it).

[10] *See, e.g.*, *Sullivan v. NFL*, 34 F.3d 1091, 1101, 1096 (1st Cir. 1994) ("The Supreme Court has emphasized, however, that overall consumer preferences in setting output and prices is more important than higher prices and lower output, *per se*, in determining whether there has been an injury to competition.").

[11] *Brown Shoe*, 370 U.S. at 315.

[12] *Phila. Nat'l Bank*, 374 U.S. at 362-63.

[13] *See, e.g.*, *Von's Grocery Co.*, 384 U.S. at 274–77.

[14] *See generally* Spencer Waller, *The Language of Law and the Language of Business*, 52 Case W. Res. L. Rev. 283, 287-290 (2001).

[15] *See* U.S. Dep't of Justice, *Milton Handler Receives the Antitrust Division's John Sherman Award*, (May 21, 1998), https://www.justice.gov/archive/atr/public/press_releases/1998/212837.htm

[16] Milton Handler, Antitrust in Transition xviii (1991).

[17] *Id.* at xvii.

[18] *See Phila. Nat'l Bank*, 374 U.S. at 368.

[19] Hearing on Reviving Competition, Part 3: Strengthening the Laws to Address Monopoly Power, Before the H. Subcomm. on Antitrust, Commercial, and Administrative Law, 117th Cong. (2021) (statement of Hon. Diane P. Wood), https://www.congress.gov/117/meeting/house/111350/witnesses/HHRG-117-JU05-Wstate-WoodD-20210318.pdf.

[20] *Nat'l Soc'y of Pro. Eng'rs*, 435 U.S. at 695.

[21] *F.T.C. v. Indiana Fed'n of Dentists*, 476 U.S. 447, 459 (1986) ("limiting consumer choice by impeding the "ordinary give and take of the market place" cannot be sustained under the Rule of Reason" (internal citation omitted)); *Bd. of Regents*, 468 U.S. at 107 ("A restraint that has the effect of reducing the importance of consumer preference in setting price and output is not consistent with this fundamental goal of antitrust law.").

[22] 374 U.S. at 371.

[23] Let's go Mets!

[24] *See United States v. Trenton Potteries Co.*, 273 U.S. 392, 397 (1927) ("Reasonableness is not a concept of definite and unchanging content. Its meaning necessarily varies in the different fields of the law, because it is used as a convenient summary of the dominant considerations which control in the application of legal doctrines. Our view of what is a reasonable restraint of commerce is controlled by the recognized purpose of the Sherman Law itself.").

[25] *See* Robert H. Bork, *Legislative Intent and the Policy of the Sherman Act*, J. Law & Econ. 7, 10 (1966); Robert H. Bork, *The Rule of Reason and the Per Se Concept: Price Fixing and Market Division*, 74 Yale L.J. 775, 833–34 (1965).

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"Reigniting Competition in the American Economy"
Keynote Remarks at New America's Open Markets Program Event
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******As Prepared for Delivery******

Thank you, thank you. As Barry mentioned, before I was a Senator, I was a law professor. What he didn't say is that I taught contracts, secured transactions, and bankruptcy – all courses related to the functioning of competitive markets. I love markets! Strong, healthy markets are the key to a strong, healthy America.

That's the reason I am here today. Because anyone who loves markets knows that for markets to work, there has to be competition. But today, in America, competition is dying. Consolidation and concentration are on the rise in sector after sector. Concentration threatens our markets, threatens our economy, and threatens our democracy.

Evidence of the problem is everywhere. Just look at banking. For years, banks have been in a feeding frenzy, swallowing up smaller competitors to become more powerful and, eventually, too big to fail.[1] The combination of their size, their risky practices, and the hands-off policies of their regulators created a perfect storm, resulting in the worst financial crisis in 80 years. We know that excessive size and interconnectedness promotes risky behavior that can take down our economy – and yet, today, eight years after that financial crisis, three out of the four biggest banks in America are even bigger than they were before the crisis and two months ago five were designated by both the Fed and the FDIC as "too big to fail."[2]

The concentration problem—and particularly the idea of "too big to fail" in the financial sector—gets a lot of attention. But the problem isn't unique to the financial sector. It's hiding in plain sight all across the American economy.

In the last decade, the number of major U.S. airlines has dropped from nine to four.[3] The four that are left standing—American, Delta, United, and Southwest—control over 80% of all domestic airline seats in the country.[4] And man, are they are hitting the jackpot now. Last year those four big airlines raked in a record $22 billion in profits.[5] Eighteen billion alone came from fees for baggage and legroom and pay toilets. Ok, the last one was a joke, but what have passengers received in return for their higher costs? Fewer flights and worse service.[6] Airline complaints rose 30 percent just from 2014 to 2015.[7]

The list goes on. A handful of health insurance giants—including Anthem, Blue Cross Blue Shield, United Healthcare, Aetna, and Cigna—control over 83 percent of the country's health insurance market.[8]

Three drug stores—CVS, Walgreen's, and Rite Aid—control 99% of the drug stores in the country.[9]

Four companies control nearly 85% of the U.S. beef market, and three produce almost half of all chicken.[10]

Some people argue that concentration can be good because big profits encourage competitors to get into the game. This is the perfect stand-on-your-head-and-the-world-looks-great argument. It says that there's no competition today, but maybe there will someday be competition.[11] The truth is pretty basic—markets need competition now. So I want to talk about five reasons to be concerned about the decline of competition.

The first problem is that less competition means less consumer choice.[12] When consumers can purchase similar products from multiple competitors, they force market players to constantly seek out new ways to reduce prices and increase the quality of goods and services to get their business. But when companies consume their rivals instead of competing with them, consumers can get stuck with few or no alternatives. Prices go up, and quality suffers.

Consider Comcast, the nation's largest cable and internet service provider. Comcast has consolidated its position by buying up rivals.[13] Today, over half of all cable and internet subscribers in America are Comcast customers.[14] And last year was Comcast's best year in nearly a decade.[15] But while big telecom giants have been consuming each other, consumers have been left out in the cold—facing little or no choice in service providers and paying through the nose for cable and internet service. Over a third of Americans who theoretically have access to high speed internet don't actually subscribe because the price tag is too high.[16] And the data are clear: Americans pay much more for cable and internet than their counterparts in other advanced countries and, in return, we get worse service.[17]

The second reason the decline in competition should cause concern is that big guys can lock out smaller guys and newer guys. Take a look at the technology sector—specifically, the battle between large platforms and small tech companies.

Google, Apple, and Amazon provide platforms that lots of other companies depend on for survival. But Google, Apple, and Amazon also, in many cases, compete with those same small companies, so that the platform can become a tool to snuff out competition. Look at some examples.

In 2012, FTC staff concluded that Google was using its dominant search engine to harm rivals of its Google Plus user review feature. Among other things, the staff produced evidence showing that Google promoted its own Google-branded content over its rivals even though those rivals would have otherwise had top billing through its organic search algorithm.[18] The FTC commissioners ultimately sided against the conclusion of their staff, but the European Commission has moved forward with formal charges on similar allegations, and Europeans may soon enjoy better protections than U.S. consumers.[19]

Apple has received attention over similar issues. The latest example is its treatment of rival music-streaming companies. While Apple Music is easily accessible on the iPhone, Apple has placed conditions on its rivals that make it difficult for them to offer competitive streaming

services. The FTC is investigating those issues and deciding whether to sue Apple for antitrust violations.[20]

Amazon has faced similar charges. Last year, groups representing thousands of authors claimed that Amazon uses its position as the dominant bookseller to steer consumers to books published by Amazon to the detriment of other publishers and that it extracts larger and larger shares of book profits from publishers, which discourages publishing houses from publishing risker books or books written by lesser-known authors.[21]

Google, Apple and Amazon have created disruptive technologies that changed the world, and every day they deliver enormously valuable products. They deserve to be highly profitable and successful. But the opportunity to compete must remain open for new entrants and smaller competitors that want their chance to change the world again.

The third problem created by less competition is that when competition declines, small businesses can be wiped out – and our whole economy can suffer. Look at what is often referred to as the Wal-Mart effect. Wal-Mart is big, and it's powerful. It delivers anywhere from 30 to 50 percent of the products Americans consume, and it controls over half of all groceries sold in some major cities.[22]

Wal-Mart's gigantic size gives it a competitive advantage over small businesses. And often, when Wal-Mart moves into town, small businesses collapse because they can't compete with the price leverage Wal-Mart has built with its suppliers.[23]

Wal-Mart is notorious for the low wages and poor working conditions it offers, and the Wal-Mart effect has an impact on suppliers as well—forcing them to cut their own workers' wages and benefits to keep Wal-Mart's business.[24] Workers who cannot survive on those wages turn to public assistance, including housing, health care and food stamps, that is subsidized by other taxpayers. Wal-Mart workers alone are estimated to collect about $6 billion a year in federal taxpayer subsidies just to survive.[25] That means the low, low prices that Wal-Mart advertises are paid for, in part, by high, high tax subsidies that every other American pays for. In the meantime, Wal-Mart's investors pocket the high, high profits. [26]

The fourth problem is that concentrated markets create concentrated political power. The larger and more economically powerful these companies get, the more resources they can bring to bear on lobbying government to change the rules to benefit exactly the companies that are doing the lobbying. Over time, this means a closed, self-perpetuating, rigged system – a playing field that lavishes favors on the big guys, hammers the small guys, and fuels even more concentration.

This is a big one – and it should terrify every conservative who hates government intervention. Competitive markets generate so many benefits on their own that the government's only role in those markets should be simple and structural – prevent cheating, protect taxpayers, and maintain competition. Concentrated markets dominated by a handful of powerful players, on the other hand, don't produce the consumer benefits that flow from robust competition. Instead, the benefits are sucked up by a handful of executives and large investors, and their lobbying remains focused on protecting the giant corporations. Government intervention in concentrated markets

inevitably becomes more and more complex and technocratic, as it attempts to impose complicated regulations in an effort to recreate the benefits of competitive markets.

It's costly, it's inefficient, and it plays right into the hands of the big guys, who can afford to throw armies of lawyers at the regulatory process. Small players end up having to shoulder regulatory compliance costs that make it even harder for them to compete, while big players use their resources and political clout to win loopholes, carveouts, and rollbacks that favor themselves and make it even harder for new competitors to survive. Over time, the result is a trifecta: more intrusive government, more concentration, and less competition.

Finally, concentration has contributed to the decline of what was once a strong, robust middle class in this country. As corporations get bigger, and bigger, and bigger, a handful of managers get richer, and richer, and richer. And god-bless—in America, we celebrate success. But what about everybody else? What about small business owners and community bankers – people who used to be able to hold their own with big guys but now find it harder and harder to keep up with the armies of corporate lawyers and lobbyists determined to rig the economy against them? What about the employees at Wal-Mart who scrape by on help from the food pantry and Medicaid, but who never have enough money to build any security? What about them? They are stuck.

Concentration is not the only reason for rising economic insecurity, but it is one of them. Concentrated industries result in concentrated profits. It's the ultimate price squeeze. When markets are not competitive, big businesses are able to extract monopoly profits by setting prices that are higher and higher above the cost of making an item or providing a service. In 2014, the top 500 largest firms pocketed 45 percent of the global profits of ALL American businesses.[27] And the vast majority of those profits went to the wealthiest of the wealthy. As of 2013, the wealthiest 1 percent of Americans held nearly half of all the stock and mutual fund assets held by all Americans.[28]

And who gets a shot at their own dream? When big business can shut out competition, entrepreneurs and small businesses are denied their shot at building something new and exciting.

Left unchecked, concentration will destroy innovation. Left unchecked, concentration will destroy more small companies and start-ups. Left unchecked, concentration will suck the last vestiges of economic security out of the middle class. Left unchecked, concentration will pervert our democracy into one more rigged game.

But the good news is that this isn't the first time America has faced this threat. We have been here before, and we know the way out.

More than a century ago, America was in the midst of a transformation from a nation of small shopkeepers, craftsmen, and farmers to a country of giant corporations. As greater and greater economic and political power concentrated in a smaller and smaller number of firms, America decided we needed some new policies – simple, structural rules – to level the playing field. Congress created antitrust law to address the concentration of wealth and power in the hands of the few, passing the Sherman Anti-Trust Act and Clayton Anti-Trust Act. Progressive-Era

reformers like Teddy Roosevelt, William Howard Taft, and Woodrow Wilson were trust-busters, people who fought the power that monopolies wield in the economy and in politics.

The original purpose of these laws was to fight concentrated economic ***and*** political power. One hundred years ago, Congress understood that these two factors were forever intertwined. Arguing for passage of the Sherman Act in 1889, Senator John Sherman famously declared: "If we will not endure a king as a political power, we should not endure a king over the production, transportation, and sale of any of the necessaries of life."[29]

A generation later, Supreme Court Justice Louis Brandeis worried that the "concentration of economic power" was so great that "private corporations are sometimes able to dominate the state."[30] The corporate system was becoming akin to the "feudal system," that would mean "the rule of a plutocracy."[31] Brandeis declared that without vigilance, our government would be controlled by the very rich and the very powerful.

Under Franklin Roosevelt, antitrust enforcement took off. With Thurman Arnold at the helm, the Justice Department's Antitrust Division grew from 18 lawyers to 500 and ramped up litigation. In Arnold's five years running the Division, those lawyers brought almost as many cases as there had been in the previous thirty-five years.[32] Antitrust law was real—and American corporations knew it.

But starting in the 1970s, the story began to change. In the late 1970s, Robert Bork wrote an influential book rejecting the idea of competition as the driving rationale for antitrust law.[33] Bork argued that the government should weigh the costs of less competition against the claims of greater economic efficiency that consolidation could create. In his view, if a monopoly persisted, it was because the monopolist was more "efficient" than its competitors. If not, the market would correct itself and the former-monopolist would be driven out—no need for government in his make-believe world. Bork proudly ignored all of the harms caused by concentrated political or economic power that had motivated Congress to pass strong antitrust laws in the first place.

Bork's framework limits antitrust thinking even today. When coupled with the deregulatory ideology of the Reagan era, the Bork approach to antitrust law meant that government largely stepped out of the way and let companies grow larger and larger.[34]

Now the country needs more competition – and more competitors – to accelerate economic growth, more competition to promote innovation, and more competition to reduce the ability of giant corporations to use their money and power to bend government policy and regulation to benefit themselves.

So how do we get more competition? And how do we do it without new legislation that would require cooperation from a Congress awash in campaign contributions and influence peddling?

We can start with a President and an Executive Branch willing to once again enforce our laws in the way Congress originally intended them to be enforced. We have the tools—right now—to reinvigorate antitrust law. Here are three ways to do it:

First: Hold the line on anticompetitive mergers.[35] The DOJ and FTC are at the front lines of the battle over mergers. These two agencies already have the authority to stop harmful mergers in their tracks. Too often, though, they don't use that authority. There's no question that antitrust enforcement has picked up since the Reagan administration. The largest increases in merger challenges were during the Clinton and Obama years, and the Obama administration has challenged a higher percentage of mergers than any administration since before Reagan's.[36] But mergers are outrunning enforcement. While the DOJ and FTC have opposed some huge mergers recently,[37] many others have slipped through with little push back. In fact, 2015 was the biggest year for mergers in U.S. history—both in terms of the number of mergers and the size of mergers.[38]

It has become fashionable in recent decades for the DOJ and FTC to allow mergers with serious antitrust implications to go forward IF the merging entity agrees to certain conditions. For example, one or both of the merging companies might need to sell off parts of its business, or the new entity might agree to change business practices in ways that supposedly would preserve competition despite increased market concentration.[39] These conditional approvals are sold as a win-win. There's just one problem – too often, they don't work.

A recent analysis of mergers challenged by the DOJ or FTC between 1999 and 2003 concluded that stopping mergers is the best way for regulators to prevent high price hikes down the road.[40] The study compared product prices before and after mergers and found that, when the DOJ and FTC allowed mergers to proceed with conditions attached, dramatic price increases still usually followed. By comparison, when regulators opposed the mergers altogether, prices rose at a fraction of the pace.[41]

The other problem with relying on conditions to offset the impact of bad mergers is that regulators who didn't have the political chops to block the deal in the first place are very unlikely to force the companies to break up after the fact, even if the companies blow off the conditions. In other words, enforcement of merger conditions is weak at best. Even when companies meet conditions, like selling off some assets, they sometimes just turn around and buy back the same assets they originally sold off. Literally. That actually happens. That's what happened after Hertz was permitted to merge with Dollar Thrifty and Albertsons was allowed to merge with Safeway. In both cases, the divested parts of the business declared bankruptcy, and the bigger companies just bought back part of the companies they sold off.[42]

The lesson is clear: where a merger raises fundamental antitrust concerns, regulators need to stand tall and say no.

Number Two: Closely scrutinize vertical mergers. Vertical monopolies exist when one company owns multiple parts of its supply chain – manufacturing, production, distribution, and sales. Again, size creates an advantage. When there's no competition anywhere in the chain, other businesses are locked out and die. The DOJ and FTC should approach vertical mergers with the same skepticism as horizontal mergers. As an aside, the guidelines that apply to vertical mergers haven't been reissued since 1984, and the world has changed a lot since then.[43] Revising those guidelines would be a good start.

Number Three: Require ALL agencies to promote market competition and appoint agency heads who will do so. Too often, the DOJ and FTC are viewed as the only agencies responsible for promoting competition. Promoting competition should be taken seriously across the Executive Branch. Some examples:

- The FDIC, the Federal Reserve, and other agencies have a role to play in making sure that financial institutions don't become so large that their smaller competitors don't have the opportunity to serve American families and small businesses.
- The FCC and FTC both have a role to play in making sure that small, innovative tech companies can develop newer and better ways for us to connect with each other without being crushed by the big guys.
- The Agriculture Department has a role to play in making sure that poultry farmers and produce growers aren't held hostage to the whims of giant firms.

In April, the White House issued an Executive Order requiring all government agencies to identify ways that they can play a role in increasing competition. That is exactly the right place to start.[44] We need strong regulators who will promote competition across all agencies – not just at the DOJ and FTC. We need strong regulators who draw the line on mega-mergers and on concentration across the economy. We need strong regulators who believe in competition because *personnel is policy*.

These are just a handful of steps that the President and federal agencies can take to restore and defend competition, but there is much more to do at all levels of government. And there are a lot of good ideas out there. Earlier this month, the Roosevelt Institute issued a report laying out a number of ways to check corporate, financial, and monopoly power.[45] And today, the Center for American Progress released a paper discussing the harmful effects of excess market power and proposing an extensive set of reforms designed to reinvigorate competition policy. Proposals include adopting a public interest standard for enforcement actions, placing the burden on merging companies to prove mergers will not harm competition, and requiring agencies to release more information about their enforcement actions. Those proposals could make a real difference.

Strong Executive leadership could revive antitrust enforcement in this country and begin, once again, to fight back against dominant market power and overwhelming political power.

But we need something else too – and that's a revival of the movement that created the antitrust laws in the first place.

For much of our history, Americans organized and protested against the forces of consolidation. As a people, we understood that concentrated power anywhere was a threat to liberty everywhere. It was one of the basic founding principles of our nation. And it threatens us now.

Competition in America is essential to liberty in America, but the markets that have given us so much will become corrupt and die if we do not keep the spirit of competition strong. America is a country where everyone should have a fighting chance to succeed—and that happens only when we demand it.

Thank you.

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Here's how we can break up Big Tech

Team Warren Follow
Mar 8 · 7 min read

By Elizabeth Warren

IT'S TIME TO BREAK UP
AMAZON, GOOGLE,
AND FACEBOOK

WARREN

Twenty-five years ago, Facebook, Google, and Amazon didn't exist. Now they are among the most valuable and well-known companies in the world. It's a great story—but also one that highlights why the government must break up monopolies and promote competitive markets.

In the 1990s, Microsoft—the tech giant of its time—was trying to parlay its dominance in computer operating systems into dominance in the new area of web browsing. The federal government sued Microsoft for violating anti-monopoly laws and eventually reached a settlement. The government's antitrust case against Microsoft helped clear a path for Internet companies like Google and Facebook to emerge.

The story demonstrates why promoting competition is so important: it allows new, groundbreaking companies to grow and thrive—which pushes everyone in the marketplace to offer better products and services. Aren't we all glad that now we have the option of using Google instead of being stuck with Bing?

Today's big tech companies have too much power—too much power over our economy, our society, and our democracy. They've bulldozed competition, used our private information for profit, and tilted the playing field against everyone else. And in the process, they have hurt small businesses and stifled innovation.

I want a government that makes sure everybody—even the biggest and most powerful companies in America—plays by the rules. And I want to make sure that the next generation of great American tech companies can flourish. To do that, we need to stop this generation of big tech companies from throwing around their political power to shape the rules in their favor and throwing around their economic power to snuff out or buy up every potential competitor.

That's why my administration will make big, structural changes to the tech sector to promote more competition—including breaking up Amazon, Facebook, and Google.

How the new tech monopolies hurt small businesses and innovation

America's big tech companies provide valuable products but also wield enormous power over our digital lives. Nearly half of all e-commerce goes through Amazon. More than 70% of all Internet traffic goes through sites owned or operated by Google or Facebook.

As these companies have grown larger and more powerful, they have used their resources and control over the way we use the Internet to squash small businesses and innovation, and substitute their own financial interests for the broader interests of the American people. To restore the balance of power in our democracy, to promote competition, and to ensure that the next generation of technology innovation is as vibrant as the last, it's time to break up our biggest tech companies.

America's big tech companies have achieved their level of dominance in part based on two strategies:

- ***Using Mergers to Limit Competition***. Facebook has purchased potential competitors Instagram and WhatsApp. Amazon has used its immense market power to force smaller competitors like Diapers.com to sell at a discounted rate. Google has snapped up the mapping company Waze and the ad company DoubleClick. Rather than blocking these transactions for their negative long-term effects on competition and innovation, government regulators have waved them through.
- ***Using Proprietary Marketplaces to Limit Competition***. Many big tech companies own a marketplace—where buyers and sellers transact—while also participating on the marketplace. This can create a conflict of interest that undermines competition. Amazon crushes small companies by copying the goods they sell on the Amazon Marketplace and then selling its own branded version.

> Google allegedly snuffed out a competing small search engine by demoting its content on its search algorithm, and it has favored its own restaurant ratings over those of Yelp.

Weak antitrust enforcement has led to a dramatic reduction in competition and innovation in the tech sector. Venture capitalists are now hesitant to fund new startups to compete with these big tech companies because it's so easy for the big companies to either snap up growing competitors or drive them out of business. The number of tech startups has slumped, there are fewer high-growth young firms typical of the tech industry, and first financing rounds for tech startups have declined 22% since 2012.

With fewer competitors entering the market, the big tech companies do not have to compete as aggressively in key areas like protecting our privacy. And some of these companies have grown so powerful that they can bully cities and states into showering them with massive taxpayer handouts in exchange for doing business, and can act—in the words of Mark Zuckerberg—"more like a government than a traditional company."

We must ensure that today's tech giants do not crowd out potential competitors, smother the next generation of great tech companies, and wield so much power that they can undermine our democracy.

Restoring competition in the tech sector

America has a long tradition of breaking up companies when they have become too big and dominant—even if they are generally providing good service at a reasonable price.

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. In response to the rise of these "trusts," Republican and Democratic reformers pushed for antitrust laws to break up these conglomerations of power to ensure competition.

But where the value of the company came from its network, reformers recognized that ownership of a network and participating on the network caused a conflict of interest. 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.

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.

For smaller companies (those with annual global revenue of between $90 million and $25 billion), their platform utilities would be required to meet the same standard of fair, reasonable, and nondiscriminatory dealing with users, but would not be required to structurally separate from any participant on the platform.

To enforce these new requirements, federal regulators, State Attorneys General, or injured private parties would have the right to sue a platform utility to enjoin any conduct that violates these requirements, to disgorge any ill-gotten gains, and to be paid for losses and damages. A company found to violate these requirements would also have to pay a fine of 5 percent of annual revenue.

Amazon Marketplace, Google's ad exchange, and Google Search would be platform utilities under this law. Therefore, Amazon Marketplace and Basics, and Google's ad exchange and businesses on the exchange would be split apart. Google Search would have to be spun off as well.

Second, my administration would appoint regulators committed to reversing illegal and anti-competitive tech mergers.

Current antitrust laws empower federal regulators to break up mergers that reduce competition. I will appoint regulators who are committed to using existing tools to unwind anti-competitive mergers, including:

- *Amazon*: Whole Foods; Zappos
- *Facebook*: WhatsApp; Instagram
- *Google*: Waze; Nest; DoubleClick

Unwinding these mergers will promote healthy competition in the market—which will put pressure on big tech companies to be more responsive to user concerns, including about privacy.

Protecting the future of the internet

So what would the Internet look like after all these reforms?

Here's what *won't* change: You'll still be able to go on Google and search like you do today. You'll still be able to go on Amazon and find 30 different coffee machines that you can get delivered to your house in two days. You'll still be able to go on Facebook and see how your old friend from school is doing.

Here's what *will* change: Small businesses would have a fair shot to sell their products on Amazon without the fear of Amazon pushing them out of business. Google couldn't smother competitors by demoting their products on Google Search. Facebook would face real pressure from Instagram and WhatsApp to improve the user experience and protect our privacy. Tech entrepreneurs would have a fighting chance to compete against the tech giants.

Of course, my proposals today won't solve every problem we have with our big tech companies.

We must give people more control over how their personal information is collected, shared, and sold—and do it in a way that doesn't lock in massive competitive advantages for the companies that already have a ton of our data.

We must help America's content creators—from local newspapers and national magazines to comedians and musicians—keep more of the value their content generates, rather than seeing it scooped up by companies like Google and Facebook.

And we must ensure that Russia—or any other foreign power—can't use Facebook or any other form of social media to influence our elections.

Those are each tough problems, but the benefit of taking these steps to promote competition is that it allows us to make some progress on each of these important issues too. More competition means more options for consumers and content creators, and more pressure on companies like Facebook to address the glaring problems with their businesses.

Healthy competition can solve a lot of problems. The steps I'm proposing today will allow existing big tech companies to keep offering customer-friendly services, while promoting competition, stimulating innovation in the tech sector, and ensuring that America continues to lead the world in producing cutting-edge tech companies. It's how we protect the future of the Internet.

We can get this done. We can make big, structural change. But it's going to take a grassroots movement, and it starts right now. Sign our petition if you agree, and let's get ready to fight hard together.

1 Title: To.
2
3

4 Be it enacted by the Senate and House of Representatives of the United States of America in
5 Congress assembled,

6 SECTION 1. SHORT TITLE.

7 This Act may be cited as the [“Anti-Monopoly and Competition Restoration Act of _____”.]

8 SEC. 2. FINDINGS AND PURPOSE.

9 (a) Findings.—Congress finds that—

10 (1) fair, open, and competitive markets are necessary for a strong, healthy United States
11 economy;

12 (2) over the last 3 decades, powerful corporations have amassed too much power over the
13 United States economy, stifling competition in United States markets and harming
14 consumers, workers, small businesses and entrepreneurs, and innovation;

15 (3) after remaining constant for nearly 3 decades, markups by United States companies
16 increased by an average of 42 percent between 1980 and 2016, resulting in higher prices for
17 consumers and higher profits for the richest corporations;

18 (4) in 1975, 109 companies pocketed half of all profits generated by firms in the United
19 States whereas in 2015, only the top 30 firms did;

20 (5) market concentration is associated with lower wages and evidence shows that in more
21 concentrated markets, giant corporations are less likely to pass on productivity gains to
22 workers in the form of higher wages;

23 (6) market concentration has been accompanied by record drops in the prevalence of
24 young companies, startups, and business investment ;

25 (7) startup rates fell by more than half over the last 4 decades in industries that saw an
26 increase in concentration;

27 (8) net business investment has been cut in half since the early 1970s;

28 (9) corporate consolidation has disproportionately impacted low-income communities
29 and communities of color as the recent Sprint and T-Mobile merger is estimated to increase
30 prices for low-income customers who purchase prepaid plans by almost twice as much as
31 for other customers;

32 (10) concentrated economic power creates concentrated political power, allowing giant
33 corporations to invest growing sums of money into influencing government to tilt laws and
34 rules in their favor;

35 (11) antitrust laws, including the Sherman Act (15 U.S.C. 1 et seq.), the Clayton Act (15
36 U.S.C. 12), and the Federal Trade Commission Act (15 U.S.C. 41 et seq.) were created to
37 protect fair, open, and competitive markets and to prevent corporations from abusing their
38 power to stifle competition;

(12) antitrust laws were not created exclusively to enhance the narrowly defined concept "consumer welfare" as articulated by academics such Robert Bork, or as described by the Supreme Court of the United States in Reiter v. Sonotone Corp., 442 U.S. 330 (1979), and its progeny;

(13) the Federal Trade Commission and the Department of Justice have failed to adequately enforce antitrust laws and courts have misinterpreted antitrust laws by adopting the misguided consumer welfare standard; and

(14) market concentration must be remedied to restore and protect competition in markets in the United States and ensure the United States economy benefits consumers, workers, small businesses and entrepreneurs, and innovation.

(b) Purpose.—The purpose of the antitrust laws is to protect the competitive process, including the market structures that—

(1) restore and protect competition between rivals;

(2) prevent the acquisition, maintenance, and abuse of market power; and

(3) preserve the benefits a competitive economy provides to all segments of American society, including workers, consumers, entrepreneurs, and citizens, especially increased innovation, a dynamic economy, and a healthy democracy.

SEC. 3. DEFINITIONS.

In this Act:

(1) AGENCY.—The term "Agency" means—

(A) the Commission; or

(B) any other agency enforcing the antitrust laws.

(2) ANTICOMPETITIVE CONDUCT.—The term "anticompetitive conduct" means conduct that violates the antitrust laws (including rules of the Commission interpreting the antitrust laws).

(3) ANTITRUST LAWS.—The term "antitrust laws"—

(A) has the meaning given the term in subsection (a) of the first section of the Clayton Act (15 U.S.C. 12); and

(B) includes—

(i) section 5 of the Federal Trade Commission Act (15 U.S.C. 45); and

(ii) this Act.

(4) COMMISSION.—The term "Commission" means the Federal Trade Commission.

SEC. 4. BANNING MEGA MERGERS, LIMITING LARGE MERGERS, AND REMEDYING PAST MERGERS.

(a) Definitions.—Subsection (a) of the first section of the Clayton Act (15 U.S.C. 12) is amended by adding at the end the following:

"'Anticompetitive conduct' means conduct that violates the antitrust laws (including any rules of the Federal Trade Commission interpreting the antitrust laws).

"'Antitrust laws' has the meaning given the term in section 2 of the Anti-Monopoly and Competition Restoration Act of _____.

"'Large merger'—

"(1) means an acquisition in which—

"(A) the acquiring person or the person whose stocks or assets are being acquired has annual revenue of not less than $5,000,000,000 and not greater than $40,000,000,000;

"(B) the acquiring person and the person whose stocks or assets are being acquired each have annual revenue of not less than $1,000,000,000 and not greater than $15,000,000,000;

"(C) as a result of the acquisition, the acquiring person would have a market share of greater than 10 percent of any relevant market as a buyer or seller, not greater than 45 percent of any relevant market as a seller, and not greater than 25 percent of any relevant market as a buyer;

"(D) as a result of the acquisition, there would be fewer than 5 competitors of the acquiring person with not less than 10 percent market share in any relevant market;

"(E) during the previous 7-year period, the acquiring person or the person whose stocks or assets are being acquired has been found to have violated the antitrust laws; and

"(2) does not include an acquisition that is a transaction described in paragraph (1), (2), (3), (4), (5), (9), or (10) of section 7A(c).

"'Mega merger'—

"(1) means an acquisition in which—

"(A) the acquiring person or the person whose stocks or assets are being acquired has annual revenue of not less than $40,000,000,000;

"(B) the acquiring person and the person whose stocks or assets are being acquired each have annual revenue of not less than $15,000,000,000;

"(C) as a result of the acquisition, the acquiring person would have a market share of greater than 45 percent of any relevant market as a seller, or greater than 25 percent of any relevant market as a buyer; or

"(D) as a result of the acquisition, there would be fewer than 4 competitors of the acquiring person with not less than 10 percent market share in any relevant market; and

"(2) does not include an acquisition in which—

"(A)(i) the party being acquired is in danger of immediate insolvency;

"(ii) the party being acquired would not be able to reorganize successfully in bankruptcy;

1 "(iii) the party being acquired has made unsuccessful good-faith efforts to elicit
2 reasonable alternative offers that would keep its assets in the relevant market and pose
3 a less severe danger to competition than does the proposed merger or acquisition; and

4 "(iv) the acquiring party is the only available purchaser; or

5 "(B) the acquisition is a transaction described in paragraph (1), (2), (3), (4), (5), (9),
6 or (10) of section 7A(c).".

7 (b) Prohibition on Mega Mergers and Presumption Against Large Mergers.—Section 7 of the
8 Clayton Act (15 U.S.C. 18) is amended—

9 (1) by striking "lessen competition, or to tend to create a monopoly" each place the term
10 appears and inserting "harm the competitive process or lessen competition, or tend to create
11 or help maintain a monopoly or monopsony"; and

12 (2) by adding at the end the following:

13 "Any mega merger shall be unlawful under this section.

14 "Any large merger shall be presumptively unlawful under this section.

15 "In any action brought under this section for a merger or acquisition that is not a mega merger
16 or a large merger, if an initial showing that the merger may substantially harm the competitive
17 process or lessen competition, or tend to create or help maintain a monopoly or monopsony, is
18 made, the acquiring party or the party having its stocks or assets acquired in the proposed
19 transaction must show by clear and convincing evidence the lack of such harm. A court may not
20 balance procompetitive efficiencies with anticompetitive harms upon review.

21 "No acquiring person or person whose voting securities or assets are being acquired may make
22 any payment to an executive, board member, or any of the 20 highest paid employees or
23 consultants, in connection with or as a result of the acquisition, except in the case of a reasonable
24 severance payment if the executive or employee had their employment terminated against their
25 will.".

26 (c) Process for Large Mergers.—

27 (1) HSR FILINGS.—

28 (A) HSR SHARING.—Section 7A of the Clayton Act (15 U.S.C. 18a) is amended by
29 adding at the end the following:

30 "(l)(1) The Federal Trade Commission shall identify, for large mergers, each State that—

31 "(A) would be impacted by the acquisition; and

32 "(B) would have jurisdiction to bring an action under section 4C.

33 "(2) The Federal Trade Commission shall submit to each attorney general of a State identified
34 under paragraph (1)—

35 "(A) notification of an acquisition under subsection (a) not later than 7 days after the date
36 on which any information or documentary material is filed with the Federal Trade
37 Commission under this section; and

38 "(B) an agreement to share information with the State relating to an acquisition under
39 subsection (a) not later than 7 days after the date on which any information or documentary

1 material is filed with the Federal Trade Commission under this section.

2 “(3) The Federal Trade Commission shall—

3 “(A) identify for a large merger any agency with substantial regulatory authority over a
4 party involved in the merger or acquisition;

5 “(B) notify any agency with substantial regulatory authority over a party involved in the
6 merger or acquisition of the proposed merger or acquisition; and

7 “(C) provide a copy of all documents submitted in relation to the merger or acquisition;
8 and

9 “(D) reject a merger or acquisition unless all agencies with substantial regulatory
10 authority have approved of the merger or acquisition.”.

11 (B) ENHANCED HSR REQUIREMENTS.—Section 7A(d) of the Clayton Act (15 U.S.C.
12 18a(d)) is amended—

13 (i) in paragraph (1), by striking “and” at the end;

14 (ii) by redesignating paragraph (2) as paragraph (4); and

15 (iii) by inserting after paragraph (1) the following:

16 “(2) shall require that for a large merger that the notification required under subsection
17 (a) of this section include, in addition to the information described in paragraph (1)—

18 “(A) basic information on the acquiring person and the person whose voting
19 securities or assets are being acquired, including—

20 “(i) names of each executive officer and board member of each person;

21 “(ii) the annual revenue for the previous 5-year period of each person; and

22 “(B) the stated justification for the acquisition and proposed plans to benefit
23 workers, consumers, sellers, entrepreneurship, privacy, and innovation, including—

24 “(i) the use of new expertise, resources, and additional revenues to reduce
25 prices;

26 “(ii) increase quality;

27 “(iii) increase privacy;

28 “(iv) increase worker pay, benefits, and conditions;

29 “(v) invest in the local community; and

30 “(vi) invest in research and development;

31 “(C) the projected impact of the acquisition on competition, workers, consumers,
32 sellers, entrepreneurship, privacy, and innovation.”.

33 (2) LARGE MERGERS REQUIRE APPROVAL.—Section 7A of the Clayton Act (15 U.S.C.
34 18a) is amended—

35 (A) in subsection (a), in the matter preceding paragraph (1), by inserting “, subject to
36 subsection (b)(4),” before “the waiting period”; and

1 (B) in subsection (b), by adding at the end the following:

2 "(4)(A) An acquiring person may not acquire stocks or assets as part of a large merger unless
3 the Federal Trade Commission authorizes the acquisition or a court issues an order authorizing
4 the acquisition.

5 "(B)(i) Subject to clause (ii), not later than 120 days after the Federal Trade Commission
6 receives a notification pursuant to rules under subsection (d)(1) relating to a large merger the
7 Federal Trade Commission shall determine whether to authorize the acquisition of stocks or
8 assets as part of a large merger.

9 "(ii) If the Federal Trade Commission determines that all information and documentary
10 material has not been supplied, the Federal Trade Commission shall reject the merger.

11 "(iii) The Federal Trade Commission shall reject a large merger unless the parties prove
12 that the merger will not substantially harm the competitive process or lessen competition, or
13 tend to create or help maintain a monopoly or monopsony.".

14 (3) BAN ON CONDITIONAL APPROVAL.—The Commission or attorney general of State—

15 (A) may only approve or block a large merger; and

16 (B) may not approve a large merger dependent on any condition, including the sale
17 of assets.

18 (4) PUBLIC COMMENT.—The Commission shall provide an opportunity for public
19 comment during the 60-period beginning on the date on which the Agency commences
20 review of a merger or acquisition.

21 (5) PUBLIC DECISION AND APPEAL.—The decision of the Commission or attorney general
22 of a State to allow or block a large merger shall be made publicly available.

23 (6) RETROACTIVE REVIEW.—

24 (A) LARGE MERGERS.—

25 (i) IN GENERAL.—Except as provided in clause (ii), the Commission shall
26 review any approved large mergers, as defined in section 7 of the Clayton Act (15
27 U.S.C. 18) during the 1-year period beginning on the date that is 2 years after the
28 merger or acquisition was approved.

29 (ii) EXCEPTION.—The Commission may initiate a review described in clause (i)
30 before or after the 1-year period described in that clause if the Commission
31 determines that the merger did not result in the benefits described in the stated
32 justification submitted under section [X].

33 (iii) FACTORS.—A review conducted under clause (i) shall analyze the
34 following factors:

35 (I) The impact of the merger or acquisition on consumers, workers, sellers,
36 entrepreneurship, privacy, innovation, and competition.

37 (II) Whether the acquiring person has satisfied the stated justification and
38 proposed plans for the use of the expected efficiencies of the merger or
39 acquisition under paragraph (2) of section 7A(d) of the Clayton Act (15
40 U.S.C. 18a(d)), as added by subsection (b) of this section.

1 (iv) UNWINDING.—

2 (I) IN GENERAL.—The Commission shall unwind a merger or acquisition
3 reviewed under this paragraph, including by requiring that the acquiring
4 person make divestitures, if the Agency determines that—

5 (aa) the merger or acquisition has materially harmed consumers,
6 workers, sellers, entrepreneurship, privacy, innovation, or competition;
7 or

8 (bb) the acquiring person has failed to satisfy the stated justification
9 of the merger or acquisition the merger did not result in the benefits
10 described in the stated justification submitted under paragraph (2) of
11 section 7A(d) of the Clayton Act (15 U.S.C. 18a(d)), as added by
12 subsection (b) of this section.

13 (II) JUDICIAL REVIEW.—An unwinding under this clause shall be subject to
14 judicial review.

15 (B) IMMEDIATE RETROACTIVE REVIEW OF MEGA MERGERS.—

16 (i) IN GENERAL.—The Commission shall immediately review every merger or
17 acquisition that is a mega merger, as defined in section 7 of the Clayton Act (15
18 U.S.C. 18) that has been completed on or after January 1, 2000, and before the
19 Agency has established and implemented a review process after the date of
20 enactment of this Act.

21 (ii) REMEDY.—The Commission shall take immediate action to remedy a
22 merger or acquisition under clause (i) to restore competition, including by
23 unwinding the merger or acquisition and requiring that the acquiring person make
24 divestitures, if the Commission determines that the merger or acquisition brought
25 material harm—

26 (I) to competition or the competitive process; or

27 (II) consumers, workers, sellers, entrepreneurship, privacy, or innovation.

28 (iii) DEADLINE.—The Commission shall complete its review and make
29 enforcement decisions not later than 2 years after the date on which the Agency
30 establishes and implements a review process after the date of enactment of this
31 Act.

32 (iv) PUBLIC FINDINGS.—And that all findings and decisions described in clause
33 (iii) shall be made publicly available.

34 (d) Standards of Review.—

35 (1) IN GENERAL.—A decision to allow or block a merger under this section shall be
36 subject to judicial review under section 702 of title 5, United States Code.

37 (2) APPROVAL.—An approval of a large merger shall be considered a question of fact,
38 reviewable for clear error.

39 (3) REJECTION.—The rejection of a large merger shall be considered matters of discretion
40 and reviewable for abuse of discretion.

1 SEC. 5. EXPANDING BANS ON ANTICOMPETITIVE
2 BEHAVIOR.

3 (a) Definitions.—Section 8 of the Sherman Act (15 U.S.C. 7) is amended by striking "That the
4 word 'person,' or 'persons,' whenever used in this act shall be deemed to include" and inserting
5 the following: "In this Act:

6 "(1) ANTICOMPETITIVE CONDUCT.—The term 'anticompetitve conduct' means conduct
7 that violates the antitrust laws (including any rules of the Federal Trade Commission
8 interpreting the antitrust laws).

9 "(2) ANTITRUST LAWS.—The term 'antitrust laws' has the meaning given the term in
10 section 2 of the Anti-Monopoly and Competition Restoration Act of _____.

11 "(3) AGENCY.—The term 'Agency' means—

12 "(A) the Federal Trade Commission; or

13 "(B) any other agency enforcing the antitrust laws.

14 "(4) COMPETITIVE TERMS.—The term 'competitive terms' means the material non-price
15 terms and conditions of competition, including product quality, quantity, privacy, data
16 protection, product variety, service, and innovation.

17 "(5) PERSON.—The term 'person' includes".

18 (b) Prohibition on the Worst Anticompetitive Behavior.—

19 (1) IN GENERAL.—Section 1 of the Sherman Act (15 U.S.C. 1) is amended—

20 (A) by striking "Every" and inserting "(a) Every"; and

21 (B) by adding at the end the following:

22 "(b)(1) In this subsection:

23 "(A) The term 'bid rigging'—

24 "(i) means any coordination or agreement that undermines a competitive bidding
25 process, including coordination of an agreement that is written, verbal, or inferred from
26 conduct, among 2 or more potential or actual bidders or the Government soliciting
27 bids; and

28 "(ii) includes—

29 "(I) an agreement as to which bidder will win the bid;

30 "(II) an agreement to alternate acting as low bidder;

31 "(III) an agreement to sit out a bidding round;

32 "(IV) an agreement to provide an unacceptable bid; and

33 "(V) an agreement to subcontract to a losing bidder or forming a joint venture
34 to submit a single bid.

35 "(B) The terms 'employee' and 'employer' have the meanings given the terms in section
36 3 of the Fair Labor Standards Act of 1938 (29 U.S.C. 203).

1 "(C) The term 'group boycott' means any agreement, including an agreement that is
2 written, verbal, or inferred from conduct—

3 "(i) between 2 or more competitors to refuse, including a constructive refusal, to
4 conduct business with a firm; and

5 "(ii) the purpose or effect of which is to lessen competition.

6 "(D) The term 'horizontal market allocation' means any agreement, including an
7 agreement that is written, verbal, or inferred from conduct, among 2 or more competitors—

8 "(i) to divide or allocate, or attempt to divide or allocate, territories, markets,
9 product lines, or customers; or

10 "(ii) the purpose or effect of which is to limit the ability of a competitor or reduce
11 the incentive of a competitor to compete for customers in any market or market
12 segment.

13 "(E) The term 'horizontal price fixing' means—

14 "(i) any agreement, including an agreement that is written, verbal, or inferred from
15 conduct, among 2 or more competitors for the purpose of raising, lowering, stabilizing,
16 or setting minimum or maximum prices or otherwise tampering with prices or
17 competitive terms; or

18 "(ii) the exchange of prices or competitive terms among competitors—

19 "(I) with the intent to fix prices or competitive terms; or

20 "(II) that adversely impacts prices or competitive terms.

21 "(F) The term 'noncompete agreement' means an agreement, entered into between a
22 person and any individual who performs work for the person and who in any workweek is
23 engaged in commerce or in the production of goods for commerce (or is employed in an
24 enterprise engaged in commerce or in the production of goods for commerce), including an
25 agreement entered into before and enforced after the date of enactment of this subparagraph,
26 that restricts the individual from performing, after the relationship for providing work
27 terminates, any of the following:

28 "(i) Any work for another employer for a specified period of time.

29 "(ii) Any work in a specified geographical area.

30 "(iii) Any work for another employer that is similar to the work by the employee for
31 the employer that is a party to the agreement.

32 "(G) The term 'no-poach agreement'—

33 "(i) means any agreement that—

34 "(I) is written, verbal, or inferred from conduct;

35 "(II) is between 2 or more employers, including franchisees; and

36 "(III) prohibits or restricts one employer from soliciting or hiring the
37 employees or former employees of another employer; and

38 "(ii) includes—

1 "(I) a franchise agreement; and

2 "(II) a contractor-subcontractor agreement

3 "(H) The term 'vertical market allocation'—

4 "(i) means any agreement, including an agreement that is written, verbal, or inferred
5 from conduct, among 2 firms in the same supply chain, including manufacturers,
6 wholesalers, distributors, and retailers to divide or allocate, or attempt to divide or
7 allocate, territories, markets, product lines, or customers; and

8 "(ii) does not include any agreement related to the introduction of a product or
9 service that has been on the market for not longer than 1 year.

10 "(I) The term 'wage fixing' means—

11 "(i) any agreement, including an agreement that is written, verbal, or inferred from
12 conduct, among 2 or more competitors for the purpose of raising, lowering, stabilizing,
13 or setting minimum or maximum wages, salaries, benefits or other forms of
14 compensation, or otherwise tampering with any form of compensation or competitive
15 employment terms; or

16 "(ii) the exchange of wages, salaries, benefits, or other forms of compensation or
17 competitive employment terms among competitors—

18 "(I) with the intent to fix any form of worker compensation or competitive
19 employment terms; or

20 "(II) that adversely impacts any form of worker compensation or competitive
21 employment terms.

22 "(2) It shall be a violation of this section for any person to engage in, or attempt to engage in,
23 the following conduct:

24 "(A) Horizontal price fixing.

25 "(B) Bid rigging.

26 "(C) Horizontal market allocation

27 "(D) Vertical market allocation.

28 "(E) Wage fixing.

29 "(F) A group boycott.

30 "(G) A noncompete agreement, except in the case of a legitimate sale of a business or
31 assets.

32 "(H) A no-poach agreement.

33 "(3)(A) Any entity who violates this subsection shall—

34 "(i) be fined not more than 15 percent of the annual revenue of the entity; and

35 "(ii) disgorge any profits gained by the entity as a result of the unlawful conduct.

36 "(B) An individual who knowingly violates this subsection—

"(i) shall be fined not more than $20,000,000, imprisoned for not more than 10 years, or both; and

"(ii) may not participate as a stock holder, officer, employee, board member, or consultant of any entity that violates this section.

"(C) A chief executive officer shall be liable under this paragraph for any violation of this subsection committed by an officer or employee of the company of the chief executive officer if the chief executive officer knew or should have known of the violation.

"(4) The Federal Trade Commission shall promulgate regulations to add additional types of conduct to those listed in paragraph (2).".

SEC. 6. PROHIBITING THE ABUSE OF MARKET POWER.

(a) Prohibition on Abuse of Market Power.—

(1) IN GENERAL.—Section 2 of the Sherman Act (15 U.S.C. 2) is amended—

(A) by striking "Every" and inserting "(a) Every"; and

(B) by adding at the end the following:

"(b)(1) No person may abuse, or attempt to abuse, market power.

"(2) A person shall be deemed guilty of violating this subsection by abusing market power if the person—

"(A) has market power; and

"(B) engages in conduct, or has engaged in a pattern of past conduct, that materially harms competition or the competitive process.

"(3) In an action under this subsection, market power shall be established by showing—

"(A) that the person—

"(i) has not less than 40 percent market share in the relevant market as a seller;

"(ii) has not less than 25 percent market share in the relevant market as a buyer, including as an employer; or

"(iii) has annual revenue of not less than $40,000,000,000; or

"(B) that—

"(i) the person has—

"(I) directly or indirectly imposed an unfair purchase or selling terms or any other unfair trading condition;

"(II) limited production, markets, or technical development to the prejudice or detriment of consumers or sellers;

"(III) placed parties in trade at a competitive disadvantage by applying dissimilar conditions to substantially equivalent transactions; or

"(IV) made the conclusion or effectiveness of a contract subject to the other party accepting a supplementary obligation that has no connection with the

subject of the contract;

"(ii) the entry of a new competitor would likely—

"(I) reduce prices by at least 5 percent, result in the person losing significant sales, or improve competitive terms for one or more buyers, in the case of a seller; or

"(II) increase prices or wages, or improve competitive terms for one or more sellers, in the case of a buyer; or

"(iii) the person engaged in any behavior described in a rule promulgated by the Federal Trade Commission under subsection (c)(2) of the [Anti-Monopoly and Competition Restoration Act of _____.]

"(4) It shall be a presumptive abuse of market power under this section for a person with market power to engage or attempt to engage in the following conduct:

"(A) Vertical price-fixing.

"(B) Any refusal to deal.

"(C) Exclusive dealing.

"(D) Serving as both a platform and a merchant that competes with third-party merchants.

"(E) Price gouging.

"(F) Predatory pricing.

"(G) Denying access to essential facilities.

"(H) Tying.

"(I) Any nonsolicitation clause.

"(J) Any restriction on the freedom to disclose information about wages and benefits.

"(K) An agreement among employers to share wage and salary information exclusively across employers.

"(L) Misclassification of employees as independent contractors.

"(M) Unfair labor practices listed in section 8 of the National Labor Relations Act (29 U.S.C. 158).

"(N) Any contract clause that restricts post-employment employee mobility.

"(O) Any conduct considered a per se violation of section 1.

"(P) Any behavior that may reasonably help the person attain or maintain market power if the behavior leads to a criminal conviction or civil liability.

"(5)(A) Any entity that violates this subsection shall—

"(i) be fined not less than 5 percent of the annual revenue of the entity;

"(ii) disgorge any profits gained by the entity as a result of the unlawful conduct; and

"(iii) provide restitution to any person injured by the anticompetitive conduct of the entity.

1 “(B) An individual who knowingly violates this subsection—

2 “(i) shall be fined not more than $50,000,000, imprisoned for not more than 15 years, or
3 both;

4 “(ii) may not participate as a stock holder, officer, board member, employee, or
5 consultant of any entity that violates this section; and

6 “(iii) shall be banned from participating in the relevant market—

7 “(I) in the case of an initial violation of this subsection, for a period of 1 year;

8 “(II) in the case of a second violation of this subsection, for a period of 10 years; and

9 “(III) in the case of a third or subsequent violation of this subsection, for life.

10 “(C) A chief executive officer shall be liable under this paragraph for any violation of this
11 subsection committed by an officer or employee of the company of the chief executive officer if
12 the chief executive officer knew or should have known of the violation.

13 “(6) The Federal Trade Commission—

14 “(A) shall promulgate regulations to add additional types of conduct to those listed in
15 paragraph (2); and

16 “(B) may promulgate regulations to decrease the thresholds in paragraph (3)(A).

17 “(7) In this subsection:

18 “(A) The term ‘essential facilities’ means the digital or physical infrastructure materially
19 important for reaching customers or trading partners or for enabling competitors to carry on
20 business and difficult to duplicate due to physical, geographical, legal, technological, or
21 economic constraints.

22 “(B) The term ‘exclusive dealing’ means—

23 “(i) to lease or make a sale or contract for sale of any commodities or services, or fix
24 a price charged therefor, or discount from, or rebate upon, such price, on the condition,
25 agreement, or understanding that the lessee or purchaser thereof shall not use or deal in
26 the goods, wares, merchandise, machinery, supplies, or other commodities or services
27 of another person; or

28 “(ii) to incentivize through excessive rebates or similar benefits in exchange for a
29 commitment from a lessee or purchaser not to use or deal in the goods, wares,
30 merchandise, machinery, supplies, or other commodities or services of another person.

31 “(C) The term ‘market power’ means—

32 “(i) with respect to a seller, the ability to increase prices above, diminish quality
33 below, or obtain more favorable competitive terms from a buyer than would exist in a
34 competitive market; and

35 “(ii) with respect to a buyer, the ability to reduce prices, including wages, below,
36 diminish quality, or obtain more favorable competitive terms from a seller than would
37 exist in a competitive market.

38 “(D) The term ‘nonsolicitation clause’ means any agreement between an employer and an

employee that prohibits, restricts, or in any way limits the employee from soliciting or customers of the employer.

"(E) The term 'platform' means any technology or group of technologies that—

"(i) operate or provide the main interface between different users or market participants, such as individuals, advertisers, or providers of content, services, and goods; and

"(ii) allow for exchanges of at least some goods, services, or content that the technology does not own.

"(F) The term 'predatory pricing' means—

"(i) pricing below the average variable cost of a person, regardless of whether there is a dangerous probability of recouping the investment in below-cost prices; or

"(ii) pricing above the average variable cost of a person that has the purpose or effect of excluding competition or harming the competitive process.

"(G) The term 'price gouging' means charging a price above cost more than 15 percent higher than the average price above cost for a product or service in the relevant market during the preceding 12-month period.

"(H) The term 'refusal to deal' means—

"(i) terminating an existing agreement with a person or refusing to enter an agreement with a person to achieve an anticompetitive end; or

"(ii) a refusal by a person to provide access to a product, service, resource, or facility—

"(I) that is likely to exclude rivals or diminish competition; and

"(II)(aa) that prevents the emergence of a new product for which there is potential consumer demand; or

"(bb) prevents improving current products in a relevant market.

"(I) The term 'resale price maintenance' means a contract, combination, or conspiracy that establishes a maximum price above, or a minimum price below, which a retailer, wholesaler, or distributor may not sell a commodity or service.

"(J) The term 'tying' means any agreement, including an agreement that is written, verbal, or inferred from conduct, by a party to sell 1 product or service if the purpose or effect is to force the buyer into purchasing or obtaining a separate and distinct product or service.

"(K) The term 'vertical price fixing' means—

"(i) any agreement, including an agreement that is written, verbal, or inferred from conduct, among 2 firms in the same supply chain, including manufacturers, wholesalers, distributors, and retailers, for the purpose of raising, lowering, stabilizing, setting minimum prices, or otherwise tampering with prices or competitive terms; or

"(ii) the exchange of prices or competitive terms among competitors—

1 "(I) with the intent to fix prices or competitive terms; or

2 "(II) that adversely impacts prices or competitive terms.".

3 (2) RULEMAKING.—Not later than 2 years after the date of enactment of this Act, the
4 Agency shall promulgate regulations identifying direct evidence of market power, including
5 forms of price and wage discrimination, in addition to the evidence described in subsection
6 (c)(1) of section 2 of the Sherman Act (15 U.S.C. 2), as added by paragraph (1) of this
7 subsection.

8 (b) Jurisdiction.—Section 4 of the Sherman Act (15 U.S.C. 4) is amended—

9 (1) in the first sentence—

10 (A) by inserting "and the Federal Trade Commission" after "Attorney-General,";
11 and

12 (B) by striking "The several circuit" and inserting "(a) The several district"; and

13 (2) by adding at the end the following:

14 "(b)(1) In an action brought under section 1 of this Act, if an initial showing of harm caused
15 by anticompetitive conduct is made, the parties complained of must show by clear and
16 convincing evidence the lack of such harm.

17 "(2) Economic efficiencies or procompetitive benefits may only be considered to rebut the
18 initial showing of harm caused by anticompetitive conduct if—

19 "(A)(i) the procompetitive benefit or efficiency applies to the same population impacted
20 by the anticompetitive harm; and

21 "(ii) the procompetitive benefit or efficiency eliminates the anticompetitive harm;

22 "(B) the procompetitive benefit or efficiency is verifiable; and

23 "(C) the anticompetitive conduct is reasonably necessary to achieve the procompetitive
24 benefit or efficiency and there is no less restrictive alternative for doing so.

25 "(3) If a showing of the presence of anticompetitive intent is made by clear and convincing
26 evidence, there shall be a presumption of harm such that the burden shall shift to the party
27 engaged in the conduct to demonstrate by clear and convincing evidence the lack of such harm.

28 "(c)(1) In an action brought under section 2, if the an initial showing of an abuse of power is
29 made, the person must show by clear and convincing evidence the lack of such harm.

30 "(2) Economic efficiencies or procompetitive benefits may not be considered to rebut an abuse
31 of power.

32 "(d) A party may rebut a presumption established under section 2(b)(4) through clear and
33 convincing evidence that the conduct does not materially harm competition or the competitive
34 process. A court may not balance procompetitive efficiencies with anticompetitive impacts upon
35 review."

36 SEC. 7. STRENGTHENING ANTITRUST ENFORCEMENT.

37 (a) Definitions.—Section 4 of the Federal Trade Commission Act (15 U.S.C. 44) is amended
38 by adding at the end the following:

1 "'Agency' has the meaning given the term in section 2 of the Anti-Monopoly and Competition
2 Restoration Act of _____.

3 "'Anticompetitive conduct' means conduct that violates the antitrust laws (including any rules
4 of the Commission interpreting the antitrust laws).

5 "'Antitrust laws' has the meaning given the term in section 2 of the Anti-Monopoly and
6 Competition Restoration Act of _____.

7 "'Market power' has the meaning given the term in section 2 of the Sherman Act (15 U.S.C.
8 2).".

9 (b) Jurisdiction.—

10 (1) INVESTIGATIONS.—Section 6 of the Federal Trade Commission Act (15 U.S.C. 46) is
11 amended—

12 (A) in subsection (c), by striking ", and upon the application of the Attorney
13 General";

14 (B) in subsection (e), by striking "Upon the application of the Attorney General to"
15 and inserting "To";

16 (C) in subjection (j)(1), by striking ", other than Federal antitrust laws," and all that
17 follows through "6211(5))),"; and

18 (D) by adding at the end the following:

19 "(m) Rule of Construction.—Nothing in this section may be construed to limit the jurisdiction
20 of the Board of Governors of the Federal Reserve System, the Department of Agriculture, or the
21 Federal Communications Commission.".

22 (2) PERSONS, PARTNERSHIPS, AND CORPORATIONS.—Section 5(a)(2) of the Federal Trade
23 Commission Act (15 U.S.C. 45(a)(2)) is amended by striking ", except banks" and all that
24 follows through "said Act,".

25 (3) REFERRALS.—Section 7 of the Federal Trade Commission Act (15 U.S.C. 47) is
26 amended by inserting "or the Commission" after "the Attorney General".

27 (c) Rulemaking.—

28 (1) SECTION 1.—Not later than 1 year after the date of enactment of this Act, the Federal
29 Trade Commission shall promulgate regulations to further define conduct that constitutes a
30 contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade, as
31 prohibited by section 1 of the Sherman Act (15 U.S.C. 1).

32 (2) SECTION 2.—Not later than 1 year after the date of enactment of this Act, the Federal
33 Trade Commission shall promulgate regulations to further define conduct that creates a
34 presumption of abuse of market power, as prohibited by section 2 of the Sherman Act (15
35 U.S.C. 2).

36 (3) CERTIFICATIONS.—Not later than 1 year after the date of enactment of this Act, the
37 Federal Trade Commission shall promulgate regulations setting forth the process under
38 which certifications made under Section 12(a) of this Act shall be submitted.

39 (4) INTERPRETIVE RULES.—Section 18 of the Federal Trade Commission Act (15 U.S.C.

1 57a) is amended—
2 (A) in subsection (a)(1)—
3 (i) in subparagraph (A), by striking ", and" and inserting a semicolon;
4 (ii) in subparagraph (B)—
5 (I) by striking "section 5(a)(1)), except" and inserting "section 5(a)(1))
6 (except";
7 (II) by striking "section. Rules" and inserting "section) and any rules"; and
8 (III) by striking the period at the end and inserting a "; and"; and
9 (iii) by adding at the end the following:
10 "(C) interpretive rules and general statements of policy with respect to the antitrust
11 laws;".
12 (B) by striking subsections (b) through (h) and inserting the following:
13 "(b) The Commission may promulgate rules under subsection (a)(1) in accordance with
14 section 553 of title 5, United States.";
15 (C) by redesignating subsections (i) and (j) as subsections (c) and (d), respectively;
16 and
17 (D) by adding at the end the following:
18 "(e) If an antitrust law that an agency administers is silent or ambiguous, and an agency has
19 followed the procedures in section 553 and 554 of title 5, United States, as applicable, a
20 reviewing court shall defer to the agency's reasonable or permissible interpretation of that
21 statute.".
22 (d) Litigation Authority.—
23 (1) IN GENERAL.—Section 16 of the Federal Trade Commission Act (15 U.S.C. 56) is
24 amended to read as follows:

25 # "SEC. 16. INDEPENDENT LITIGATION AUTHORITY.

26 "(a) In General.—The Commission shall have authority to commence or defend, and supervise
27 the litigation of a civil action and any appeal of such an action in its own name by any of its
28 attorneys designated by it for such purpose under the antitrust laws.
29 "(b) Foreign Litigation.—
30 "(1) COMMISSION ATTORNEYS.—The Commission may—
31 "(A) retain foreign counsel to represent the Commission in foreign courts on
32 particular matters in which the Commission has an interest; and
33 "(B) designate Commission attorneys to assist in connection with such matters.
34 "(2) COSTS OF FOREIGN COUNSEL.—The Commission is authorized to expend
35 appropriated funds for the retention of foreign counsel for litigation in foreign courts and for
36 expenses related to litigation in foreign courts in which the Commission has an interest.

1 "(3) LIMITATION ON USE OF FUNDS.—Nothing in this subsection authorizes the payment
2 of claims or judgments from any source other than the permanent and indefinite
3 appropriation authorized by section 1304 of title 31, United States Code.

4 "(4) OTHER AUTHORITY.—The authority provided by this subsection is in addition to any
5 other authority of the Commission.".

6 (2) MANDAMUS.—Section 9 of the Federal Trade Commission Act (15 U.S.C. 49) is
7 amended in the fourth undesignated paragraph by striking "of the Attorney General" and all
8 that follows through "the district courts" and inserting "of the Commission, the district
9 courts".

10 (e) Administrative Enforcement.—

11 (1) IN GENERAL.—Section 6 of the Federal Trade Commission Act (15 U.S.C. 46), as
12 amended by subsection (a) of this section, is amended by adding at the end the following:

13 "(n) Other Administrative Enforcement.—The Commission shall have power—

14 "(1) after providing notice and an opportunity for a hearing, in accordance with chapter 5
15 of title 5, United States Code, to—

16 "(A) impose a civil penalty for a violation of the antitrust laws;

17 "(B) order divestiture of specified assets or business units with respect to—

18 "(i) a previously completed merger or acquisition, in accordance with section 7
19 of the Clayton Act (15 U.S.C. 18); or

20 "(ii) a violation of the antitrust laws if divestiture is necessary to address the
21 underlying harm;

22 "(iii) a proposed merger or acquisition that does not meet the thresholds to be
23 considered a large merger or a mega merger, as those terms are defined in section
24 7 of the Clayton Act (15 U.S.C. 18);

25 "(C) issue an order barring the completion of a merger or acquisition that is subject
26 to review under section 7 of the Clayton Act (15 U.S.C. 18);

27 "(D) for any entity against whom an administrative or judicial order is entered
28 determining that the entity engaged in anticompetitive conduct, order the entity be
29 debarred from participating in Federal contracts for a period of not less than 3 and not
30 more than 7 years;

31 "(E) issue an order barring any individual who has violated the Sherman Act (15
32 U.S.C. 1 et seq.) from participating as a stockholder, officer, board member, employee,
33 or consultant of an entity in the same market, as determined by the Commission, in
34 which the individual committed the violation;

35 "(F) issue an order imposing personal liability on an individual who is the chief
36 executive officer (or equivalent) of an entity that has violated section 2 of the Sherman
37 Act (15 U.S.C. 2) for payment of damages and penalties relating to the violation by the
38 entity;

39 "(G) issue an order requiring disgorgement of all ill-gotten gains made by engaging
40 in unlawful actions; and

1 "(H) issue an order requiring restitution to all parties injured by unlawful actions;
2 and

3 "(2) to initiate proceedings before an administrative law judge seeking damages relating
4 to a violation of the antitrust laws.

5 "(o) Effect of Administrative Enforcement.—Any determination in an administrative
6 enforcement by the Commission relating to the Sherman Act (15 U.S.C. 1 et seq.) shall have the
7 force and effect of a rulemaking.".

8 (2) DEFERENCE.—Any reasonable definition of the relevant market, market share, and
9 any anticompetitive conduct alleged in an enforcement action by the Agency shall be given
10 deference by a reviewing court.

11 SEC. 8. TRANSPARENCY AND PUBLIC PARTICIPATION.

12 (a) Publicly Available Decisionmaking.—

13 (1) IN GENERAL.—Any decision by the Agency to take or not to take an enforcement
14 action under the antitrust laws and the results of any investigation shall—

15 (A) be made publicly available; and

16 (B) include a substantive justification for the decision described paragraph (2).

17 (2) SUBSTANTIVE JUSTIFICATION.—A substantive decision described in this paragraph—

18 (A) with respect to an acquisition, includes—

19 (i) an explanation of how the acquisition met or did not harm the competitive
20 process or lessen competition, or tend to create or help maintain a monopoly or
21 monopsony, including an analysis of how the merger or acquisition will impact
22 competition, workers, consumers, sellers, entrepreneurship, privacy, and
23 innovation; and

24 (ii) an explanation of why, in light of the factors described in clause (i), the
25 acquisition was blocked or approved; and

26 (B) with respect to enforcement of the antitrust laws not relating to acquisitions,
27 includes—

28 (i) an explanation of how the conduct was or was not illegal under the antitrust
29 laws, including an analysis of how the conduct impacted competition, workers,
30 consumers, sellers, entrepreneurship, privacy, and innovation; and

31 (ii) an explanation of why, in light of the factors described in clause (i), an
32 enforcement action was or was not brought.

33 (b) Review Upon Request of Aggrieved Parties.—

34 (1) DEFINITION.—In this subsection, the term "aggrieved party"—

35 (A) with respect to an acquisition, includes a competitor in any relevant market, a
36 business entity in the supply chain of the acquiring or acquired entity, a consumer of
37 either party to the acquisition, and an employee of the acquiring or acquired entity; and

38 (B) with respect to an enforcement action, includes any person that would have

1 standing to bring a claim under the antitrust laws relating to the alleged conduct.

2 (2) REQUEST.—An aggrieved party may submit a written request that the Agency—

3 (A) initiate an investigation or an enforcement action under the antitrust laws; or

4 (B) seek to block a merger or acquisition or reject a large merger under section 7 of
5 the Clayton Act (15 U.S.C. 18).

6 (3) AGENCY ACTION.—

7 (A) IN GENERAL.—Not later than 30 days after receiving a written request under
8 paragraph (2), the Agency shall notify the aggrieved party in writing regarding whether
9 the Agency will conduct an investigation.

10 (B) CONTENTS.—If the Agency determines not to instigate an investigation in
11 response to a written request under paragraph (2), the notice under subparagraph (A)
12 shall include a substantive justification for the decision of the Agency.

13 SEC. 9. PROTECTING WORKER COOPERATION.

14 Section 6 of the Clayton Act (15 U.S.C. 17) is amended to read as follows:

15 "SEC. 6. LABOR.

16 "(a) That the labor of a human being is not a commodity or article of commerce.

17 "(b) Nothing contained in the antitrust laws shall be construed to forbid or restrain—

18 "(1) the existence and operation of labor, agricultural, service, or horticultural
19 organizations that—

20 "(A) are instituted for the purposes of mutual help; and

21 "(B)(i) do not issue capital stock; or

22 "(ii) are not conducted for profit;

23 "(2) individual members of an organization described in paragraph (1) from carrying out
24 the objects of the organization;

25 "(3) cooperation among workers when negotiating their compensation, benefits, fees, or
26 working conditions through joint bargaining or collective action with other parties; or

27 "(4) cooperation among workers when taking unilateral collective action related to
28 compensation, benefits, fees, or working conditions, including collective withholding or
29 reduction of labor or services, strikes, and boycotts.

30 "(c) The organizations and workers described in subsection (b) shall not be held of construed
31 to be illegal combinations or conspiracies in restraint of trade under the antitrust laws.

32 "(d) The applicability of subsections (b) and (c) shall include relationships between a worker
33 and a platform that mediates between the worker and a buyer.

34 "(e) The term 'platform' means any technology or group of technologies that—

35 "(1) operate or provide the main interface between different users or market participants
36 such as individuals, advertisers, or providers of content, services, and goods; and

"(2) allow for exchanges of some goods, services, or content that the technology does not own.".

SEC. 10. PLEADING STANDARD AND CLASS CERTIFICATION.

(a) Pleading Standard.—

(1) IN GENERAL.—Rule 12 of the Federal Rules of Civil Procedure is amended by adding at the end the following:

"(j) Pleading standards. A court shall not dismiss a complaint under Rule 12(b)(6), 12(c), 12(e), or 56—

"(1) unless it appears beyond doubt that the plaintiff can prove no set of facts in support of the claim which would entitle the plaintiff to relief;

"(2) on the basis of a determination by the court that the factual contents of the complaint do not show the plaintiff's claim to be plausible or are insufficient to warrant a reasonable inference that the defendant is liable for the misconduct alleged; or

"(3) on the grounds that the alleged conduct is or would be economically irrational or implausible.".

(2) APPLICABILITY.—Rule 12(j) of the Federal Rules of Civil Procedure, as added by subsection (a), shall apply with respect to the dismissal of complaints except as otherwise expressly provided by an Act of Congress enacted after the date of the enactment of this Act or by amendments made after such date of enactment to the Federal Rules of Civil Procedure pursuant to the procedures prescribed by the Judicial Conference of the United States under chapter 131 of title 28, United States Code.

(b) Class Certification.—Any class action may be certified under rule 23 of the Federal Rules of Civil Procedure—

(1) regardless of whether the damages resulting from an alleged injury are measurable on a class-wide basis at the time of class certification; and

(2) if the alleged injury to some class members other than the class representative is at least de minimis.

(c) Antitrust Injury.—In an antitrust case, a showing that harm or anticipated harm to the plaintiff flows from that which makes an act of a person unlawful, as required by article III of the Constitution of the United States, shall be sufficient to establish injury and obtain damages or equitable relief.

SEC. 11. FUNDING.

(a) Merger or Acquisition Filing Fees.—Section 605 of the Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, 1990 (15 U.S.C. 18a note) is amended by adding at the end the following:

"(c)(1) In addition to the fee paid under subsection (b), for any acquisition of voting securities or assets that is a large merger, as defined in section 7 of the Clayton Act (15 U.S.C. 18), the

parties to the acquisition shall pay a fee in the amount equal to 2 percent of the value of the voting securities or assets of both parties.

"(2) The person acquiring the voting securities or assets shall pay 100 percent of the fee under paragraph (1).

"(3) The Federal Trade Commission, after providing notice and an opportunity for comment, may increase the percentage specified under paragraph (1).".

(b) Appropriations.—The Federal Trade Commission Act is amended by inserting after section 26 the following:

"SEC. 27. FUNDING. (a)

"To the extent there are insufficient funds from fines and fees received by the Commission for the costs of the programs, projects, and activities of the Commission, there are appropriated, out of monies in the Treasury not otherwise appropriated, for fiscal year 2019 and each fiscal year thereafter such sums as are necessary for the costs of the programs, projects, and activities of the Commission.

"(b) The Commission may use any funds from fines and settlements not returned to consumers for future operations of the Commission.".

SEC. 12. ACCOUNTABILITY FOR VIOLATIONS OF THE ANTITRUST LAWS.

(a) Penalties.—The Sherman Act (15 U.S.C. 1 et seq.) is amended—

(1) in subsection (a) of section 1 (15 U.S.C. 1), as designated by subsection (b) of this section—

(A) by striking"$100,000,000" and inserting "15 percent of total revenue of the person"; and

(B) by striking "$1,000,000" and inserting "$20,000,000";

(2) in subsection (a) of section 2 (15 U.S.C. 2), as designated by subsection (c) of this section—

(A) by striking "$1,000,000" and inserting "$50,000,000"; and

(B) by striking "10 years" and inserting "15 years"; and

(3) in section 3 (15 U.S.C. 3)—

(A) in subsection (a)—

(i) by striking"$100,000,000" and inserting "15 percent of total revenue of the person"; and

(ii) by striking "$1,000,000" and inserting "$20,000,000"; and

(B) in subsection (b)—

(i) by striking "$1,000,000" and inserting "$50,000,000"; and

(ii) by striking "10 years" and inserting "15 years".

(b) Certification.—

(1) IN GENERAL.—The chief executive officer, chief financial officer, chief operating officer, and chief compliance officer of any company with revenue equal to or greater than $40,000,000,000 shall submit to the Chairman of the Federal Trade Commission and the Attorney General, subject to section 1001 of title 18, United States Code, an annual certification that the officers have conducted due diligence and found that neither the company nor any individual on behalf of the company has violated Federal antitrust laws in such a manner that has not been disclosed in full to the Department of Justice or the Federal Trade Commission. If a disclosure to the Department of Justice or the Federal Trade Commission has been made, the certification shall explicitly describe all of the details of the conduct that has been disclosed, including the date of disclosure and the person to whom the disclosure was made.

(2) LIABILITY FOR ANTITRUST LAW VIOLATIONS.—Failure to submit a certificate under paragraph (1) shall constitute sufficient knowledge of a violation of the antitrust laws as required for individual liability for chief executive officers under sections 1 and 2 of the Sherman Act (15 U.S.C. 1, 2).

(3) EFFECTIVE DATE.—This subsection shall take effect on the effective date of the regulations promulgated under subsection (b).

(c) Regulations.—Not later than 1 year after the date of enactment of this Act, the Federal Trade Commission shall promulgate regulations on the process under which certifications made under subsection (a) shall be submitted.

(d) Website.—The Federal Trade Commission shall, on the website of the Federal Trade Commission—

(1) not later than 90 calendar days after the date on which regulations are promulgated under subsection (b), and on an annual basis thereafter, publish a list of all companies subject to the upcoming year's annual certification requirement under subsection (a); and

(2) maintain on the homepage a direct link for the public to report alleged misconduct pertaining to any entity listed under paragraph (1).

(e) Enforcement.—

(1) INJUNCTIONS.—

(A) IN GENERAL.—If the Federal Trade Commission believes a person has violated, is violating, or will violate this section or a regulation promulgated under this section, the Commission may bring a civil action in the appropriate district court of the United States to enjoin the violation or to enforce compliance with the section or regulation.

(B) NO BOND.—An injunction or temporary restraining order shall be issued without bond.

(2) CIVIL PENALTIES.—

(A) IN GENERAL.—A chief executive officer, chief financial officer, chief operating officer, or chief compliance officer of a company who willfully violates this section or a regulation promulgated under this section shall be liable to the United States for a civil penalty of not more than $25,000.

1 (B) NEGLIGENCE.—

2 (i) IN GENERAL.—The Federal Trade Commission may impose a civil money
3 penalty of not more than $500 on a chief executive officer, chief financial officer,
4 chief operating officer, or chief compliance officer of company who negligently
5 violates this section or a regulation promulgated under this section.

6 (ii) PATTERN OF NEGLIGENT ACTIVITY.—If a chief executive officer, chief
7 financial officer, chief operating officer, or chief compliance officer of a company
8 engages in a pattern of negligent violations of any provision of this section or any
9 regulation promulgated under this section, the Federal Trade Commission may, in
10 addition to any penalty imposed under clause (i) with respect to any such
11 violation, impose a civil money penalty of not more than $50,000 on the chief
12 executive officer, chief financial officer, chief operating officer, or chief
13 compliance officer of a company.

14 (3) CRIMINAL PENALTIES.—

15 (A) IN GENERAL.—A chief executive officer, chief financial officer, chief operating
16 officer, or chief compliance officer of a company who willfully violates this section or
17 a regulation promulgated under this section shall be fined not more than $250,000,
18 imprisoned for not more than 5 years, or both.

19 (B) OTHER LAWS.—A chief executive officer, chief financial officer, chief operating
20 officer, and chief compliance officer of a company who willfully violates this section
21 or a regulation promulgated under this section while violating another law of the
22 United States or as part of a pattern of any illegal activity involving more than
23 $100,000 in a 12-month period, shall be fined not more than $500,000, imprisoned for
24 not more than 10 years, or both.
25

Congress of the United States
Washington, DC 20510

June 21, 2022

The Honorable Jonathan Kanter
Assistant Attorney General
Antitrust Division
United States Department of Justice
950 Pennsylvania Avenue, NW
Washington, DC 20530

Dear Assistant Attorney General Jonathan Kanter,

We are writing today regarding our concerns over Reckitt Benckiser Group PLC's proposed sale of its Enfamil infant formula manufacturing arm in the midst of an ongoing, dangerous national shortage.[1] In May 2022, following the closure of Abbot's Sturgis, Michigan plant, national out-of-stock rates for infant formula exceeded 70 percent, threatening the health and safety of millions of infants, children, and adults,[2] while President Biden warned that it would take "a couple more months" before infant formula manufacturing was back to normal.[3] Given the consolidation in the infant formula market and impact of this shortage on American families, we urge you to use your authority granted under the Clayton Act to closely examine whether such a transaction would likely harm competition or prolong the crisis.[4]

As we noted in our May 2022 letter to the Department of Agriculture,[5] just four companies control nearly 90% of the infant formula market and this concentration severely weakened supply chain resiliency.[6] As a result, the infant formula marketplace was susceptible to supply shocks, like Abbott's recall and its temporary closure of its Sturgis, Michigan factory. In the weeks following this recall, out-of-stock rates reached up to 90% in some states, causing a widespread public health crisis that disproportionately impacts low-income family and high-risk infants.[7]

Given the ongoing crisis, we are extremely concerned by reports that Reckitt Benckiser Group, which owns the Enfamil brand of baby formula and is the second biggest infant formula

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[1] Wall Street Journal, "Enfamil Maker Reckitt Shops Baby-Formula Unit Amid Shortage," Saabira Chaudhuri and Ben Dummett, May 27, 2022, https://www.wsj.com/articles/enfamil-maker-reckitt-shops-baby-formula-unit-amid-shortage-11653655305.

[2] New York Magazine, "The Baby-Formula Shortage Could Ease by Late July," Bindu Bansinath and Mia Mercado, June 6, 2022, https://www.thecut.com/2022/06/baby-formula-shortage-fda.html .

[3] Wall Street Journal, "Baby Formula Shortage Worsens, Hitting Low-Income Families Hardest," June 1, 2022, https://www.wsj.com/articles/baby-formula-shortage-worsens-hitting-low-income-families-hardest-11654088402?mod=hp_lead_pos11.

[4] 15 U.S.C. 18.

[5] Letter from Senator Cory Booker and colleagues to USDA Secretary Tom Vilsack, May 13, 2022, https://www.booker.senate.gov/news/press/booker-duckworth-klobuchar-lead-8-senators-in-urging-usda-to-address-infant-formula-shortages.

[6] Politico, "Infant formula shortage suddenly Topic A in Washington," Helena Bottemiller Evich and Meredith Lee, May 13, 2022, https://www.politico.com/news/2022/05/13/unconscionable-pelosi-vows-action-on-infant-formula-shortages-00032459.

[7] CNN Health, "Despite moves to increase supply, families are still feeling the pain of the baby formula shortage," Brenda Goodman, June 6, 2022, https://www.cnn.com/2022/06/06/health/families-struggle-formula-shortage/index.html; Washington Post, "Formula shortage is worst for low-income families, high-risk infants," Frances Stead Sellers, May 18, 2022, https://www.washingtonpost.com/health/2022/05/18/baby-formula-shortage-impact/.

manufacturer in the U.S., is pushing ahead with a sale process that could shallow out the market.[8] Private equity firm Clayton Dubilier & Rice (CDR), which submitted a non-binding bid to purchase Reckitt Benckiser's infant nutrition unit,[9] already has a history of saddling its acquisitions with debt,[10] and of profiting from a public health crisis when one of their subsidiaries exported "large shipments" of personal protective gear and respirator equipment out of the U.S. at the beginning of the coronavirus (COVID-19) pandemic.[11] If private equity investors take over a key infant formula manufacturer with the intent to further consolidate and merge operations when the market is already failing families and their children, matters will be even worse for consumers.[12]

Reckitt Benckiser's potential sale to private equity, during a shortage that has resulted in the company temporarily holding up to 55% of the U.S. market, represents a potential antitrust issue and a threat to the already consolidated market.[13] It is understood that Reckitt Benckiser's sale would guarantee "operational disruption" and likely weaken the company with massive debt at a time when their success is essential to families across the country.[14] You have previous acknowledged the weaknesses inherent to oligopolies, accurately placing the blame for the fragility of the infant formula market squarely on the high level of concentration in this industry.[15] In addition, your division has addressed the role of private equity in concentrating markets by "rolling up" aspects of the American economy, unchecked by regulators.[16] Section 7 of the Clayton Act prohibits acquisitions where the effect "may be substantially to lessen competition,"[17] and this may well apply to any private equity firm with a noted history of selling off assets, laying off workers, and loading companies up with debt—regardless of whether any competing companies are in the firm's investment portfolio. In September 2021, Federal Trade Commission Chair Lina Khan called for greater scrutiny of mergers that involved private equity firms, warning that their "business models may distort ordinary incentives in ways that strip productive capacity and may facilitate unfair methods of competition and consumer protection violations."[18] Just last week, Chair Khan re-emphasized these concerns, noting that private equity

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[8] Wall Street Journal, "Enfamil Maker Reckitt Shops Baby-Formula Unit Amid Shortage," Saabira Chaudhuri and Ben Dummett, May 27, 2022, https://www.wsj.com/articles/enfamil-maker-reckitt-shops-baby-formula-unit-amid-shortage-11653655305; The American Prospect, "A Formula for Public Ownership," Robert Kuttner, May 27, 2022, https://prospect.org/blogs-and-newsletters/tap/formula-for-public-ownership/.

[9] Bloomberg, "Reckitt's $7 Billion Formula Sale Draws Muted Interest," Ruth David and Dinesh Nair, May 27, 2022, https://www.bloomberg.com/news/articles/2022-05-27/reckitt-s-sale-of-baby-formula-unit-said-to-draw-muted-interest#xj4y7vzkg.

[10] Wall Street Journal, "Buyout Firms Set Record for Loading Companies With Debt to Pay Themselves," Chris Cumming, October 25, 2021, https://www.wsj.com/articles/buyout-firms-set-record-for-loading-companies-with-debt-to-pay-themselves-11635156003.

[11] The Intercept, "KEY MEDICAL SUPPLIES WERE SHIPPED FROM U.S. MANUFACTURERS TO FOREIGN BUYERS, RECORDS SHOW," Lee Fang, April 1, 2020, https://theintercept.com/2020/04/01/coronavirus-medical-supplies-export/.

[12] Vox, "What is private equity, and why is it killing everything you love?" Emily Stewart, January 6, 2020, https://www.vox.com/the-goods/2020/1/6/21024740/private-equity-taylor-swift-toys-r-us-elizabeth-warren.

[13] Wall Street Journal, "Enfamil Maker Reckitt Shops Baby-Formula Unit Amid Shortage," Saabira Chaudhuri and Ben Dummett, May 27, 2022, https://www.wsj.com/articles/enfamil-maker-reckitt-shops-baby-formula-unit-amid-shortage-11653655305.

[14] Axios, "Baby formula makers hit the auction block," Dan Primack, May 31, 2022, https://www.axios.com/2022/05/31/baby-formula-makers-hit-the-auction-block.

[15] Department of Justice, "Assistant Attorney General Jonathan Kanter Delivers Remarks at New York City Bar Association's Milton Handler Lecture," May 18, 2022, https://www.justice.gov/opa/speech/assistant-attorney-general-jonathan-kanter-delivers-remarks-new-york-city-bar-association.

[16] Financial Times, "Crackdown on buyout deals coming, warns top US antitrust enforcer," 2022, https://www.ft.com/content/7f4cc882-1444-4ea3-8a31-c382364aace1.

[17] 15 U.S.C. 18.

acquisitions had caused concrete damage to the lives of ordinary Americans.[19] The ruinous model of private equity does not promote long-term competition; it reduces quality and safety and drives vulnerable target companies out of business.

The Department of Justice has wide authority under the Clayton Act to investigate any proposed transaction for potential anticompetitive effects.[20] We encourage your division to give serious weight to the fragility of this particular market and the urgent need for strong, competing firms if Reckitt Benckiser and CDR move forward with a deal. If CDR's history suggests that its acquisition of Enfamil would endanger the manufacturing arm's ability to compete going forward or threaten the supply of infant formula during this period of crisis, your division should sue to block the deal immediately without considering any remedies.

The ongoing crisis of infant formula shortages call for your division to pay close attention to any possible merger or acquisition in this sector. However, we urge the Department of Justice to closely examine *any* private equity-backed deal with similar caution and fully oppose in court any such transaction involving firms with checkered acquisition histories that are likely to hollow out their targets and weaken competition.

Thank you for your attention to this matter.

Sincerely,

Elizabeth Warren
United States Senator

Katie Porter
Member of Congress

Cory A. Booker
United States Senator

Bernard Sanders
United States Senator

[18] Federal Trade Commission Chair Lina M. Khan, "Vision and Priorities for the FTC," Memorandum, September 22, 2021, https://www.ftc.gov/system/files/documents/public_statements/1596664/agency_priorities_memo_from_chair_lina_m_khan_9-22-21.pdf.
[19] Financial Times, "Lina Khan vows 'muscular' US antitrust approach on private equity deals," Stefania Palma, Mark Vandevelde, and James Fontanella-Khan, June 8, 2022, https://www.ft.com/content/ef9e4ce8-ab9a-45b3-ad91-7877f0e1c797.
[20] 15 U.S.C. 18.

INVESTIGATION OF COMPETITION IN DIGITAL MARKETS

MAJORITY STAFF REPORT AND RECOMMENDATIONS

SUBCOMMITTEE ON ANTITRUST, COMMERCIAL AND ADMINISTRATIVE LAW OF THE COMMITTEE ON THE JUDICIARY

Jerrold Nadler, Chairman, Committee on the Judiciary

David N. Cicilline, Chairman, Subcommittee on Antitrust, Commercial and Administrative Law

UNITED STATES
2020

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These practices have recently come under scrutiny by antitrust authorities. In March 2019, Spotify filed a complaint against Apple before the European Commission, reportedly alleging, among other things, that Apple is restricting Spotify's access to Siri.[2402] In July 2020, the European Commission's antitrust authority announced that it had opened an inquiry into the use of digital assistants and smart home products by Apple, Google, and Amazon, among other companies.[2403] In her statement accompanying the announcement, Margrethe Vestager, the Commission's Executive Vice President, identified interoperability and self-preferencing as areas of concern.[2404]

VI. RECOMMENDATIONS

As part of its top-to-bottom review of competition in digital markets, the Subcommittee examined whether current laws and enforcement levels are adequate to address the market power concerns identified through this investigation. In pursuit of this goal, on March 13, 2020, the Subcommittee requested submissions from antitrust and competition policy experts. These experts were chosen on a careful, bipartisan basis to ensure the representation of a full range of views. Throughout the investigation, the Subcommittee received additional submissions and written statements from antitrust enforcers and other leading experts, including Margrethe Vestager, the Executive Vice President of the European Commission, and Rod Sims, the Chair of the Australian Competition and Consumer Commission. Most recently, the Subcommittee held an oversight hearing on October 1, 2020 regarding "Proposals to Strengthen the Antitrust Laws and Restore Competition Online," its seventh and final hearing as part of the investigation.

[2402] Thomas Ricker, *Apple to be formally investigated over Spotify's antitrust complaint, says report*, THE VERGE (MAY 6, 2019), https://www.theverge.com/2019/5/6/18530894/apple-music-monopoly-spotify-app-store-europe.

[2403] Margrethe Vestager, Exec. Vice Pres., Eur. Comm'n, Statement by Executive Vice-President Margrethe Vestager on the launch of a Sector Inquiry on the Consumer Internet of Things (July 16, 2020), https://ec.europa.eu/commission/presscorner/detail/en/speech_20_1367.

[2404] *Id.*

Subcommittee Chairman David N. Cicilline (D-RI) requested that staff provide Members of the Subcommittee with a series of recommendations, informed by this investigation, on how to strengthen the antitrust laws and restore competition online. As he noted in remarks to the American Antitrust Institute in June 2019:

> No doubt, other branches of government have a key role to play in the development of antitrust law. But Congress—not the courts, agencies, or private companies—enacted the antitrust laws, and Congress ultimately decides what the law should be and whether the law is working for the American people. As such, it is Congress' responsibility to conduct oversight of our antitrust laws and competition system to ensure that they are properly working and to enact changes when they are not. While I do not have any preconceived ideas about what the right answer is, as Chairman of the Antitrust Subcommittee, I intend to carry out that responsibility with the sense of urgency and serious deliberation that it demands.[2405]

In response to this request, Subcommittee staff identified a broad set of reforms for further examination by the Members of the Subcommittee for purposes of crafting legislative and oversight responses to the findings of this Report. These reforms include proposals to: (1) promote fair competition in digital markets; (2) strengthen laws relating to mergers and monopolization; and (3) restore vigorous oversight and enforcement of the antitrust laws.

Subcommittee staff intends for these recommendations to serve as a complement, not a substitute, to strong enforcement of the antitrust laws. This is particularly true for acquisitions by dominant firms that may have substantially lessened competition or tended to create a monopoly in violation of the Clayton Act. In these cases, Subcommittee staff supports as a policy matter the examination of the full range of remedies—including unwinding consummated acquisitions or divesting business lines—to fully restore competition that was harmed as a result of these acquisitions and to prevent future violations of the antitrust laws.[2406]

A. Restoring Competition in the Digital Economy

For more than a century, Congress has addressed the market power of dominant intermediaries using a robust antitrust and antimonopoly toolkit.[2407] The antitrust laws prohibit anticompetitive

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[2405] Hon. David N. Cicilline, Chairman, Subcomm. on Antitrust, Commercial and Admin. Law of the H. Comm. on the Judiciary, Keynote Address at American Antitrust Institute's 20th Annual Policy Conference (June 20, 2019), https://cicilline.house.gov/press-release/cicilline-delivers-keynote-address-american-antitrust-institute%E2%80%99s-20th-annual-policy.

[2406] Due to separation of powers concerns and other relevant considerations, we do not take a position on the outcome of any individual matter before the Justice Department or Federal Trade Commission.

[2407] *See, e.g.*, Subcomm. on Study of Monopoly Power of the H. Comm. on the Judiciary, 81st Cong. 2d Sess., *The Antitrust Laws: A Basis for Economic Freedom* iii (1950) (identifying an extensive list of statutes "dealing directly with the

4. Reduce Market Power Through Merger Presumptions

The firms investigated by the Subcommittee owe part of their dominance to mergers and acquisitions. Several of the platforms built entire lines of business through acquisitions, while others used acquisitions at key moments to neutralize competitive threats. Although the dominant platforms collectively engaged in several hundred mergers and acquisitions between 2000-2019, antitrust enforcers did not block a single one of these transactions. The Subcommittee's investigation revealed that several of these acquisitions enabled the dominant platforms to block emerging rivals and undermine competition.

Despite a significant number of ongoing antitrust investigations, the dominant platforms have continued to pursue significant deal-making. Over the last year, for example, Google purchased Fitbit for $2.1 billion and Looker for $2.6 billion; Amazon purchased Zoox for $1.3 billion; and Facebook acquired Giphy for an undisclosed amount.[2453] Meanwhile, all four of the firms investigated by the Subcommittee have recently focused on acquiring startups in the artificial intelligence and virtual reality space.[2454]

Ongoing acquisitions by the dominant platforms raise several concerns. Insofar as any transaction entrenches their existing position, or eliminates a nascent competitor, it strengthens their market power and can close off market entry. Furthermore, by pursuing additional deals in artificial intelligence and in other emerging markets, the dominant firms of today could position themselves to control the technology of tomorrow.

It is unclear whether the antitrust agencies are presently equipped to block anticompetitive mergers in digital markets. The record of the Federal Trade Commission and the Justice Department in this area shows significant missteps and repeat enforcement failures. While both agencies are currently pursuing reviews of pending transactions, it is not yet clear whether they have developed the analytical tools to challenge anticompetitive deals in digital markets. For example, the Justice Department in February permitted Google's acquisition of Looker, a data analytics and business intelligence startup, despite serious risks that the deal would eliminate an independent rival and could allow Google to cut

[2453] Chaim Gartenberg, *Google buys Fitbit for $2.1 billion*, THE VERGE (Nov. 1, 2019), https://www.theverge.com/2019/11/1/20943318/google-fitbit-acquisition-fitness-tracker-announcement; Lauren Feiner & Jordan Novet, *Google cloud boss Thomas Kurian makes his first big move — buys Looker for $2.6 billion*, CNBC (June 6, 2019), https://www.cnbc.com/2019/06/06/google-buys-cloud-company-looker-for-2point6-billion.html; Karen Weise & Erin Griffith, *Amazon to Buy Zoox, in a Move Toward Self-Driving Cars*, N.Y. TIMES (June 26, 2020), https://www.nytimes.com/2020/06/26/business/amazon-zoox.html; Kurt Wagner & Sarah Frier, *Facebook Buys Animated Image Library Giphy for $400 Million*, BLOOMBERG (May 15, 2020), https://www.bloomberg.com/news/articles/2020-05-15/facebook-buys-animated-image-library-giphy-to-boost-messaging.

[2454] *See infra* Appendix.

off access to rivals.[2455] These concerns are especially acute today, given the combined national health and economic crises, which have widened the gap between the dominant platforms and businesses across the rest of the economy.

To address this concern, Subcommittee staff recommends that Congress consider shifting presumptions for future acquisitions by the dominant platforms. Under this change, any acquisition by a dominant platform would be presumed anticompetitive unless the merging parties could show that the transaction was necessary for serving the public interest and that similar benefits could not be achieved through internal growth and expansion. This process would occur outside the current Hart-Scott-Rodino Act (HSR) process, such that the dominant platforms would be required to report *all* transactions and no HSR deadlines would be triggered. Establishing this presumption would better reflect Congress's preference for growth through ingenuity and investment rather than through acquisition.

5. Create an Even Playing Field for the Free and Diverse Press

The free and diverse press—particularly local press—is the backbone of a healthy and vibrant democracy. But as discussed in this Report, the rise of market power online has corresponded with a significant decline in the availability of trustworthy sources of news.[2456] Through dominating both digital advertising and key communication platforms, Google and Facebook have outsized power over the distribution and monetization of trustworthy sources of news online,[2457] creating an uneven playing field in which news publishers are beholden to their decisions.[2458]

To address this imbalance of bargaining power, we recommend that the Subcommittee consider legislation to provide news publishers and broadcasters with a narrowly tailored and temporary safe harbor to collectively negotiate with dominant online platforms.

In April 2019, Subcommittee Chairman Cicilline and Doug Collins (R-GA), the former-Ranking Member of the Committee on the Judiciary, introduced H.R. 2054, the "Journalism

[2455] Letter from Diana L. Moss, Pres., Am. Antitrust Inst., to Hon. Makan Delrahim, Assistant Att'y Gen., U.S. Dep't of Justice, Antitrust Div. (July 8, 2019), https://www.antitrustinstitute.org/wp-content/uploads/2019/07/AAI-Ltr-to-DOJ_Google-Looker_7.8.19.pdf.

[2456] Free and Diverse Press Hearing at 3 (statement of David Chavern, Pres. & CEO, News Media Alliance) ("In effect, a couple of dominant tech platforms are acting as regulators of the digital news industry.").

[2457] Submission of Source 52, to H. Comm. on the Judiciary, 12 (Oct. 30, 2019) (on file with Comm.).

[2458] Submission from Source 53, to H. Comm. on the Judiciary, 7 (Oct. 14, 2019) (on file with Comm.). Although Apple News and Apple News Plus are increasingly popular news aggregators, most market participants that the Subcommittee received evidence from during the investigation do not view it as a critical intermediary for online news at this time. Some publishers raised competition concerns about the tying of payment inside Apple's news product.

Competition and Preservation Act of 2019."[2459] H.R. 2054 would allow coordination by news publishers under the antitrust laws if it: (1) directly relates to the quality, accuracy, attribution or branding, or interoperability of news; (2) benefits the entire industry, rather than just a few publishers, and is non-discriminatory to other news publishers; and (3) directly relates to and is reasonably necessary for these negotiations, instead of being used for other purposes. As Subcommittee Chairman Cicilline noted at the time of the bill's introduction:

> The free press is a cornerstone of our democracy. Journalists keep the public informed, root out corruption, and hold the powerful accountable. This bill will provide a much-needed lifeline to local publishers who have been crushed by Google and Facebook. It's about time we take a stand on this issue.[2460]

Mr. Collins added that the proposed legislation would allow "community newspapers to more fairly negotiate with large tech platforms that are operating in an increasingly anti-competitive space," which would "help protect journalism, promote competition and allow communities to stay informed."[2461]

We recommend the consideration of this legislation as part of a broader set of reforms to address the rise of market power online. This proposed legislation follows a long congressional tradition of allocating coordination rights to individuals or entities that lack bargaining power in a marketplace.[2462] Although antitrust exemptions have been disfavored, at various times lawmakers have created exemptions in order to rectify imbalances of power or to promote non-competition values.[2463] In this instance, the risk associated with antitrust exemptions to preserve the free and diverse press—a bedrock constitutional value—is low, while the benefits of preserving access to high-quality journalism are difficult to overstate. As discussed earlier in the Report, the bill would follow steps that other jurisdictions are similarly taking to rebalance the power between news publishers and the dominant platforms.

6. Prohibit Abuse of Superior Bargaining Power and Require Due Process

By virtue of functioning as the only viable path to market, dominant platforms enjoy superior bargaining power over the third parties that depend on their platforms to access users and markets.

[2459] Press Release, Rep. David N. Cicilline, Collins Introduce Bill to Provide Lifeline to Local News (Apr. 3, 2019), https://cicilline.house.gov/press-release/cicilline-collins-introduce-bill-provide-lifeline-local-news.

[2460] *Id.*

[2461] *Id.*

[2462] *See generally* Submission from Sanjukta Paul, Ass't Prof. of Law, Wayne State Univ., to H. Comm. on the Judiciary, 2–4 (Apr. 21, 2020) (on file with Comm.) [hereinafter Paul Submission].

[2463] *See, e.g.*, Clayton Act, 15 U.S.C. § 17 (1914); Capper-Volstead Act, ch. 57, 42 Stat. 388–89 (1922) (codified as amended at 7 U.S.C. §§ 291, 292 (2012)).

Their bargaining leverage is a form of market power,[2464] which the dominant platforms routinely use to protect and expand their dominance.

Through its investigation, the Subcommittee identified numerous instances in which the dominant platforms abused this power. In several cases, dominant platforms used their leverage to extract greater money or data than users would be willing to provide in a competitive market. While a firm in a competitive market would lose business if it charged excessive prices for its goods or services because the customer would switch to a competitor, dominant platforms have been able to charge excessive prices or ratchet up their prices without a significant loss of business. Similarly, certain dominant platforms have been able to extort an ever-increasing amount of data from their customers and users, ranging from a user's personal data to a business's trade secrets and proprietary content. In the absence of an alternative platform, users effectively have no choice but to accede to the platform's demands for payment whether in the form of dollars or data.

The Subcommittee's investigation found that dominant platforms have also leveraged their market power in negotiations with businesses and individuals to dictate the terms of the relationship. The dominant platforms frequently impose oppressive contractual provisions or offer "take-it-or-leave-it" terms in contract negotiations—even when dealing with relatively large companies represented by sophisticated counsel.[2465] Lacking bargaining power, dependent third parties often find themselves at the whims of the platform's arbitrary decisions. Subcommittee staff encountered numerous instances in which a third party had been abruptly delisted or demoted from a platform, without notice or explanation, and often without a clear avenue for recourse.

The dominant platforms' ability to abuse their superior bargaining power in these ways can cause long-term and far-reaching harm. To address these issues, the Subcommittee recommends that Congress consider prohibiting the abuse of superior bargaining power, including through potentially targeting anticompetitive contracts, and introducing due process protections for individuals and businesses dependent on the dominant platforms.[2466]

[2464] Aviv Nevo, Deputy Assistant Att'y Gen. for Econ., U.S. Dep't of Justice, Antitrust Div., Mergers that Increase Bargaining Leverage, Remarks at the Stanford Institute for Economic Policy Research, 7 (Jan. 22, 2014), https://www.justice.gov/atr/file/517781/download ("[A]s a matter of economic theory and case law bargaining leverage is a source of market power.").

[2465] *See, e.g.*, Dig. Competition Expert Panel Report at 45 (noting how a report commissioned by the UK's Department for Digital, Culture, Media & Sport found that as "a consequence of their high market share, ownership of key technologies and strong user data assets, Google and Facebook are, to some extent, able to set their own terms to advertisers and publishers").

[2466] Foer Submission at 2–3; Submission from Marshall Steinbaum, Assistant Prof. of Econ., Univ. of Utah, to H. Comm. on the Judiciary, 8 (Apr. 2020) (on file with Comm.) [hereinafter Steinbaum Submission]. *See generally* Austl. Competition & Consumer Comm'n Report at 205–79; Competition & Mkts. Auth. Report at 328–49.

B. Strengthening the Antitrust Laws

1. Restore the Antimonopoly Goals of the Antitrust Laws

The antitrust laws that Congress enacted in 1890 and 1914—the Sherman Act, the Clayton Act, and the Federal Trade Commission Act—reflected a recognition that unchecked monopoly power poses a threat to our economy as well as to our democracy.[2467] Congress reasserted this vision through subsequent antitrust laws, including the Robinson-Patman Act of 1936, the Celler-Kefauver Act of 1950, and the Hart-Scott-Rodino Act of 1976.[2468]

In the decades since Congress enacted these foundational statutes, the courts have significantly weakened these laws and made it increasingly difficult for federal antitrust enforcers and private plaintiffs to successfully challenge anticompetitive conduct and mergers.[2469] By adopting a narrow construction of "consumer welfare" as the sole goal of the antitrust laws, the Supreme Court has limited the analysis of competitive harm to focus primarily on price and output rather than the competitive process[2470]—contravening legislative history and legislative intent.[2471] Simultaneously, courts have adopted the view that underenforcement of the antitrust laws is preferable to overenforcement, a position at odds with the clear legislative intent of the antitrust laws, as well as the view of Congress that private monopolies are a "menace to republican institutions."[2472] In recent decades, the Justice Department and the Federal Trade Commission have contributed to this problem by taking a narrow view of their legal authorities and issuing guidelines that are highly permissive of market power and its abuse. The overall result is an approach to antitrust that has significantly diverged from the laws that Congress enacted.

[2467] *See generally* First & Fox Submission at 10–11; Steinbaum Submission; Submission from Robert H. Lande, Venable Prof. of Law, Univ. of Balt. Sch. of Law, to H. Comm. on the Judiciary (Apr. 16, 2020) (on file with Comm.) [hereinafter Lande Submission]; Paul Submission at 2–4; Submission from Maurice Stucke, Douglas A. Blaze Distinguished Prof. of Law, Univ. of Tennessee, to H. Comm. on the Judiciary, 2 (Mar. 13, 2020) (on file with Comm.) [hereinafter Stucke Submission].

[2468] Thomas J. Horton, *Rediscovering Antitrust's Lost Values*, 16 U.N.H. L. REV. 179 (2018).

[2469] *See generally* Submission from Tim Wu, Julius Silver Prof.of Law, Columbia Law Sch., to H. Comm. on the Judiciary (Apr. 25, 2020) (on file with Comm.) [hereinafter Wu Submission]; Submission from Spencer Weber Waller, John Paul Stevens Chair in Competition Law, Loyola Univ. Chicago Sch. of Law, to H. Comm. on the Judiciary (Apr. 28, 2020) (on file with Comm.) [hereinafter Waller Submission].

[2470] Jonathan Sallet, *Protecting the "Competitive Process"—The Evolution of Antitrust Enforcement in the United States*, WASH. CTR. FOR EQUITABLE GROWTH (Oct. 31, 2018), https://equitablegrowth.org/competitive-edge-protecting-the-competitive-process-the-evolution-of-antitrust-enforcement-in-the-united-states/.

[2471] Submission from John Newman, Assoc. Prof. of Law, Univ. of Miami Sch. of Law, to the Subcomm. on Antitrust, Commercial and Admin. Law of the H. Comm. on the Judiciary, 2 (Apr. 1, 2020) (on file with Comm.) [hereinafter Newman Submission]; Stucke Submission at 2.

[2472] 21 CONG. REC. 3146 (1890) (statement of Sen. Hoar).

In part due to this narrowing, some of the anticompetitive business practices that the Subcommittee's investigation uncovered could be difficult to challenge under current law.[2473] In response to this concern, this section identifies specific legislative reforms that would help renew and rehabilitate the antitrust laws in the context of digital markets. In addition to these specific reforms, the Subcommittee recommends that Congress consider reasserting the original intent and broad goals of the antitrust laws by clarifying that they are designed to protect not just consumers, but also workers, entrepreneurs, independent businesses, open markets, a fair economy, and democratic ideals.[2474]

2. Invigorate Merger Enforcement

Section 7 of the Clayton Act of 1914 prohibits any transaction where "the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly."[2475] In 1950, Congress passed the Celler-Kevauver Anti-Merger Act to broaden the types of transactions covered by the Clayton Act, specifically to include vertical mergers, conglomerate mergers, and purchases of assets.[2476]

As noted above, since 1998, Amazon, Apple, Facebook, and Google collectively have purchased more than 500 companies.[2477] The antitrust agencies did not block a single acquisition. In one instance—Google's purchase of ITA—the Justice Department required Google to agree to certain terms in a consent decree before proceeding with the transaction.[2478]

The Subcommittee's review of the relevant documents revealed that several of these acquisitions lessened competition and increased market power. In several cases, antitrust enforcers permitted dominant platforms to acquire a competitive threat. For example, documents produced during the investigation demonstrate that Facebook acquired Instagram to neutralize an emerging rival, while Google purchased Waze to eliminate an independent provider of mapping data. In other instances, the platform engaged in a series of acquisitions that enabled it to gain a controlling position across an entire supply chain or ecosystem. Google's acquisitions of DoubleClick, AdMeld, and AdMob, for example, let Google achieve a commanding position across the digital ad tech market.

[2473] *See* Wu Submission at 2 ("If read broadly, the prohibitions on 'monopolization,' 'unfair means of competition,' and 'restraints on trade' could be used to handle the challenges of our time. But 'broadly' is manifestly not how the laws are read by the judiciary at this point. For the courts have grafted onto these laws burdens of proof, special requirements and defenses that are found nowhere in the statutes, and that have rendered the laws applicable only to the narrowest of scenarios, usually those involving blatant price effects. And it is this that makes the laws inadequate for the challenges presented by digital markets.").

[2474] *See generally* First & Fox Submission at 10–11; Stucke Submission at 2; Wu Submission; Waller Submission.

[2475] Clayton Act, 15 U.S.C. § 18 (1914).

[2476] Celler-Kefauver Anti-Merger Act, 64 Stat. 1125 (1950).

[2477] *See infra* Appendix.

[2478] Stipulation and Order, United States v. Google Inc. & ITA Software Inc., No. 1:11-cv-00688 (D.D.C. 2011).

In light of this, Subcommittee staff recommends that Congress considers a series of reforms to strengthen merger enforcement.

a. Codify Bright-Line Rules and Structural Presumptions in Concentrated Markets

A major change in antitrust enforcement over the last few decades has been the shift away from bright-line rules in favor of "rule of reason" case-by-case analysis. Although the rule of reason approach is said to reduce errors in enforcement through fact-specific analysis, in practice the standard tilts heavily in favor of defendants.[2479] The departure from bright-line rules and presumptions has especially affected merger enforcement, where enforcers seeking to challenge a merger must fully prove that it will have anticompetitive effects, even in cases where the merging parties are dominant firms in highly concentrated markets. Scholarship by Professor John Kwoka of Northeastern University shows that the antitrust agencies acted in only 38% of all mergers that led to price increases, suggesting that the current approach to merger review is resulting in significant underenforcement.[2480]

To respond to this concern, the Subcommittee recommends that Members consider codifying bright-line rules for merger enforcement, including structural presumptions.[2481] Under a structural presumption, mergers resulting in a single firm controlling an outsized market share, or resulting in a significant increase in concentration, would be presumptively prohibited under Section 7 of the Clayton Act.[2482] This structural presumption would place the burden of proof upon the merging parties to show that the merger would not reduce competition. A showing that the merger would result in efficiencies should not be sufficient to overcome the presumption that it is anticompetitive. It is the view of Subcommittee staff that the 30% threshold established by the Supreme Court in *Philadelphia National Bank* is appropriate, although a lower standard for monopsony or buyer power claims may deserve consideration by the Subcommittee.

By shifting the burden of proof to the merging parties in cases involving concentrated markets and high market shares, codifying the structural presumption would help promote the efficient allocation of agency resources and increase the likelihood that anticompetitive mergers are blocked.

[2479] Michael A. Carrier, *The Rule of Reason: An Empirical Update for the 21st Century*, 16 GEO. MASON L. REV. 827 (2009).

[2480] JOHN KWOKA, MERGERS, MERGER CONTROL, AND REMEDIES 155 (2014).

[2481] For support of codifying the structural presumption, *see* Submission from John Kwoka, Finnegan Prof. of Econ., Northeastern Univ., to H. Comm. on the Judiciary, 3 (Apr. 17, 2020) (on file with Comm.) [hereinafter Kwoka Submission]; Submission from Michael Kades, Dir., Mkts. & Competition Pol'y, Wash. Ctr. for Equitable Growth et al., to H. Comm. on the Judiciary, 9 (Apr. 30, 2020) (on file with Comm.) [hereinafter Kades Submission]; Lande Submission at 5; Slaiman Submission at 3; Foer Submission at 9. *See also* Herbert Hovenkamp & Carl Shapiro, *Horizontal Mergers, Market Structure, and Burdens of Proof*, 127 YALE L.J. 1996 (2018); Steven C. Salop, *The Evolution and Vitality of Merger Presumptions: A Decision-Theoretic Approach*, 80 ANTITRUST L.J. 269 (2015).

[2482] Although some courts still follow the structural presumption adopted by the Supreme Court in *Philadelphia National Bank*, it is not universally followed, especially given the D.C. Circuit's decision in *United States v. Baker Hughes Inc.*, 908 F.2d 981 (D.C. Cir. 1990).

b. Protect Potential Rivals, Nascent Competitors, and Startups

The Subcommittee's investigation produced evidence that several of the dominant platforms acquired potential rivals and nascent competitors. Potential rivals are firms that are planning to enter or could plausibly enter the acquirer's market. Nascent competitors are firms whose "prospective innovation represents a serious future threat to an incumbent."[2483] In digital markets, potential rivals and nascent competitors play a critical role in driving innovation, as their prospective entry may dislodge incumbents or spur competition. For this reason, incumbents may view potential rivals and nascent competitors as a significant threat, especially as their success could render the incumbent's technologies obsolete.

To strengthen the law relating to potential rivals and nascent competitors, Subcommittee staff recommends strengthening the Clayton Act to prohibit acquisitions of potential rivals and nascent competitors. This could be achieved by clarifying that proving harm on potential competition or nascent competition grounds does not require proving that the potential or nascent competitor would have been a successful entrant in a but-for world.[2484] Given the patchwork of cases that are unfavorable to potential and nascent competition-based theories of harm, this amendment should also make clear that Congress intends to override this case law.[2485]

Since startups can be an important source of potential and nascent competition, the antitrust laws should also look unfavorably upon incumbents purchasing innovative startups. One way that Congress could do so is by codifying a presumption against acquisitions of startups by dominant firms, particularly those that serve as direct competitors, as well as those operating in adjacent or related markets.[2486]

Lastly, Subcommittee staff's review of relevant documents produced by the Federal Trade Commission and Justice Department demonstrated that the antitrust agencies consistently underestimated—by a significant margin—the degree to which an acquisition would undermine competition and impede entry. In light of this tendency, Subcommittee staff recommends that Congress consider strengthening the incipiency standard by amending the Clayton Act to prohibit acquisitions that "may lessen competition or tend to increase market power."[2487] Revising the law

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[2483] Wu Submission at 4–5; *see also* C. Scott Hemphill & Tim Wu, *Nascent Competitors*, 168 U. PA. L. REV. (forthcoming 2020); Kades Submission at 14.

[2484] Wu Submission at 6; Kwoka Submission at 6.

[2485] *See, e.g.*, United States v. Marine Bancorporation, Inc., 418 U.S. 602 (1974).

[2486] Submission from Mark Lemley, William H. Neukom Prof. of Law, Stanford Law Sch., to H. Comm. on the Judiciary, 7–8 (Apr. 8, 2020) (on file with Comm.) [hereinafter Lemley Submission].

[2487] Submission from Consumer Reports, to H. Comm. on the Judiciary, 5 (Apr. 17, 2020) (on file with Comm.) [hereinafter Consumer Reports Submission]; Submission from Richard M. Steuer, Adjunct Prof., Fordham Univ. Sch. of Law, to H. Comm. on the Judiciary (Apr. 8, 2020) (on file with Comm.) [hereinafter Steuer Submission]; Peter C. Carstensen &

would "arrest the creation of trusts, conspiracies, and monopolies in their incipiency and before consummation."[2488]

c. Strengthen Vertical Merger Doctrine

The Subcommittee's investigation identified several ways in which vertical integration of dominant platforms enabled anticompetitive conduct. For this reason, the Subcommittee recommends that Congress examine proposals to strengthen the law relating to vertical mergers. The current case law disfavors challenges to vertical mergers. Specifically, courts tend to defer to claims from the merging parties that the transaction will yield efficiencies through the "elimination of double marginalization" and are skeptical about claims that the merger will result in foreclosure.

To address this concern, the Subcommittee recommends that Congress explore presumptions involving vertical mergers, such as a presumption that vertical mergers are anticompetitive when either of the merging parties is a dominant firm operating in a concentrated market, or presumptions relating to input foreclosure and customer foreclosure.[2489]

3. Rehabilitate Monopolization Law

Section 2 of the Sherman Act makes it illegal to "monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States."[2490] Over recent decades, courts have significantly heightened the legal standards that plaintiffs must overcome in order to prove monopolization. Several of the business practices the Subcommittee's investigation uncovered should be illegal under Section 2. This section briefly identifies the relevant business practices and the case law that impedes effective enforcement of Section 2 of the Sherman Act.

a. Abuse of Dominance

Robert H. Lande, *The Merger Incipiency Doctrine and the Importance of 'Redundant' Competitors*, 2018 WIS. L. REV. 783 (2018).

[2488] S. REP. NO. 698 (1914) in EARL W. KINTNER, THE LEGISLATIVE HISTORY OF THE FEDERAL ANTITRUST LAWS AND RELATED STATUTES 1744–52 (1978) (noting that the Senate Judiciary Committee report stated that the purpose of the bill was to supplement the Sherman Act "by making these practices illegal, to arrest the creation of trusts, conspiracies, and monopolies in their incipiency and before consummation").

[2489] Kades Submission at 5; Jonathan Baker et al., *Five Principles for Vertical Merger Enforcement Policy*, 33 ANTITRUST 3 (2019).

[2490] Sherman Act, 15 U.S.C. § 2 (1890).

The Subcommittee's investigation found that the dominant platforms have the incentive and ability to abuse their dominant position against third-party suppliers, workers, and consumers. Some of these business practices are a detriment to fair competition, but they do not easily fit the existing categories identified by the Sherman Act, namely "monopolization" or "restraint of trade." Since courts have shifted their interpretation of the antitrust law to focus primarily on the formation or entrenchment of market power, and not on its exploitation or exercise, many of the business practices that Subcommittee staff identified as undermining competition in digital markets could be difficult to reach under the prevailing judicial approach.

To address this concern, Subcommittee staff recommends that Congress consider extending the Sherman Act to prohibit abuses of dominance.[2491] Furthermore, the Subcommittee should examine the creation of a statutory presumption that a market share of 30% or more constitutes a rebuttable presumption of dominance by a seller, and a market share of 25% or more constitute a rebuttable presumption of dominance by a buyer.[2492]

b. Monopoly Leveraging

The Subcommittee's investigation found that the dominant platforms have engaged in "monopoly leveraging," where a dominant firm uses its monopoly power in one market to boost or privilege its position in another market. For example, Google's use of its horizontal search monopoly to advantage its vertical search offerings is a form of monopoly leveraging. Although monopoly leveraging was previously a widely cognizable theory of harm under antitrust law, courts now require that use of monopoly power in the first market "actually monopolize" the secondary market or "dangerously threaten[] to do so."[2493] The Subcommittee's investigation identified several instances in which use of monopoly power in one market to privilege the monopolist's position in the second market injured competition, even if the conduct did not result in monopolization of the second market. For this reason, Subcommittee staff recommends overriding the legal requirement that monopoly leveraging "actually monopolize" the second market, as set out in *Spectrum Sports, Inc. v. McQuillan.*[2494]

c. Predatory Pricing

[2491] First & Fox Submission at 2; Foer Submission at 2–4; Newman Submission at 7–8; Stucke Submission at 14; Waller Submission at 13.

[2492] Waller Submission at 12.

[2493] 506 U.S. 447 (1993).

[2494] *Id. See also* Alaska Airlines, Inc. v. United Airlines, Inc., 948 F.2d 536 (9th Cir. 1991).

The Subcommittee's investigation identified several instances in which a dominant platform was pricing goods or services below-cost in order to drive out rivals and capture the market. For example, documents produced during the investigation revealed that Amazon had been willing to lose $200 million in a single quarter in order to pressure Diapers.com, a firm it had recognized as its most significant rival in the category. Amazon cut prices and introduced steep promotions, prompting a pricing war that eventually weakened Diapers.com. Amazon then purchased the company, eliminating its competitor and subsequently cutting back the discounts and promotions it had introduced.

Predatory pricing is a particular risk in digital markets, where winner-take-all dynamics incentivize the pursuit of growth over profits, and where the dominant digital platforms can cross-subsidize between lines of business. Courts, however, have introduced a "recoupment" requirement, necessitating that plaintiffs prove that the losses incurred through below-cost pricing subsequently were or could be recouped. Although dominant digital markets can recoup these losses through various means over the long term, recoupment is difficult for plaintiffs to prove in the short term. Since the recoupment requirement was introduced, successful predatory pricing cases have plummeted.[2495]

The Subcommittee recommends clarifying that proof of recoupment is not necessary to prove predatory pricing or predatory buying, overriding the Supreme Court's decisions in *Matsushita v. Zenith Ratio Corp.*,[2496] *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*,[2497] and *Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co.*[2498]

d. Essential Facilities and Refusals to Deal

The Subcommittee's investigation uncovered several instances in which a dominant platform used the threat of delisting or refusing service to a third party as leverage to extract greater value or more data or to secure an advantage in a distinct market. Because the dominant platforms do not face meaningful competition in their primary markets, their threat to refuse business with a third party is the equivalent of depriving a market participant of an essential input. This denial of access in one market can undermine competition across adjacent markets, undermining the ability of market participants to compete on the merits.

To address this concern, the Subcommittee recommends that Congress consider revitalizing the "essential facilities" doctrine, the legal requirement that dominant firms provide access to their

[2495] Hubbard Submission at 20; Stucke Submission at 7; Teachout Submission at 12; Christopher R. Leslie, *Predatory Pricing and Recoupment*, 113 COLUM. L. REV. 1695 (2013).

[2496] 475 U.S. 574 (1986).

[2497] 509 U.S. 209 (1993).

[2498] 549 U.S. 312 (2007).

infrastructural services or facilities on a nondiscriminatory basis.[2499] To clarify the law, Congress should consider overriding judicial decisions that have treated unfavorably essential facilities- and refusal to deal-based theories of harm.[2500]

e. Tying

The Subcommittee's investigation identified several instances in which a dominant platform conditioned access to a good or service that the dominant platform controlled on the purchase or use of a separate product or service. This business practice undermines competition on the merits by enabling a firm with market power in one market to privilege products or services in a distinct market.

Although antitrust law has long treated tying by a monopolist as anticompetitive, in recent decades, courts have moved away from this position. Subcommittee staff recommends that Congress consider clarifying that conditioning access to a product or service in which a firm has market power to the purchase or use of a separate product or service is anticompetitive under Section 2, as held by the Supreme Court in *Jefferson Parish Hosp. Dist. v. Hyde*.[2501]

f. Self-Preferencing and Anticompetitive Product Design

The Subcommittee's investigation uncovered several instances in which a dominant platform used the design of its platform or service to privilege its own services or to disfavor competitors. This practice undermines competition by enabling a firm that controls an essential input to distort competition in separate markets. The Subcommittee recommends that Congress consider whether making a design change that excludes competitors or otherwise undermines competition should be a violation of Section 2, regardless of whether the design change can be justified as an improvement for consumers.[2502]

4. Additional Measures to Strengthen the Antitrust Laws

In response to the Subcommittee's requests for submissions, experts identified other proposals that Subcommittee staff believes warrant review by Congress. These include:

[2499] Submission from the Am. Antitrust Inst., to H. Comm. on the Judiciary, 4 (Apr. 17, 2020) (on file with Comm.) [hereinafter AAI Submission]; Waller Submission at 13.

[2500] Verizon Commc'ns Inc. v. Law Offices of Curtis v. Trinko, LLP, 540 U.S. 398 (2004); Pacific Bell Telephone Co. v. LinkLine Commc'ns, Inc., 555 U.S. 438 (2009).

[2501] 466 U.S. 2 (1984).

[2502] This would require overriding *Allied Orthopedic Appliances, Inc. v. Tyco Health Care Grp. LP*, 592 F.3d 991 (9th Cir. 2010).

- Overriding *Ohio v. American Express* by clarifying that cases involving platforms do not require plaintiffs to establish harm to both sets of customers;[2503]

- Overriding *United States v. Sabre Corp*., clarifying that platforms that are "two-sided," or serve multiple sets of customers, can compete with firms that are "one-sided";[2504]

- Clarifying that market definition is not required for proving an antitrust violation, especially in the presence of direct evidence of market power;[2505] and

- Clarifying that "false positives"—or erroneous enforcement—are not more costly than "false negatives"—or erroneous non-enforcement—and that, in relation to conduct or mergers involving dominant firms, "false negatives" are costlier.[2506]

C. Strengthening Antitrust Enforcement

1. Congressional Oversight

As discussed earlier in the Report, Congress has a strong tradition of performing vigorous oversight of the enforcement and adequacy of the antitrust laws. Over the last century, Congress at key moments responded forcefully to the courts' narrowing of antitrust laws, the rising tide of economic concentration, or other challenges to the sound and effective administration of the antitrust laws.[2507]

This tradition includes the creation of the Federal Trade Commission and concurrent enactment of the Clayton Antitrust Act in 1914, as both a response to the Supreme Court's narrow construction of the Sherman Act in 1911 and an effort to limit the discretion of the courts.[2508] It also includes Congress's broadening of merger enforcement to cover non-horizontal acquisitions and other transactions in the Celler-Kefauver Anti-Merger Act of 1950 as well as establishing a mechanism for judicial oversight of consent decrees in response to political interference in merger enforcement with

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[2503] AAI Submission at 4; Submission from Herbert Hovenkamp, James G. Dinan Univ. Prof., Univ. of Pa. Law Sch., to H. Comm. on the Judiciary, 3 (Apr. 17, 2020) (on file with Comm.) [hereinafter Hovenkamp Submission]; Hubbard Submission at 20; Kades Submission at 8.

[2504] United States *v*. Sabre Corp., 452 F. Supp. 3d 97 (D. Del. 2020). *See also* Kades Submission at 10.

[2505] Hovenkamp Submission at 3–4; Newman Submission at 5–6.

[2506] Subcommittee staff believes that Congress could clarify that the views set out by then-Professor Frank Easterbrook in *The Limits of Antitrust*, 63 TEX. L. REV. 1 (1984) do not reflect the views of the Congress in enacting the antitrust laws. *See also* Submission from Bill Baer, Visiting Fellow, Brookings Inst., to H. Comm. on the Judiciary, 3 (May 19, 2020) (on file with Comm.) [hereinafter Baer Submission] ("That is my fundamental concern with the state of antitrust enforcement today. It is too cautious, too worried about adverse effects of "over enforcement" (so called Type I errors).").

[2507] *See generally,* Marc Winerman, *The Origins of the FTC: Concentration, Cooperation, Control, and Competition*, 71 ANTITRUST L.J. 1 (2003).

[2508] Clayton Act, 15 U.S.C. § 12; Fed. Trade Comm'n Act, 15 U.S.C. § 41.

the Tunney Act of 1974.[2509] Additionally, Congress has regularly investigated the rise and abuse of market power in important markets.[2510] In support of these efforts, Congress dedicated substantial congressional and agency resources to perform the task of identifying and responding to anticompetitive conduct.[2511]

In recent decades, Congress has departed from this tradition, deferring largely to the courts and to the antitrust agencies in the crafting of substantive antitrust policy.[2512] Its inaction has been read as acquiescence to the narrowing of the antitrust laws and has contributed to antitrust becoming "overly technical and primarily dependent on economics."[2513]

In other cases, congressional attention has fallen short as lawmakers tried to address competition problems without sustained efforts to implement enforcement changes, leading some reform efforts in recent decades to misfire.[2514] Responding to these concerns, Congress has increased appropriations and provided modest improvements to the Federal Trade Commission's budget and remedial authority during this period. But these efforts were insufficient without sustained support in the face of "ferocious opposition" from large defendants and businesses lobbying Congress.[2515]

To remedy these broader trends, Subcommittee staff recommends that Congress revive its long tradition of robust and vigorous oversight of the antitrust laws and enforcement, along with its

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[2509] 5 U.S.C. § 16. *See also Consent Decree Program of the Dep't of Justice: Hearings Before the Subcomm. on Antitrust of the H. Comm. on the Judiciary, 85th Cong.* (1957); REPORT OF THE SUBCOMM. ON ANTITRUST OF THE H. COMM. ON THE JUDICIARY, CONSENT DECREE PROGRAM OF THE DEP'T OF JUSTICE, 86TH CONG., 1ST SESS. (1959).

[2510] In the 1990s, the Committee on the Judiciary conducted significant oversight of competition in the telecommunications market in the wake of the breakup of Ma Bell and through oversight of the 1982 consent decree. These efforts culminated in the passage of H.R. 3626, the "Antitrust and Communications Reform Act," by the House of Representatives in 1994 by a vote of 423 to 5. Chairman Jack B. Brooks introduced this bill—a precursor to the Telecommunications Act of 1996—to address monopolization in the telecommunications market. *See generally* H. REP. NO. 103-559 (1994); Robert M. Frieden, *The Telecommunications Act of 1996: Predicting the Winners and Losers*, 20 HASTINGS COMM. & ENT. L.J. 11, 57 n.8 (1997).

[2511] Submission from Alison Jones & William E. Kovacic, to H. Comm. on the Judiciary, 4 (Apr. 17, 2020) (on file with Comm.) [hereinafter Jones & Kovacic Submission].

[2512] Harry First & Spencer Weber Waller, *Antitrust's Democracy Deficit*, 81 FORDHAM L. REV. 2543, 2556 (2013) ("[D]espite a history of bipartisan congressional support for the importance of the antitrust laws and their enforcement, of late Congress has done little. And when it has done something, it has focused on the micro rather than the macro changes that have occurred in the field.").

[2513] *Id.* at 2559.

[2514] Jones & Kovacic Submission at 4 ("The miscalculation of Congress (and the agencies) about the magnitude of implementation tasks in this earlier period came at a high price. Implementation weaknesses undermined many investigations and cases that the federal agencies launched in response to congressional guidance. The litigation failures raised questions about the competence of the federal agencies, particularly their ability to manage large cases dealing with misconduct by dominant firms and oligopolists. The wariness of the federal agencies since the late 1970s to bring cases in this area—a wariness that many observers today criticize as unwarranted—is in major part the residue of bitter litigation experiences from this earlier period.").

[2515] *Id.* at 6.

commitment to ongoing market investigations and legislative activity. Additionally, greater attention to implementation challenges will enable Congress to better see its reform efforts through.

2. Agency Enforcement

Over the course of the investigation, the Subcommittee uncovered evidence that the antitrust agencies consistently failed to block monopolists from establishing or maintaining their dominance through anticompetitive conduct or acquisitions. This institutional failure follows a multi-decade trend whereby the antitrust agencies have constrained their own authorities and advanced narrow readings of the law. In the case of the Federal Trade Commission, the agency has been reluctant to use the expansive set of tools with which Congress provided it, neglecting to fulfill its broad legislative mandate. Restoring the agencies to full strength will require overcoming these trends.

As a general matter, Congress created the FTC to police and prohibit "unfair methods of competition,"[2516] and to serve as an "administrative tribunal" that carefully studied ongoing business practices and economic conditions.[2517] To enable the agency to carry out these functions, Congress assigned the Commission powers to "make rules and regulations for the purpose of carrying out the [FTC Act's] provisions," as well as broad investigative authority to compel business information and conduct market studies.[2518] Notably, Congress established the provision prohibiting "unfair methods of competition" to reach beyond the other antitrust statutes, "to fill in the gaps in the other antitrust laws, to round them out and make their coverage complete."[2519] Lawmakers delegated to the FTC the task of defining what constituted an "unfair method of competition," recognizing that an expert agency equipped to continuously monitor business practices would be best positioned to ensure the legal definition kept pace with business realities.

[2516] *See* S. REP. NO. 63-597, 13 (1914) ("The committee gave careful consideration to the question as to whether it would attempt to define the many and variable unfair practices which prevail in commerce and to forbid [them] . . . or whether it would, by a general declaration condemning unfair practices, leave it to the commission to determine what practices were unfair. It concluded that the latter course would be better, for the reason . . . that there were too many unfair practices to define, and after writing 20 of them into the law it would be quite possible to invent others.").

[2517] Neil W. Averitt, *The Meaning of "Unfair Methods of Competition" in Section 5 of the Federal Trade Commission Act*, 21 B.C. L. REV. 227 (1980); *see also* Marc Winerman, *The Origins of the FTC: Concentration, Cooperation, Control, and Competition*, 71 ANTITRUST L.J. 1 (2003).

[2518] 15 U.S.C. § 46.

[2519] Neil W. Averitt, *The Meaning of "Unfair Methods of Competition" in Section 5 of the Federal Trade Commission Act*, 21 B.C. L. REV. 227, 251 (1980) ("Section 5 is not confined to conduct that actually violates, or that threatens to violate, one of the other antitrust statutes. If it were limited to this extent it would be a largely duplicative provision. The legislative purpose instead assigned to Section 5 a broader role. It was to be an interstitial statute: it was to fill in the gaps in the other antitrust laws, to round them out and make their coverage complete. In addition to overt violations, therefore, Section 5 would reach closely similar conduct that violates the policy or 'spirit' of the antitrust laws, even though it may not come technically within its terms.").

In practice, however, the Commission has neglected to play this role. In its first hundred years, the FTC promulgated only one rule defining an "unfair method of competition."[2520] In 2015 the Commission adopted a set of "Enforcement Principles," stating that the FTC's targeting of "unfair methods of competition" would be guided by the "promotion of consumer welfare," a policy goal absent from any legislative directive given to the Commission.[2521] Since the adoption of this framework, the FTC has brought only one case under its standalone Section 5 authority.[2522] The agency has also failed to regularly produce market-wide studies, having halted regular data collection in the 1980s.[2523]

Together with the DOJ, the FTC has also chosen to stop enforcing certain antitrust laws entirely. For two decades, neither agency has filed a suit under the Robinson-Patman Act, which Congress passed in order to limit the power of large chain retailers to extract concessions from independent suppliers.[2524] In 2008, the Justice Department issued a report recommending that Section 2 of the Sherman Act be curbed dramatically.[2525] Although the report was subsequently rescinded, the Justice Department has not filed a significant monopolization case in two decades. Meanwhile, both agencies have targeted their enforcement efforts on relatively small players—including ice skating teachers and organists—raising questions about their enforcement priorities.[2526]

The agencies have also been hamstrung by inadequate budgets. In 1981, FTC Chairman Jim Miller won steep budget cuts at the Commission, a drastic rollback from which the agency has not yet recovered. Prior to this Congress, appropriations for both agencies have reached historic lows.[2527] To

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[2520] Discriminatory Practices in Men's and Boys' Tailored Clothing Industry, 16 C.F.R. pt. 412 (1968).

[2521] Fed. Trade Comm'n, Statement of Enforcement Principles Regarding "Unfair Methods of Competition" Under Section 5 of the FTC Act (Aug. 13, 2015), https://www.ftc.gov/system/files/documents/public_statements/735201/150813section5enforcement.pdf.

[2522] The one exception is FTC's recent suit against Qualcomm. Fed. Trade Comm'n v. Qualcomm Inc., 411 F. Supp. 3d 658 (N.D. Cal. 2019) (5:17-cv-00220).

[2523] FED. TRADE COMM'N, BUR. OF ECON., ANNUAL LINE OF BUSINESS REPORT 1977 (1985), https://www.ftc.gov/reports/us-federal-trade-commission-bureau-economics-annual-line-business-report-1977-statistical.

[2524] In a memo submitted on behalf of the United States to the OECD, the Justice Department stated that "a shift in emphasis based on economic analysis resulted in a significant reduction in enforcement actions brought by the Agencies under the Robinson-Patman Act. As a result, current enforcement of the Act occurs mainly through private treble damages actions." Note by the United States, Roundtable on "Price Discrimination," OECD (Nov. 2016), https://www.justice.gov/atr/case-document/file/979211/download.

[2525] Thomas O. Barnett & Hill B. Wellford, *The DOJ's Single-Firm Conduct Report: Promoting Consumer Welfare Through Clearer Standards for Section 2 of the Sherman Act* (Sept. 8, 2008), https://www.justice.gov/sites/default/files/atr/legacy/2009/05/11/238599.pdf.

[2526] Sandeep Vaheesan, *Accommodating Capital and Policing Labor: Antitrust in the Two Gilded Ages*, 78 MD. L. REV. 766 (2019). *See also* Brief for the United States and the Fed. Trade Comm'n as Amicus Curiae in Support of Appellant and in Favor of Reversal, Chamber of Commerce of the United States of America and Rasier, LLC, v. City of Seattle, 890 F.3d 769 (9th Cir. 2018) (No. 17-35640).

[2527] MICHAEL KADES, WASH. CTR. FOR EQUITABLE GROWTH, THE STATE OF U.S. FEDERAL ANTITRUST ENFORCEMENT (2019), https://equitablegrowth.org/wp-content/uploads/2019/09/091719-antitrust-enforcement-report.pdf.

restore the antitrust agencies to full strength, Subcommittee staff recommends that Congress consider the following:

- Triggering civil penalties and other relief for violations of "unfair methods of competition" rules, creating symmetry with violations of "unfair or deceptive acts or practices" rules;

- Requiring the Commission to regularly collect data and report on economic concentration and competition in sectors across the economy, as permitted under Section 6 of the FTC Act;

- Enhancing the public transparency and accountability of the antitrust agencies, by requiring the agencies to solicit and respond to public comments for merger reviews, and by requiring the agencies to publish written explanations for all enforcement decisions;[2528]

- Requiring the agencies to conduct and make publicly available merger retrospectives on significant transactions consummated over the last three decades;

- Codifying stricter prohibitions on the revolving door between the agencies and the companies that they investigate, especially with regards to senior officials;[2529] and

- Increasing the budgets of the Federal Trade Commission and the Antitrust Division.[2530]

3. Private Enforcement

Private enforcement plays a critical role in the nation's antitrust system. The Sherman Act and Clayton Act both include a private right of action. This reflected lawmakers' desire to ensure that those abused by monopoly power have an opportunity for direct recourse.[2531] It also reflected a recognition that public enforcers would be susceptible to capture by the very monopolists that they were supposed to investigate, necessitating other means of enforcement.

Empirical surveys of trends in antitrust enforcement indicate that private enforcement deters anticompetitive conduct and strengthens enforcement overall.[2532] In recent decades, however, courts

[2528] Mitchell Submission at 9–10.

[2529] *See* submission from Source 17.

[2530] *See* Baer Submission at 7–8; Kades Submission at 12–13.

[2531] *See, e.g.*, 51 CONG. REC. 9073 (1914) (remarks of Rep. Webb) (stating that private Section 7 remedies "open the door of justice to every man, whenever he may be injured by those who violate the antitrust laws, and give the injured party ample damages for the wrong suffered").

[2532] Joshua P. Davis & Robert H. Lande, *Toward an Empirical and Theoretical Assessment of Private Antitrust Enforcement*, 36 SEATTLE U. L. REV. 1269, 1276 (2013).

have erected significant obstacles for private antitrust plaintiffs, both through procedural decisions and substantive doctrine.

One major obstacle is the rise of forced arbitration clauses, which undermine private enforcement of the antitrust laws by allowing companies to avoid legal accountability for their actions.[2533] These clauses allow firms to evade the public justice system—where plaintiffs have far greater legal protections—and hide behind a one-sided process that is tilted in their favor.[2534] For example, although Amazon has over two million sellers in the United States, Amazon's records reflect that only 163 sellers initiated arbitration proceedings between 2014 and 2019.[2535] This data seems to confirm studies showing that forced arbitration clauses often fail to provide a meaningful forum for resolving disputes and instead tend to suppress valid claims and shield wrongdoing.[2536]

Several other trends in judicial decisions have hampered private antitrust plaintiffs, including in cases involving dominant platforms. To address these concerns, the Subcommittee recommends that Congress consider:

- Eliminating court-created standards for "antitrust injury"[2537] and "antitrust standing,"[2538] which undermine Congress's grant of enforcement authority to "any person . . . injured . . . by reason of anything forbidden in the antitrust laws;"[2539]

- Reducing procedural obstacles to litigation, including through eliminating forced arbitration clauses[2540] and undue limits on class action formation;[2541] and

[2533] *Justice Denied: Forced Arbitration and the Erosion of our Legal System: Hearing Before the Subcomm. on Antitrust, Commercial and Admin. Law of the H. Comm. on the Judiciary*, 116th Cong. 2 (2019) (statement of Myriam Gilles, Paul R. Verkuil Research Chair in Public Law & Prof. of Law, Benjamin N. Cardozo Sch. of Law).

[2534] *Justice Denied: Forced Arbitration and the Erosion of our Legal System*: *Hearing Before the Subcomm. on Antitrust, Commercial and Admin. Law of the H. Comm on the Judiciary*, 116th Cong. 2 (2019) (statement of Deepak Gupta, Founding Principal, Gupta Wessler PLLC).

[2535] Innovation and Entrepreneurship Hearing at 49 (response to Questions for the Record of Nate Sutton, Assoc. Gen. Counsel, Competition, Amazon.com, Inc.).

[2536] Judith Resnik, *Diffusing Disputes: The Public in the Private of Arbitration, the Private in Courts, and the Erasure of Rights*, 124 YALE L. J. 2804 (2015).

[2537] Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477 (1977).

[2538] Assoc. Gen. Contractors v. California State Council of Carpenters, 459 U.S. 519 (1983).

[2539] Clayton Act, 15 U.S.C. § 15 (1914).

[2540] American Express v. Italian Colors, 570 U.S. 228 (2013); AT&T Mobility v. Concepcion, 563 U.S. 333 (2011).

[2541] Comcast v. Behrend, 569 U.S. 27 (2013).

- Lowering the heightened pleading requirement introduced in *Bell Atlantic Corp. v. Twombly*.[2542]

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[2542] 550 U.S. 544 (2007).

Congress of the United States
Washington, DC 20510

June 21, 2022

The Honorable Jonathan Kanter
Assistant Attorney General
Antitrust Division
United States Department of Justice
950 Pennsylvania Avenue, NW
Washington, DC 20530

Dear Assistant Attorney General Jonathan Kanter,

We are writing today regarding our concerns over Reckitt Benckiser Group PLC's proposed sale of its Enfamil infant formula manufacturing arm in the midst of an ongoing, dangerous national shortage.[1] In May 2022, following the closure of Abbot's Sturgis, Michigan plant, national out-of-stock rates for infant formula exceeded 70 percent, threatening the health and safety of millions of infants, children, and adults,[2] while President Biden warned that it would take "a couple more months" before infant formula manufacturing was back to normal.[3] Given the consolidation in the infant formula market and impact of this shortage on American families, we urge you to use your authority granted under the Clayton Act to closely examine whether such a transaction would likely harm competition or prolong the crisis.[4]

As we noted in our May 2022 letter to the Department of Agriculture,[5] just four companies control nearly 90% of the infant formula market and this concentration severely weakened supply chain resiliency.[6] As a result, the infant formula marketplace was susceptible to supply shocks, like Abbott's recall and its temporary closure of its Sturgis, Michigan factory. In the weeks following this recall, out-of-stock rates reached up to 90% in some states, causing a widespread public health crisis that disproportionately impacts low-income family and high-risk infants.[7]

Given the ongoing crisis, we are extremely concerned by reports that Reckitt Benckiser Group, which owns the Enfamil brand of baby formula and is the second biggest infant formula

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[1] Wall Street Journal, "Enfamil Maker Reckitt Shops Baby-Formula Unit Amid Shortage," Saabira Chaudhuri and Ben Dummett, May 27, 2022, https://www.wsj.com/articles/enfamil-maker-reckitt-shops-baby-formula-unit-amid-shortage-11653655305.

[2] New York Magazine, "The Baby-Formula Shortage Could Ease by Late July," Bindu Bansinath and Mia Mercado, June 6, 2022, https://www.thecut.com/2022/06/baby-formula-shortage-fda.html .

[3] Wall Street Journal, "Baby Formula Shortage Worsens, Hitting Low-Income Families Hardest," June 1, 2022, https://www.wsj.com/articles/baby-formula-shortage-worsens-hitting-low-income-families-hardest-11654088402?mod=hp_lead_pos11.

[4] 15 U.S.C. 18.

[5] Letter from Senator Cory Booker and colleagues to USDA Secretary Tom Vilsack, May 13, 2022, https://www.booker.senate.gov/news/press/booker-duckworth-klobuchar-lead-8-senators-in-urging-usda-to-address-infant-formula-shortages.

[6] Politico, "Infant formula shortage suddenly Topic A in Washington," Helena Bottemiller Evich and Meredith Lee, May 13, 2022, https://www.politico.com/news/2022/05/13/unconscionable-pelosi-vows-action-on-infant-formula-shortages-00032459.

[7] CNN Health, "Despite moves to increase supply, families are still feeling the pain of the baby formula shortage," Brenda Goodman, June 6, 2022, https://www.cnn.com/2022/06/06/health/families-struggle-formula-shortage/index.html; Washington Post, "Formula shortage is worst for low-income families, high-risk infants," Frances Stead Sellers, May 18, 2022, https://www.washingtonpost.com/health/2022/05/18/baby-formula-shortage-impact/.

manufacturer in the U.S., is pushing ahead with a sale process that could shallow out the market.[8] Private equity firm Clayton Dubilier & Rice (CDR), which submitted a non-binding bid to purchase Reckitt Benckiser's infant nutrition unit,[9] already has a history of saddling its acquisitions with debt,[10] and of profiting from a public health crisis when one of their subsidiaries exported "large shipments" of personal protective gear and respirator equipment out of the U.S. at the beginning of the coronavirus (COVID-19) pandemic.[11] If private equity investors take over a key infant formula manufacturer with the intent to further consolidate and merge operations when the market is already failing families and their children, matters will be even worse for consumers.[12]

Reckitt Benckiser's potential sale to private equity, during a shortage that has resulted in the company temporarily holding up to 55% of the U.S. market, represents a potential antitrust issue and a threat to the already consolidated market.[13] It is understood that Reckitt Benckiser's sale would guarantee "operational disruption" and likely weaken the company with massive debt at a time when their success is essential to families across the country.[14] You have previous acknowledged the weaknesses inherent to oligopolies, accurately placing the blame for the fragility of the infant formula market squarely on the high level of concentration in this industry.[15] In addition, your division has addressed the role of private equity in concentrating markets by "rolling up" aspects of the American economy, unchecked by regulators.[16] Section 7 of the Clayton Act prohibits acquisitions where the effect "may be substantially to lessen competition,"[17] and this may well apply to any private equity firm with a noted history of selling off assets, laying off workers, and loading companies up with debt—regardless of whether any competing companies are in the firm's investment portfolio. In September 2021, Federal Trade Commission Chair Lina Khan called for greater scrutiny of mergers that involved private equity firms, warning that their "business models may distort ordinary incentives in ways that strip productive capacity and may facilitate unfair methods of competition and consumer protection violations."[18] Just last week, Chair Khan re-emphasized these concerns, noting that private equity

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[8] Wall Street Journal, "Enfamil Maker Reckitt Shops Baby-Formula Unit Amid Shortage," Saabira Chaudhuri and Ben Dummett, May 27, 2022, https://www.wsj.com/articles/enfamil-maker-reckitt-shops-baby-formula-unit-amid-shortage-11653655305; The American Prospect, "A Formula for Public Ownership," Robert Kuttner, May 27, 2022, https://prospect.org/blogs-and-newsletters/tap/formula-for-public-ownership/.

[9] Bloomberg, "Reckitt's $7 Billion Formula Sale Draws Muted Interest," Ruth David and Dinesh Nair, May 27, 2022, https://www.bloomberg.com/news/articles/2022-05-27/reckitt-s-sale-of-baby-formula-unit-said-to-draw-muted-interest#xj4y7vzkg.

[10] Wall Street Journal, "Buyout Firms Set Record for Loading Companies With Debt to Pay Themselves," Chris Cumming, October 25, 2021, https://www.wsj.com/articles/buyout-firms-set-record-for-loading-companies-with-debt-to-pay-themselves-11635156003.

[11] The Intercept, "KEY MEDICAL SUPPLIES WERE SHIPPED FROM U.S. MANUFACTURERS TO FOREIGN BUYERS, RECORDS SHOW," Lee Fang, April 1, 2020, https://theintercept.com/2020/04/01/coronavirus-medical-supplies-export/.

[12] Vox, "What is private equity, and why is it killing everything you love?" Emily Stewart, January 6, 2020, https://www.vox.com/the-goods/2020/1/6/21024740/private-equity-taylor-swift-toys-r-us-elizabeth-warren.

[13] Wall Street Journal, "Enfamil Maker Reckitt Shops Baby-Formula Unit Amid Shortage," Saabira Chaudhuri and Ben Dummett, May 27, 2022, https://www.wsj.com/articles/enfamil-maker-reckitt-shops-baby-formula-unit-amid-shortage-11653655305.

[14] Axios, "Baby formula makers hit the auction block," Dan Primack, May 31, 2022, https://www.axios.com/2022/05/31/baby-formula-makers-hit-the-auction-block.

[15] Department of Justice, "Assistant Attorney General Jonathan Kanter Delivers Remarks at New York City Bar Association's Milton Handler Lecture," May 18, 2022, https://www.justice.gov/opa/speech/assistant-attorney-general-jonathan-kanter-delivers-remarks-new-york-city-bar-association.

[16] Financial Times, "Crackdown on buyout deals coming, warns top US antitrust enforcer," 2022, https://www.ft.com/content/7f4cc882-1444-4ea3-8a31-c382364aace1.

[17] 15 U.S.C. 18.

acquisitions had caused concrete damage to the lives of ordinary Americans.[19] The ruinous model of private equity does not promote long-term competition; it reduces quality and safety and drives vulnerable target companies out of business.

The Department of Justice has wide authority under the Clayton Act to investigate any proposed transaction for potential anticompetitive effects.[20] We encourage your division to give serious weight to the fragility of this particular market and the urgent need for strong, competing firms if Reckitt Benckiser and CDR move forward with a deal. If CDR's history suggests that its acquisition of Enfamil would endanger the manufacturing arm's ability to compete going forward or threaten the supply of infant formula during this period of crisis, your division should sue to block the deal immediately without considering any remedies.

The ongoing crisis of infant formula shortages call for your division to pay close attention to any possible merger or acquisition in this sector. However, we urge the Department of Justice to closely examine *any* private equity-backed deal with similar caution and fully oppose in court any such transaction involving firms with checkered acquisition histories that are likely to hollow out their targets and weaken competition.

Thank you for your attention to this matter.

Sincerely,

Elizabeth Warren
United States Senator

Katie Porter
Member of Congress

Cory A. Booker
United States Senator

Bernard Sanders
United States Senator

[18] Federal Trade Commission Chair Lina M. Khan, "Vision and Priorities for the FTC," Memorandum, September 22, 2021, https://www.ftc.gov/system/files/documents/public_statements/1596664/agency_priorities_memo_from_chair_lina_m_khan_9-22-21.pdf.
[19] Financial Times, "Lina Khan vows 'muscular' US antitrust approach on private equity deals," Stefania Palma, Mark Vandevelde, and James Fontanella-Khan, June 8, 2022, https://www.ft.com/content/ef9e4ce8-ab9a-45b3-ad91-7877f0e1c797.
[20] 15 U.S.C. 18.

S. 1288

At the request of Mr. SANDERS, the name of the Senator from Maryland (Mr. VAN HOLLEN) was added as a cosponsor of S. 1288, a bill to amend the Higher Education Act of 1965 to ensure College for All.

S. 1315

At the request of Ms. CANTWELL, the name of the Senator from New Mexico (Mr. HEINRICH) was added as a cosponsor of S. 1315, a bill to amend title XVIII of the Social Security Act to provide for coverage of certain lymphedema compression treatment items under the Medicare program.

S. 1536

At the request of Ms. COLLINS, the name of the Senator from Montana (Mr. TESTER) was added as a cosponsor of S. 1536, a bill to amend title XVIII of the Social Security Act to expand the availability of medical nutrition therapy services under the Medicare program.

S. 1695

At the request of Mrs. CAPITO, the name of the Senator from South Carolina (Mr. SCOTT) was added as a cosponsor of S. 1695, a bill to amend the Public Works and Economic Development Act of 1965 to provide for a high-speed broadband deployment initiative.

S. 1720

At the request of Mr. PETERS, the names of the Senator from Alaska (Ms. MURKOWSKI) and the Senator from Vermont (Mr. SANDERS) were added as cosponsors of S. 1720, a bill to provide stability to and enhance the services of the United States Postal Service, and for other purposes.

S. 1737

At the request of Mr. COONS, the name of the Senator from California (Mrs. FEINSTEIN) was added as a cosponsor of S. 1737, a bill to establish a global zoonotic disease task force, and for other purposes.

S. 1853

At the request of Mr. PETERS, the names of the Senator from Maine (Mr. KING) and the Senator from Iowa (Ms. ERNST) were added as cosponsors of S. 1853, a bill to amend title 49, United States Code, to establish a Motorcyclist Advisory Council.

S. 1857

At the request of Mr. KING, the name of the Senator from Nevada (Ms. CORTEZ MASTO) was added as a cosponsor of S. 1857, a bill to provide appropriations for the Internal Revenue Service to overhaul technology and strengthen enforcement, and for other purposes.

S. 1964

At the request of Mr. BENNET, the name of the Senator from New Hampshire (Mrs. SHAHEEN) was added as a cosponsor of S. 1964, a bill to amend the Omnibus Parks and Public Lands Management Act of 1996 to provide for the establishment of a Ski Area Fee Retention Account, and for other purposes.

S. 2014

At the request of Ms. WARREN, the name of the Senator from Delaware (Mr. COONS) was added as a cosponsor of S. 2014, a bill to permit legally married same-sex couples to amend their filing status for tax returns outside the statute of limitations.

S. 2029

At the request of Mr. MURPHY, the name of the Senator from Pennsylvania (Mr. CASEY) was added as a cosponsor of S. 2029, a bill to prohibit the use of corporal punishment in schools, and for other purposes.

S. 2030

At the request of Mr. JOHNSON, the names of the Senator from Iowa (Ms. ERNST), the Senator from South Carolina (Mr. SCOTT), the Senator from Montana (Mr. DAINES) and the Senator from Tennessee (Mr. HAGERTY) were added as cosponsors of S. 2030, a bill to declare that any agreement reached by the President relating to the nuclear program of Iran is deemed a treaty that is subject to the advice and consent of the Senate, and for other purposes.

S. RES. 241

At the request of Mr. MENENDEZ, the name of the Senator from Connecticut (Mr. MURPHY) was added as a cosponsor of S. Res. 241, a resolution widening threats to freedom of the press and free expression around the world, and reaffirming the vital role that a free and independent press plays in informing local and international audiences about public health crises, countering misinformation and disinformation, and furthering discourse and debate to advance healthy democracies in commemoration of World Press Freedom Day on May 3, 2021.

STATEMENTS ON INTRODUCED BILLS AND JOINT RESOLUTIONS

By Mr. LEE (for himself and Mr. GRASSLEY):

S. 2039. A bill to improve the antitrust laws, and for other purposes; to the Committee on the Judiciary.

Mr. LEE. Mr. President, I rise today to introduce a piece of legislation called the Tougher Enforcement Against Monopolists Act, or the TEAM Act. I am grateful that my good friend and ranking member of the Judiciary Committee, the senior Senator from Iowa, CHUCK GRASSLEY, has joined me as a cosponsor of the bill.

Now, I am aware that our House colleagues just recently introduced several bills intended to fight anti-competitive conduct by Big Tech. Those bills, in my view, don't go far enough. America is facing a panoply of competition concerns not just in Big Tech but across the entire economy. We need a holistic approach that benefits all consumers, in every industry. We need to deal with all the monopolists hurting competition.

Even worse, the House bills not only have too small of a target, but they use too big of a sledgehammer to hit it. They create a truly massive expansion of Federal regulatory power and are the first steps toward a command-and-control economy.

Responding to Big Tech with Big Government is adding insult to injury, not to mention something I doubt any conservative will be able to support. We don't need a bigger government. We need to make the one we have work better.

The TEAM Act avoids each of these mistakes. Instead of a narrow focus and Big Government approach, this bill will improve Federal antitrust enforcement for the entire economy without making government bigger.

The TEAM Act improves antitrust law in two ways. The first is putting all of our antitrust enforcers on one team. The TEAM Act unites our two Federal antitrust enforcement Agencies into one. For over a century, American antitrust enforcement has been something of a two-headed creature sometimes at odds with itself. The results have been delays to enforcement and consumer redress, uncertainty for businesses, and even conflicting antitrust enforcement policy.

Just recently, the two Agencies actually argued against each other on opposite sides of an appeal before the U.S. Court of Appeals for the Ninth Circuit. This arrangement isn't working for anyone—anyone, that is, perhaps, except corporations looking for an opportunity to game the system.

I hope that the bill can also put our two parties on the same team when it comes to antitrust reform. Our present reform movement is filled with bipartisan fervor to improve the lives of our constituents by improving competition in the markets that serve them and protecting them from the monopolists that exercise so much unearned power over huge swaths of our economy. Now, we don't agree on everything, but we do agree on this. It is my sincere belief that this bill represents the best and, hopefully, most bipartisan path forward.

That brings me to the second focus of the bill: preventing antitrust harm by monopolists. I use the term ''antitrust harm'' here very deliberately. In certain corners of the antitrust policy world, it has become fashionable to talk of being pro-monopoly or anti-monopoly, which is often tied to being pro- or anti-democracy. That is also deliberate terminology, and I think it is dangerous. It is a sleight of hand meant to move the conversation away from specific conduct and whether that conduct harms competition, to do so regardless and to instead imply that all that matters in this context, in this inquiry, is size and whether you support or defend a business based on its size. That position is both unserious and economically indefensible. Even the briefest, most passing moment of reflection on this will demonstrate its absurdity.

If you are anti-monopoly, are you also anti-patent? Patents are, after all, government-granted monopolies. The entire purpose of the patent is to allow

its holder to exclude competition for a limited period of time and charge the highest price that the market will bear. But we allow this because the prospect of collecting monopoly profits acts as an incentive to innovate and invest in new ideas.

The same principle is at work in market monopolies. The prospect of obtaining a monopoly through competition on the merits incentivizes competitors to offer consumers better products and services at lower prices. This free market system built on competition and innovation is responsible for many of the great achievements of mankind and the economic flourishing of the greatest civilization the world has ever known.

But even more important is the foundational principle of our Republic that the law deals with conduct, not status. We punish people for what they do, not who they are. "Big is bad" abandons that fundamental American principle of law. Instead, the facile insistence on being simply "anti-monopoly" belies the proponents' true priorities. It means being anti-business even when it hurts consumers. It is the economic version of cutting off your nose to spite your face.

The "big is bad" philosophy is also part of a broader effort to overturn the consumer welfare standard. This critical component of U.S. antitrust law has been widely misunderstood, often as a result of willful misrepresentation. The consumer welfare standard does not protect monopolists. It does not mean the government loses, and it is decidedly not limited to a narrow focus on prices.

Rather, the consumer welfare standard is a statement about the overarching goals of antitrust law; namely, that the purpose of antitrust is to advance the economic welfare of consumers as opposed to protecting the competitors themselves or advancing unrelated social policies.

As I note in my introduction to the new edition of "The Antitrust Paradox," Judge Robert Bork himself explicitly described the consumer welfare standard as being broader than an inquiry into price, and it is one that certainly includes an inquiry into quality, innovation, and consumer choice. In other words, whatever consumers value, that is what is captured by "consumer welfare."

But it is much easier to argue against the consumer welfare standard by pretending that it only cares about lower prices and, therefore, is incapable of addressing consumer harm in markets with free products, such as many online services. This misrepresentation says a lot about the true goals of the so-called anti-monopoly crowd. If they really cared about the nonprice facets of competition, they wouldn't need to abandon the consumer welfare standard to promote it. But that isn't their true goal.

The real problem they have with the consumer welfare standard is the way that it constrains judges from advancing unrelated policy goals. It turns out the push to abandon the consumer welfare standard is not about stopping monopolies or helping consumers. It is simply a Trojan horse for woke social policy.

Now, a proper application of the antitrust laws does have political benefits—what Utah's State constitution refers to as "the dispersion of economic and political power"—but those are secondary benefits. Antitrust is not primarily a political tool.

If a company acquires market power as a result of competing on the merits, then any influence that flows from that will, at least, be a result of consumer choices. Just as citizens vote at the ballot box, consumers vote at the checkout aisle. But if that market power is obtained or grown through nefarious or anti-competitive means, the resulting market power is illegitimate and a threat to the Republic, which leads to the point that, of course, many monopolies are bad. They are genuinely bad.

These are those monopolies obtained or prolonged not through competition on the merits but through anti-competitive and exclusionary conduct. This conduct obstructs rather than facilitates the natural operation of the free market, using raw market power to prevent consumers from making optimal choices and then starving them of lower prices, higher quality, and new offerings.

Competitive conduct benefits both businesses and consumers. Anti-competitive conduct only helps the monopolist.

Unfortunately, there have been attempts to defend some anti-competitive conduct. This is most often done through the use of speculative and convoluted economic models that claim to predict the future, almost always predicting that a merger or specific conduct won't actually harm competition.

We have, sadly, seen an overcorrection from the days lamented by Judge Bork when courts and enforcers ignored basic economic analysis. Now "the age of sophists, economists, and calculators has succeeded," and our antitrust enforcement efforts are frequently hampered by what Judge Bork called an "economic extravaganza." The result has been that some conduct and mergers that should have been condemned have instead escaped much needed scrutiny.

All of this is why the TEAM Act categorically rejects the Manichean belief that big is always bad, while still acknowledging that concentrated economic power can be just as dangerous as concentrated political power, and, in fact, one often leads to the other. In this way, it embraces antitrust laws as sort of federalism for the economy, and it does so by focusing not on mere size but on antitrust harm; that is, whether something actually harms consumers by harming competition.

The bill strengthens our ability to prevent and correct antitrust harm in three ways.

The TEAM Act strengthens the antitrust laws. It includes a market share-based merger presumption, improves the HSR Act, codifies the consumer welfare standard, and makes it harder for monopolists to justify or excuse anti-competitive comment.

The TEAM Act strengthens antitrust enforcers. In addition to consolidating Federal antitrust enforcement at the Department of Justice, the bill also includes a version of the Merger Filing Fee Modernization Act, introduced by Senators KLOBUCHAR and GRASSLEY. Most significantly, the bill roughly doubles the amount of money appropriated to Federal antitrust enforcement, ensuring that our antitrust enforcers have all the resources they need to protect American consumers.

The TEAM Act strengthens antitrust remedies. The bill repeals Illinois Brick and Hanover Shoe to ensure that consumers are able to recover damages from anticompetitive conduct. Even more significantly, the bill allows the Justice Department to recover trebled damages on behalf of consumers and imposes civil fines for knowingly violating the antitrust laws.

Now, I believe these reforms reflect the best way to strike the balance of protecting competition and consumer welfare, while limiting government intervention in the free market. In an era in which would-be monopolists want to move fast and break things, it is essential that our antitrust enforcers are empowered to move fast and break them up.

This is the prudent and the conservative approach. Better antitrust enforcement means less regulation and thus smaller government.

This is also a wiser approach than attempting to statutorily prohibit certain categories of conduct. That approach abandons one of the greatest strengths of American antitrust law: the fact-specific nature of every inquiry. Case-by-case adjudication is what allows us to maximize enforcement while minimizing false positives. The TEAM Act avoids the black-and-white pronouncements of other legislative proposals and instead updates the mechanics of how the antitrust laws are applied to address the enforcement gaps of recent decades.

As I have said before, we find ourselves at a critical moment. The threat to competition and free markets is real. Doing nothing is not an option. At the same time, we simply cannot allow the need to "do something" to push us into embracing bad policy that will have unintended consequences and push America closer to a government-regulated economy.

I look forward to working closely with my colleagues and with friends on both sides of the aisle and at both ends of the Capitol in order to advance the TEAM Act and help protect American consumers.

Withdrawal of the 1995 FTC Section 5 Policy Statement

United States of America
FEDERAL TRADE COMMISSION
WASHINGTON, D.C. 20580

Statement of Enforcement Principles Regarding
"Unfair Methods of Competition" Under Section 5 of the FTC Act

Section 5 of the Federal Trade Commission Act declares "unfair methods of competition in or affecting commerce" to be unlawful. 15 U.S.C. § 45(a)(1). Section 5's ban on unfair methods of competition encompasses not only those acts and practices that violate the Sherman or Clayton Act but also those that contravene the spirit of the antitrust laws and those that, if allowed to mature or complete, could violate the Sherman or Clayton Act.

Congress chose not to define the specific acts and practices that constitute unfair methods of competition in violation of Section 5, recognizing that application of the statute would need to evolve with changing markets and business practices. Instead, it left the development of Section 5 to the Federal Trade Commission as an expert administrative body, which would apply the statute on a flexible case-by-case basis, subject to judicial review. This statement is intended to provide a framework for the Commission's exercise of its "standalone" Section 5 authority to address acts or practices that are anticompetitive but may not fall within the scope of the Sherman or Clayton Act.

In deciding whether to challenge an act or practice as an unfair method of competition in violation of Section 5 on a standalone basis, the Commission adheres to the following principles:

- the Commission will be guided by the public policy underlying the antitrust laws, namely, the promotion of consumer welfare;
- the act or practice will be evaluated under a framework similar to the rule of reason, that is, an act or practice challenged by the Commission must cause, or be likely to cause, harm to competition or the competitive process, taking into account any associated cognizable efficiencies and business justifications; and
- the Commission is less likely to challenge an act or practice as an unfair method of competition on a standalone basis if enforcement of the Sherman or Clayton Act is sufficient to address the competitive harm arising from the act or practice.

Donald S. Clark
Secretary

August 13, 2015

Statement of the Federal Trade Commission[1]
On the Issuance of Enforcement Principles Regarding
"Unfair Methods of Competition" Under Section 5 of the FTC Act
August 13, 2015

The Federal Trade Commission was created in 1914 and vested with enforcement authority over "unfair methods of competition" under Section 5 of the FTC Act.[2] The Commission has issued a policy statement describing the enforcement principles that guide the exercise of our "standalone" Section 5 authority to address anticompetitive acts or practices that fall outside the scope of the Sherman and Clayton Acts.

In describing the principles and overarching analytical framework that guide the Commission's application of Section 5, our statement affirms that Section 5 is aligned with the other antitrust laws, which have evolved over time and are guided by the goal of promoting consumer welfare and informed by economic analysis. The result of this evolution is the modern "rule of reason."[3] Our statement makes clear that the Commission will rely on the accumulated knowledge and experience embedded within the "rule of reason" framework developed under the antitrust laws over the past 125 years—a framework well understood by courts, competition agencies, the business community, and practitioners. These principles also retain for the Commission the flexibility to apply its authority in a manner similar to the case-by-case development of the other antitrust laws. Finally, we confirm that the Commission will continue to rely, when sufficient and appropriate, on the Sherman and Clayton Acts as its primary enforcement tools for protecting competition and promoting consumer welfare.

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[1] This statement reflects the views of Chairwoman Ramirez and Commissioners Brill, Wright, and McSweeny.

[2] 15 U.S.C. § 45(a)(1). All references in this statement to "Section 5" relate to its prohibition of "unfair methods of competition" and not to its prohibition of "unfair or deceptive acts or practices."

[3] The "rule of reason" is the cornerstone of modern antitrust analysis. As the leading treatise on antitrust law explains,

> In antitrust jurisprudence, "reasonableness" sums up the judgment that behavior is consistent with the antitrust laws. A monopolist acting reasonably does not violate Sherman Act § 2. Reasonable collaboration among competitors does not violate Sherman Act § 1. Although reasonableness is usually judged case by case, it is sometimes made for a class of conduct, such as price fixing, which is then said to be intrinsically or "per se" unlawful. Thus, per se rules also derive from judgments about reasonableness, albeit for a type of behavior rather than for a particular case. Even under the Clayton Act, where decisions about tying, exclusive dealing, and mergers are seldom phrased in reasonableness terms, the application of those statutes depends on the same elements that define "reasonableness."

VII PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW ¶ 1500 (3d ed. 2010).

There has been much thoughtful dialogue inside and outside of the agency over the course of the last century about the precise contours of Section 5's prohibition against unfair methods of competition.[4] We have benefited greatly from this ongoing dialogue and from judicial insights through the process of judicial review, and we believe that the principles we have set forth in our Section 5 statement are ones on which there is broad consensus.[5]

[4] *See* Public Workshop Concerning the Prohibition of Unfair Methods of Competition in Section 5 of the Federal Trade Commission Act, 73 Fed. Reg. 50,818 (Aug. 28, 2008), *available at* http://www.gpo.gov/fdsys/pkg/FR-2008-08-28/pdf/E8-20008.pdf *and at* https://www.ftc.gov/sites/default/files/documents/public_events/section-5-ftc-act-competition-statute/p083900section5.pdf; *Section 5 of the FTC Act as a Competition Statute*, FED. TRADE COMM'N (Oct. 17, 2008), https://www.ftc.gov/news-events/events-calendar/2008/10/section-5-ftc-act-competition-statute.

[5] Like the Commission's policy statements on unfairness and deception, no public comment was sought here. The purpose of each of these policy statements is similar, which is to provide the Commission's view on how it approaches the use of its statutory authority. *See* FTC Policy Statement on Unfairness, Letter from the Federal Trade Commission to Senator Wendell H. Ford, Chairman, Consumer Subcommittee, Senate Committee on Commerce, Science, and Transportation, and Senator John C. Danforth, Ranking Minority Member, Consumer Subcommittee, Senate Committee on Commerce, Science, and Transportation (Dec. 17, 1980), *appended to* Int'l Harvester Co., 104 F.T.C. 949, 1070 (1984), *and available at* https://www.ftc.gov/public-statements/1980/12/ftc-policy-statement-unfairness; FTC Policy Statement on Deception, Letter from James C. Miller III, Chairman, Federal Trade Commission, to Representative John D. Dingell, Chairman, House Committee on Energy and Commerce (Oct. 14, 1983), *appended to* Cliff Assocs., Inc., 103 F.T.C. 110, 174 (1984), *and available at* https://www.ftc.gov/public-statements/1983/10/ftc-policy-statement-deception.

FEDERAL TRADE COMMISSION
PROTECTING AMERICA'S CONSUMERS

FTC Rescinds 2015 Policy that Limited Its Enforcement Ability Under the FTC Act

July 1, 2021

Rescinded Policy Failed to Fully Consider Congressional Directives

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FOR RELEASE

TAGS: Competition | FTC Operations | Section 5

The Federal Trade Commission rescinded a 2015 antitrust policy statement that has constrained the agency's use of its authority to stop anticompetitive business tactics under Section 5 of the FTC Act.

Congress directed the FTC to enforce the prohibition on "unfair methods of competition." This prohibition extends beyond the Sherman Act and the Clayton Act. The 2015 Policy Statement purported to establish an analytical framework on how the Commission would seek to enforce the prohibition.

Chair Lina M. Khan was joined by Commissioners Rebecca Kelly Slaughter and Rohit Chopra in a statement, which noted that the 2015 policy was shortsighted, and that the Commission must follow the congressional mandate to condemn "unfair methods of competition." They explained that "[i]n practice, the Statement has doubled down on the Commission's longstanding failure to investigate and pursue 'unfair methods of competition.'" Rescinding the statement, they concluded, is crucial to bringing the FTC back in line with its statutory obligations.

The Commission's inability, after a century of commanding this statutory authority, to deliver clear Section 5 principles suggests that the time is right for the Commission to rethink its approach and to recommit to its mandate to police unfair methods of competition even if they are outside the ambit of the Sherman or Clayton Acts. The task will require careful and serious work, but it is one that our enabling statute expected and required."

The majority statement also noted that the Commission will exercise this authority consistent with congressional directives and appropriate case law. In addition, the Commission may consider additional guidance, policy statements, and rules describing conduct that may violate the prohibition on unfair methods of competition.

The Commission voted 3-2 to rescind the Section 5 policy statement in an open Commission meeting live streamed to its website. Chair Khan and Commissioners Chopra and Slaughter voted yes, and Commissioners Noah Joshua Phillips and Christine S. Wilson voted no. Commissioner Phillips issued dissenting remarks. Commissioner Wilson issued a dissenting statement regarding the overall meeting agenda.

The Federal Trade Commission works to promote competition and to protect and educate consumers. You can learn more about consumer topics and report scams, fraud, and bad business practices online at ReportFraud.ftc.gov. Like the FTC on Facebook, follow us on Twitter, get consumer alerts, read our blogs, and subscribe to press releases for the latest FTC news and resources.

PRESS RELEASE REFERENCE:
FTC Issues Statement of Principles Regarding Enforcement of FTC Act as a Competition Statute

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UNITED STATES OF AMERICA
Federal Trade Commission
WASHINGTON, D.C. 20580

Statement of Chair Lina M. Khan
Joined by Commissioner Rohit Chopra and Commissioner Rebecca Kelly Slaughter on the Withdrawal of the Statement of Enforcement Principles Regarding "Unfair Methods of Competition" Under Section 5 of the FTC Act

July 1, 2021

Section 5 of the Federal Trade Commission Act prohibits "unfair methods of competition in or affecting commerce."[1] In 2015, the Federal Trade Commission under Chairwoman Edith Ramirez published the *Statement of Enforcement Principles Regarding "Unfair Methods of Competition" Under Section 5 of the FTC Act* (hereinafter "2015 Statement"), which established principles to guide the agency's exercise of its "standalone" Section 5 authority.[2] Although presented as a way to reaffirm the Commission's preexisting approach to Section 5 and preserve doctrinal flexibility,[3] the 2015 Statement contravenes the text, structure, and history of Section 5 and largely writes the FTC's standalone authority out of existence. In our view, the 2015 Statement abrogates the Commission's congressionally mandated duty to use its expertise to identify and combat unfair methods of competition even if they do not violate a separate antitrust statute. Accordingly, because the Commission intends to restore the agency to this critical mission, the agency withdraws the 2015 Statement.

I. Background

On August 13, 2015, the Federal Trade Commission issued the 2015 Statement, which announced that the Commission would apply Section 5 using "a framework similar to the rule of reason," by only challenging actions that "cause, or [are] likely to cause, harm to competition or the competitive process, taking into account any associated cognizable efficiencies and business justifications[.]"[4] The 2015 Statement advised that the Commission is "less likely" to raise a

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[1] 15 U.S.C. § 45(a)(1).

[2] FTC, Statement of Enforcement Principles Regarding "Unfair Methods of Competition" Under Section 5 of the FTC Act (Aug. 13, 2015) [hereinafter "2015 Statement"], https://www.ftc.gov/system/files/documents/public_statements/735201/150813section5enforcement.pdf.

[3] Address by Chairwoman Edith Ramirez, Competition Law Center, George Washington University Law School, 3 (Aug. 13, 2015), https://www.ftc.gov/system/files/documents/public_statements/735411/150813section5speech.pdf ("Our aim in adopting this policy statement is to reaffirm the principles that guide our enforcement decisions, leaving for future generations the flexibility to do the same.").

[4] 2015 Statement, *supra* note 2. Chairwoman Ramirez and Commissioners Julie Brill, Terrell McSweeny, and Joshua Wright voted in favor of the statement. Commissioner Maureen Ohlhausen dissented. FTC Press Release, FTC Issues Statement of Principles Regarding Enforcement of FTC Act as a Competition Statute (Aug. 13, 2015), https://www.ftc.gov/news-events/press-releases/2015/08/ftc-issues-statement-principles-regarding-enforcement-ftc-act.

standalone Section 5 claim "if enforcement of the Sherman or Clayton Act is sufficient to address the competitive harm."[5]

In a statement accompanying the issuance of these principles, the Commission explained that its enforcement of Section 5 would be "aligned with" the Sherman and Clayton Acts and thus subject to "the 'rule of reason' framework developed under the antitrust laws[.]"[6] In a speech announcing the statement, Chairwoman Ramirez noted that she favored a "common-law approach" to Section 5 rather than "a prescriptive codification of precisely what conduct is prohibited."[7] She also acknowledged that the Commission's policy statement was codifying an interpretation of Section 5 that is more restrictive than the Commission's historic approach and more constraining than the prevailing case law.[8] She added, "[W]e now exercise our standalone Section 5 authority in a far narrower class of cases than we did throughout most of the twentieth century."[9]

With the exception of certain administrative complaints involving invitations to collude, the agency has pled a standalone Section 5 violation just once in the more than five years since it published the statement.[10]

II. The Text, Structure, and History of Section 5 Reflect a Clear Legislative Mandate Broader than the Sherman and Clayton Acts

By tethering Section 5 to the Sherman and Clayton Acts, the 2015 Statement negates the Commission's core legislative mandate, as reflected in the statutory text, the structure of the law, and the legislative history, and undermines the Commission's institutional strengths.

In 1914, Congress enacted the Federal Trade Commission Act to reach beyond the Sherman Act and to provide an alternative institutional framework for enforcing the antitrust

[5] 2015 Statement, *supra* note 2.

[6] FTC, Statement on the Issuance of Enforcement Principles Regarding "Unfair Methods of Competition" Under Section 5 of the FTC Act, at 2 (Aug. 13, 2015), https://www.ftc.gov/system/files/documents/public_statements/735381/150813commissionstatementsection5.pdf; *see also* Chairwoman Ramirez, *supra* note 3, at 10 ("Today's policy statement reaffirms that this same framework governs standalone Section 5 claims no less than claims arising under the Sherman and Clayton Acts.").

[7] Address by Chairwoman Ramirez, *supra* note 3, at 2.

[8] *Id.* at 4-5.

[9] *Id.* at 2.

[10] *See* Federal Trade Commission's Complaint for Equitable Relief, *FTC v. Qualcomm Inc.*, No. 5:17-cv-00220 (N.D. Cal. Jan. 17, 2017), [hereinafter "Qualcomm Complaint"], https://www.ftc.gov/system/files/documents/cases/170117qualcomm_redacted_complaint.pdf. Even in *Qualcomm*, the Commission primarily relied on arguments under the Sherman Act; the standalone theory was not a core focus of the litigation.

laws.[11] After the Supreme Court announced in *Standard Oil* that it would subject restraints of trade to an open-ended "standard of reason" under the Sherman Act, lawmakers were concerned that this approach to antitrust delayed resolution of cases, delivered inconsistent and unpredictable results, and yielded outsized and unchecked interpretive authority to the courts.[12] For instance, Senator Newlands complained that *Standard Oil* left antitrust regulation "to the varying judgments of different courts upon the facts and the law"; he thus sought to create an "administrative tribunal … with powers of recommendation, with powers of condemnation, [and] with powers of correction."[13] Likewise, a 1913 Senate committee report lamented that the rule of reason had made it "impossible to predict" whether courts would condemn many "practices that seriously interfere with competition, and are plainly opposed to the public welfare," and thus called for legislation "establishing a commission for the better administration of the law and to aid in its enforcement."[14] These concerns spurred the passage of the FTC Act, which created an administrative body that could police unlawful business practices with greater expertise and democratic accountability than courts provided.[15]

At the heart of the statute was Section 5, which declares "unfair methods of competition" unlawful.[16] By proscribing conduct using this new term, rather than codifying either the text or judicial interpretations of the Sherman Act, the plain language of the statute makes clear that Congress intended for Section 5 to reach beyond existing antitrust law.

The structure of Section 5 also supports a reading that is not limited to an extension of the Sherman Act. Notably, the FTC Act's remedial scheme differs significantly from the remedial structure of the other antitrust statutes. The Commission cannot pursue criminal penalties for violations of "unfair methods of competition," and Section 5 provides no private right of action, shielding violators from private lawsuits and treble damages. In this way, the institutional design laid out in the FTC Act reflects a basic tradeoff: Section 5 grants the Commission extensive authority to shape doctrine and reach conduct not otherwise prohibited by the Sherman Act, but provides a more limited set of remedies.[17]

The legislative debate around the FTC Act makes clear that the text and structure of the statute were intentional. Lawmakers chose to leave it to the Commission to determine which practices fell into the category of "unfair methods of competition" rather than attempt to define through statute the various unlawful practices, given that "there were too many unfair practices

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[11] *See* Neil Averitt, *The Meaning of 'Unfair Methods of Competition' in Section 5 of the FTC Act*, 21 B.C. L. REV. 227, 229-240 (1980).

[12] *Id*. at 232-237. *See Standard Oil Co. v. United States*, 221 U.S. 1, 60 (1911).

[13] *See* 47 CONG. REC. 1225 (1911) (statement of Sen. Newlands).

[14] S. REP. NO. 1326, 62d Cong., 3d Sess., at xiv (1913).

[15] *See* Averitt, *supra* note 11, at 232-37.

[16] 15 U.S.C. § 45(a).

[17] William E. Kovacic & Marc Winerman, *Competition Policy and the Application of Section 5 of the Federal Trade Commission Act*, 76 ANTITRUST L.J. 929, 932 (2010).

to define, and after writing 20 of them into the law it would be quite possible to invent others."[18] Lawmakers were clear that Section 5 was designed to extend beyond the reach of the antitrust laws.[19] For example, Senator Cummins, one of the main sponsors of the FTC Act, stated that the purpose of Section 5 was "to make some things punishable, to prevent some things, that cannot be punished or prevented under the antitrust law."[20]

The Supreme Court has repeatedly affirmed this view of the agency's Section 5 authority, holding that the statute, by its plain text, does not limit unfair methods of competition to practices that violate other antitrust laws.[21] The Court, recognizing the Commission's expertise in competition matters, has given "deference"[22] and "great weight"[23] to the Commission's determination that a practice is unfair and should be condemned.

Although the Commission suffered a few notable defeats under Section 5 in the early 1980s, those decisions in no way support the 2015 Statement's decision to tether Section 5 to the Sherman and Clayton Acts. For example, in *Boise Cascade*, the Ninth Circuit ruled that the evidence did not support the Commission's factual finding that the defendants' conduct had an adverse effect on prices.[24] In *Ethyl*, the Second Circuit explicitly held that the FTC's Section 5 authority is broader than the Sherman or Clayton Acts, but it required the Commission to show that the challenged conduct is "collusive, coercive, predatory, or exclusionary," or has an "anticompetitive purpose," or "cannot be supported by an independent legitimate reason."[25] In short, these decisions confirm that Section 5 empowers the Commission to prohibit conduct that does not violate other antitrust laws, so long as it clearly explains why the practice is illegitimate and bases that ruling on substantial evidence.

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[18] S. REP. NO. 597, 63d Cong., 2d Sess., 13 (1914) ("The committee gave careful consideration to the question as to whether it would attempt to define the many and variable unfair practices which prevail in commerce and to forbid [them] or whether it would, by a general declaration condemning unfair practices, leave it to the commission to determine what practices were unfair. It concluded that the latter course would be the better, for the reason . . . that there were too many unfair practices to define, and after writing 20 of them into the law it would be quite possible to invent others.").

[19] *See* Averitt, *supra* note 11, at 251-252.

[20] 51 CONG. REC. 11, 236 (1914) (statement of Sen. Cummins).

[21] *See FTC v. Ind. Fed'n of Dentists*, 476 U.S. 447, 454 (1986); *FTC v. Sperry & Hutchinson Co*., 405 U.S. 233, 244 (1972); *FTC v. Brown Shoe Co.,* 384 U.S. 316, 321 (1966); *FTC v. Motion Picture Advert. Serv. Co.,* 344 U.S. 392, 394-95 (1953); *FTC v. R.F. Keppel & Bros., Inc.*, 291 U.S. 304, 309-310 (1934).

[22] *Ind. Fed'n of Dentists*, 476 U.S. at 454.

[23] *Atl. Ref. Co. v. FTC*, 381 U.S. 357, 368 (1965) (quoting *FTC v. Cement Inst.*, 333 U.S. 683, 720 (1948)).

[24] *Boise Cascade Corp. v. FTC*, 637 F.2d 573, 577-82 (9th Cir. 1980).

[25] *E.I. du Pont de Nemours & Co. v. FTC*, 729 F.2d 128, 136-40 (2d Cir. 1984). *See also Official Airline Guides, Inc. v. FTC*, 630 F.2d 920, 927-28 (2d Cir. 1980) (holding that while courts must give "great weight" to the Commission's judgment that a practice is unfair, the Commission could not condemn a monopolist's refusal to deal where it "has no purpose to restrain competition or expand [its] monopoly, and does not act coercively").

III. The 2015 Statement Overlooks the Unique Features of Section 5, Ratifies an Unadministrable Approach, and Perpetuates Uncertainty in the Law

In addition to flouting a clear congressional mandate, the 2015 Statement fails to consider or even recognize the unique features of or limits on Section 5. By instead confining Section 5 to the framework that presently governs the Sherman and Clayton Acts, the 2015 Statement willfully surrenders the Commission's key institutional advantages as an administrative agency with the power to adjudicate cases, issue rules and industry guidance, and conduct detailed marketplace studies.[26]

The Commission's efforts to constrain Section 5 in this way have only hindered the agency's enforcement efforts. Coupling Section 5 to the Sherman Act has led courts to bind the FTC to liability standards created by generalist judges in private treble-damages actions under the Sherman Act, despite the striking differences in institutional contexts and the Commission's unique role as an expert public body.[27] Aside from invitations to collude—which the agency has long treated as a violation of Section 5[28]—the Commission has pled a standalone Section 5 claim just once since the issuance of the 2015 Statement.[29] In practice, the Statement has doubled down on the Commission's longstanding failure to investigate and pursue "unfair methods of competition."

Moreover, by subjecting Section 5 to a framework similar to the rule of reason, the Commission hamstrings its enforcement mission with an approach that poses significant administrability concerns. The current iteration of the rule of reason invites courts to assess whether particular business conduct is "unreasonable," including through determining whether the "procompetitive" effects of the conduct outweigh any "anticompetitive" effects.[30] Famously unwieldy, the standard leads to soaring enforcement costs, risks inconsistent outcomes, and has been decried by judges as unadministrable or exceedingly difficult to meet.[31]

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[26] *See, e.g.*, Professor Daniel A. Crane, Comments at FTC Workshop on Section 5 of the FTC Act as a Competition Statute, 73-74 (Oct. 17, 2008), https://www.ftc.gov/sites/default/files/documents/public_events/section-5-ftc-act-competition-statute/transcript.pdf, ("What I want to suggest is that, in many ways, by marrying the meaning of Section 5 to the Sherman Act, the FTC is losing many, many of its institutional advantages, as both a norm creator and an enforcer of antitrust law.").

[27] *See id.* at 76 ("[B]y coupling the Sherman Act to the FTC Act, the FTC gets saddled with a rule that was created in a completely different institutional context with different considerations."); *id.* at 77 ("I think this is a huge mistake in terms of the institutional context. You're taking baggage you don't have to take and you shouldn't take and it leads to weakened liability norms in the FTC.").

[28] *See, e.g.*, Oregon Lithoprint, Inc.; Analysis to Aid Public Comment, 83 Fed. Reg. 11529, 11531 (Mar. 15, 2018) ("The Commission has long held that an invitation to collude violates Section 5 of the FTC Act even where there is no proof that the competitor accepted the invitation.").

[29] *See Qualcomm* Complaint, supra note 10.

[30] *See, e.g.*, *Ohio v. Am. Express Co.*, 138 S. Ct. 2274, 2283-84 (2018).

[31] *See, e.g.*, *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877, 916 (2007) (Breyer, J., dissenting) ("How easily can courts identify instances in which the benefits are likely to outweigh potential harms? My own answer is, *not very easily*."); Richard A. Posner, *The Rule of Reason and the*

In practice, courts have also used the weaknesses of the rule of reason as a basis for restricting private antitrust plaintiffs.[32] As the Supreme Court recently pointed out, scholars have found that the defendant prevailed in "nearly all rule of reason cases in the last 45 years on the ground that the plaintiff failed to show a substantial anticompetitive effect."[33] Indeed, lawmakers' concerns about the infirmities of the rule of reason standard were partly why Congress enacted Section 5 in the first place.[34] Tying Section 5 back to this framework offends the plain text, structure, and legislative history of Section 5 and needlessly constrains the Commission from taking action to safeguard the public from unfair methods of competition.

The 2015 Statement is also rife with internal contradictions that may effectively read the Commission's standalone Section 5 authority out of the statute altogether. First, although the Statement recognizes that Section 5 prohibits conduct that would violate the Sherman or Clayton Acts "if allowed to mature or complete," it then requires the Commission to prove "likely" anticompetitive effects under the rule of reason.[35] Importing the rule of reason's likelihood requirement would abrogate the Commission's statutory mandate to combat incipient wrongdoing *before* it becomes likely to harm consumers or competition. As the Supreme Court has held, Section 5 "was designed to supplement and bolster the Sherman Act and Clayton Act—to stop in their incipiency acts and practices which, when full blown, would violate those Acts."[36]

Second, although the 2015 Statement declares that the Commission will apply a "framework similar to the rule of reason," it then suggests that the Commission will typically refrain from bringing a standalone Section 5 case where the Sherman or Clayton Acts already apply. But it is hard to imagine what, if any, cases could ever meet both of these criteria: With the exception of invitations to collude, almost every practice that is unlawful under the rule of reason will already be subject to the Sherman or Clayton Acts and thus (according to the 2015 Statement) be improper targets for standalone Section 5 enforcement. The 2015 Statement may have hinted at a broader reading of Section 5 by embracing an undefined "framework *similar to*" the rule of reason, but if that was the Commission's intent, the reference was far too vague to provide any meaningful guidance. By both wedding Section 5 to the Sherman Act's legal

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Economic Approach: Reflections on the Sylvania Decision, 45 U. CHI. L. REV. 1, 14 (1977) ("The content of the Rule of Reason is largely unknown; in practice, it is little more than a euphemism for nonliability.").

[32] Maurice E. Stucke, *Does the Rule of Reason Violate the Rule of Law?*, 42 U.C. DAVIS L. REV. 1375, 1383, 1423, 1471 (2009).

[33] *NCAA v. Alston*, No. 20-512, slip op. at 25 (June 21, 2021) (citing Brief for 65 Professors of Law, Business, Economics, and Sports Management as Amici Curiae 21, n. 9); *see also* Michael A. Carrier, *The Rule of Reason: An Empirical Update for the 21st Century*, 16 GEO. MASON L. REV. 827 (2009).

[34] *See supra* pp. 2-3.

[35] 2015 Statement, *supra* note 2.

[36] *FTC v. Motion Picture Advert. Serv. Co.*, 344 U.S. 392, 394-95 (1953) (citing *FTC v. Beech-Nut Packing Co.*, 257 U.S. 441, 453 (1922); *Fashion Originators' Guild of Am. v. FTC*, 312 U.S. 457, 463, 466 (1941)); *see also FTC v. Brown Shoe Co.*, 384 U.S. 316, 321-22 (1966).

standard *and* signaling that Section 5 won't be pursued if the Sherman Act already applies, the 2015 Statement effectively turns standalone Section 5 into a dead letter.

More generally, the 2015 Statement assumes a case-by-case approach to "unfair methods of competition," despite widespread recognition that this adjudication-only approach often fails to deliver clear guidance.[37] Without explanation, the Statement fails to address the possibility of the Commission adopting rules to clarify the legal limits that apply to market participants.

The Commission's inability, after a century of commanding this statutory authority, to deliver clear Section 5 principles suggests that the time is right for the Commission to rethink its approach and to recommit to its mandate to police unfair methods of competition even if they are outside the ambit of the Sherman or Clayton Acts. The task will require careful and serious work, but it is one that our enabling statute expected and required.

IV. Looking Ahead

Withdrawing the 2015 Statement is only the start of our efforts to clarify the meaning of Section 5 and apply it to today's markets. Section 5 is one of the Commission's core statutory authorities in competition cases; it is a critical tool that the agency can and must utilize in fulfilling its congressional mandate to condemn unfair methods of competition. In the coming months, the Commission will consider whether to issue new guidance or to propose rules that will further clarify the types of practices that warrant scrutiny under this provision. In the meantime, the Commission will exercise responsibly its prosecutorial discretion in determining which cases are appropriate under Section 5, consistent with legal precedent.

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[37] *See* Rohit Chopra & Lina M. Khan, *The Case for "Unfair Methods of Competition" Rulemaking*, 87 U. CHI. L. REV. 357, 359-63 (2020); Sandeep Vaheesan, *Resurrecting "A Comprehensive Charter of Economic Liberty": The Latent Power of the Federal Trade Commission*, 19 U. PA. J. BUS. L. 645, 668-70 (2017); Jan M. Rybnicek & Joshua D. Wright, *Defining Section 5 of the FTC Act: The Failure of the Common Law Method and the Case for Formal Agency Guidelines*, 21 GEO. MASON L. REV. 1287, 1288, 1304-05 (2014); Kovacic & Winerman, *supra* note 17, at 933-34; C. Scott Hemphill, *An Aggregate Approach to Antitrust: Using New Data and Rulemaking to Preserve Drug Competition*, 109 COLUM. L. REV. 629, 674-80 (2009); Crane, *supra* note 26, at 78-79.

UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
WASHINGTON, D.C. 20580

Office of Commissioner
Noah Joshua Phillips

Remarks of Commissioner Noah Joshua Phillips

Regarding the Commission's Withdrawal of the Section 5 Policy Statement

July 1, 2021

The Majority's decision today to rescind the Commission's bipartisan 2015 Section 5 Policy Statement reduces clarity in the application of the law and augurs an attempt to arrogate terrific regulatory power never intended by Congress to a handful of unelected individuals on the FTC.

This policy proposal was announced just a week ago, the bare minimum notice permitted by law[1], diminishing the public's opportunity to give input. And the members of the public we will hear from today will speak after the vote, so that the FTC cannot consider their views. That is inconsistent with rhetoric we have heard about opening up the policy-making process.

On the proposal, I still do not know to what aspects of that bipartisan policy my colleagues object.

Perhaps it is the first principle, *i.e.,* that the public policy underlying the antitrust laws is the promotion of consumer welfare.[2] That has been black-letter Supreme Court law for almost my entire life.[3]

Maybe they object to the second, applying the "Rule of Reason", which means we look carefully at the facts to determine the effect of a company's conduct. That has been the law for over a century, as a unanimous Supreme Court reminded us just days ago, handing plaintiffs a victory in the *NCAA v. Alston* case.[4]

The policy statement we are rescinding was based on court decisions explaining the limits of Section 5.[5] Will we follow those?

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[1] 5 U.S.C. § 552b(e)(1)

[2] Fed. Trade Comm'n, *Statement of Enforcement Principles Regarding "Unfair Methods of Competition" Under Section 5 of the FTC Act* (2015), https://www.ftc.gov/system/files/documents/public_statements/735201/150813section5enforcement.pdf.

[3] *See* Reiter v. Sonotone Corp., 442 U.S. 330 (1979) (describing the Sherman Act as a "consumer welfare prescription").

[4] NCAA v. Alston, 594 U. S. __ (2021).

[5] *See, e.g.,* Address by FTC Chairwoman Edith Ramirez, Competition Law Center, George Washington University Law School (Aug. 13, 2015), https://www.ftc.gov/system/files/documents/public_statements/735411/150813section5speech.pdf.

I do not know. The public does not know. The honest businesses looking to follow the law do not know. If it is the Majority's view that the principles outlined in the Statement no longer reflect the Commission's enforcement practice, that the Commission no longer plans to abide by legal precedent, or that Section 5 is a law without limit, they should say so—and how—on the record.

Here we are at a public hearing, with a chance to add transparency, but instead we are doing the opposite: removing guidance and adding uncertainty.

This is not consistent with public statements my colleagues have made. Chair Khan and Commissioner Chopra previously wrote, for example, that clear rules "help deliver consistent enforcement and predictable results".[6] So why is one of their first initiatives to reduce clarity as to the Commission's interpretation of Section 5? They could offer a replacement—*that* could add clarity—but they decline to do so.

Reducing clarity in how the Commission will approach antitrust enforcement is bad enough, but it is particularly troubling in light of my colleagues' publicly-stated desire to fashion antitrust regulations.[7] Not only are they refusing to articulate limits to the Commission's ability to declare conduct illegal after investigating it, they are also refusing to articulate limits on their view of what they can regulate. Today, in effect, the majority is asserting broad authority to regulate the economy. They mean, in other words, for just a handful of people to answer major policy questions with no intelligible principle from Congress to guide us.[8]

My view is that our laws permit no such thing. But leaving that aside; if the majority believe they have that power, I believe it is incumbent upon them to explain its limits.

I am deeply concerned that the Commission's action today unleashes unchecked regulatory authority on businesses subject to Section 5 while keeping those businesses in the dark about which conduct is lawful and which is unlawful. And, we are undertaking it with virtually no input from the public. The need for certainty and predictability are basic tenets of good government. Today, I regret that the Commission came up short.

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[6] Rohit Chopra & Lina M. Khan, *The Case for "Unfair Methods of Competition" Rulemaking*, 87 Univ. of Chicago L. Rev. 357, 368 (2020).

[7] *See, e.g., id.*, *Reviving Competition, Part 3: Strengthening the Laws to Address Monopoly Power*: *Hearing Before the H. Comm. on the Judiciary*, 117th Cong. 7 (statement of Acting FTC Chairwoman Rebecca Kelly Slaughter).

[8] *Cf.* Gundy v. United States, 139 S. Ct. 2116 (2019) (Gorsuch, N., dissenting); Paul v. United States, 140 S. Ct. 342. (2019) (Kavanaugh, B., statement respecting denial of cert.).

Dissenting Statement of Commissioner Christine S. Wilson

Open Commission Meeting on July 1, 2021

Made in USA Final Rule

Section 18 Rulemaking Procedures

Statement of Enforcement Principles Regarding 'Unfair Methods of Competition' Under Section 5 of the FTC Act (2015)

Enforcement Investigations/Omnibuses Procedures

Today the Commission held an open meeting on four agenda items. To facilitate transparency, I post here the remarks I made during the course of the meeting.

I. Introductory Remarks

Good afternoon to the Commission and to those watching these proceedings. I want to thank the members of the public who participated in the meeting, and provided feedback about the work of the Commission and areas that may be fruitful to pursue.

I support greater transparency in government decision making generally, and in federal antitrust enforcement specifically. With sufficient notice, advance planning, input from our knowledgeable staff, and a robust dialogue among my fellow Commissioners, open Commission meetings could facilitate that goal. Unfortunately, today's meeting falls short on all accounts. In fact, I only learned last Thursday of the Chair's intention to hold this meeting. At the same time, I was informed of her intention to hold votes to rescind the Section 5 Policy Statement and to pass several Omnibus Resolutions that would remove from Commission oversight large swaths of Commission business.

American consumers are best served when policy decisions are made with input from a variety of stakeholders. The FTC has a laudable history of seeking this input by issuing for notice and comment draft policy statements and other initiatives; holding workshops and hearings on policy issues; and preparing thoughtful and thorough reports. Our staff who host these proceedings, and who work each day to fulfill our mission, have developed significant expertise. The work of the Commission is enhanced when staff is available to present recommendations and answer questions. And I benefit from staff recommendations prepared by career professionals who have thought deeply about the issues and who will be tasked with implementing the initiatives on which we are voting. I am certainly better equipped to opine on matters for which I have received staff analyses.

I also benefit from the opportunity to have a dialogue with my fellow Commissioners, each of whom brings different experiences and skill sets to the table.

Unfortunately, the format the Chair has chosen for this meeting omits our knowledgeable staff and precludes a dialogue among the Commissioners. A bipartisan and collaborative approach has been the hallmark of the FTC for years and would be welcome today, particularly given the importance of the matters being considered. We have arrived at the consumer welfare standard, a rulemaking process that respects objectivity and public input, and an appreciation for our limited jurisdiction for very specific reasons. Those reasons are worth discussing, but that requires a thoughtful process. And when we have chaos instead of thoughtful process, it is the American consumer who will suffer.

Ed. Omitted sections:

II. Made in the USA Final Rule

III. Section 18 Rulemaking Procedures

IV. "Statement of Enforcement Principles Regarding 'Unfair Methods of Competition' Under Section 5 of the FTC Act" (2015) Procedures

I oppose rescinding the 2015 Section 5 Policy Statement. It was issued during the Obama Administration on a bipartisan basis.[18] As the majority of Commissioners in 2015 explained, the principles espoused in the Section 5 Policy Statement "are ones on which there is broad consensus."[19] They reflect more than a century of judicial precedent and the input of scholars and the bar.

The Policy Statement provides that (1) the Commission will be guided by the public policy of promoting consumer welfare, (2) conduct will be evaluated considering both likely harm to competition and procompetitive justifications, and (3) a standalone Section 5 case would be less likely when the competitive harm could be addressed by the Sherman and Clayton Acts.

When these Enforcement Principles were issued, most people in the antitrust community concluded that the Policy Statement imposed very few limits on the use of Section 5. But today's vote to rescind the 2015 Policy Statement appears to be an effort to remove even the modest constraint that the Commission will be guided by the public policy of promoting consumer welfare and that the full effects of conduct will be considered.

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to give themselves superior access to markets. In 1893, the Committee on Interstate and Foreign Commerce wrote that '[n]o competition can exist between two producers of a commodity when one of them has the power to prescribe both the price and output of the other.' Congress subsequently enacted a provision to prohibit railroads from transporting any goods that they had produced or in which they held an interest."); *id.* at 382 ("The 1887 Interstate Commerce Act, for example, prohibited discriminatory treatment by railroads."); *id.* at 383 ("Historically, Congress has implemented nondiscrimination requirements in a variety of markets. With railroads, the Interstate Commerce Commission oversaw obligations and prohibitions applied to railroads designated as common carriers"); *see also* Christine S. Wilson & Keith Klovers, *The growing nostalgia for past regulatory misadventures and the risk of repeating these mistakes with Big Tech*, 8 J. Antitrust Enforcement 10, 12-14 (2019), https://academic.oup.com/antitrust/article/8/1/10/5614371 (discussing the benefits from dissolving the ICC).

[18] Chairwoman Ramirez and Commissioners Brill, Wright, and McSweeny supported issuing the Enforcement Principles.

[19] Statement of the Federal Trade Commission On the Issuance of Enforcement Principles Regarding "Unfair Methods of Competition" Under Section 5 of the FTC Act , https://www.ftc.gov/system/files/documents/public_statements/735381/150813commissionstatementsection5.pdf, at 2 (August 13, 2015).

The consumer welfare standard is premised on evolving economic analysis. It promotes predictability, administrability and credibility in antitrust enforcement.[20] Without it, we can expect that antitrust enforcement will reflect political motivations rather than reasoned and objective assessments of benefits and harms to consumers. Enforcement based on political motivations rather than economic analysis would produce unpredictable outcomes that lack credibility.[21] Decades of antitrust enforcement guided by the consumer welfare standard demonstrate that the standard is administrable.

I've said before that what you measure is what you get. If the Commission is no longer measuring consumer welfare, then by definition, consumers will be harmed by the Commission's change of direction to prioritize other interests. Consumers will face higher prices, less innovation and reductions in quality because, contrary to popular assertions, the consumer welfare standard takes into account price, quality, and innovation.

If staff were here today, I would ask them: what cases would they have brought but thought were precluded by the constraints of the Section 5 Enforcement Principles? And if dialogue with my fellow commissioners were permitted, it would be constructive to discuss additional questions:

- If we rescind the Policy Statement, with what do we plan to replace it?

- When FTC Chairman Jon Leibowitz announced a plan to use Section 5 expansively, I was in private practice. I spent a great deal of time counseling concerned clients about what types of conduct could possibly run afoul of Section 5. In my experience, businesses *want* to follow the law – but they need to know what the law is. Are we concerned with the lack of clarity that we will create for the business community if we rescind the Policy Statement?

- If promoting consumer welfare is no longer the guide for Section 5 enforcement, what principles will guide Commission actions? If the Commission will not be guided by protecting consumer interests, whose interests will guide the Commission's enforcement of Section 5? Complaining, inefficient competitors?

- In the interest of transparency, do my colleagues plan to inform the public of the types of cases they intend to bring that were precluded by the Policy Statement?

- At a time when Senator Lee has introduced legislation that would eliminate the Commission's antitrust enforcement because of divergence between the antitrust agencies,[22] are my colleagues concerned that divorcing the use of Section 5 from the accepted antitrust principle of protecting consumers will further separate the

[20] *See* Christine S. Wilson, Thomas J. Klotz & Jeremy A. Sandford, *Recalibrating the Dialogue on Welfare Standards: Reinserting the Total Welfare Standard into the Debate*, 26 Geo. Mason L. Rev. 1435, 1444-46 (2019).

[21] *See id.* at 1453-55.

[22] One Agency Act, S. 633, 117th Cong. § 4 (2021).

Commission's enforcement of the antitrust laws from enforcement by the Department of Justice?

I acknowledge that the Commission may be able to identify language in court decisions that may appear to allow a broad use of Section 5, but prudence dictates that the Commission limit its use of standalone Section 5 cases to the public policy underlying the antitrust laws and to conduct that harms consumers.[23] In the 1980s, the Commission lost three cases when it attempted to push Section 5 beyond the boundaries of accepted antitrust principles. The Commission needs to acknowledge the Commission's losses in the *Ethyl* case,[24] *Boise Cascade Corp. v. FTC*,[25] and the *Official Airline Guides* case.[26]

And as I mentioned previously, the Commission was just admonished by a unanimous Supreme Court in *AMG* regarding the interpretation of our authority. The response to that decision should not be a new concerted effort by the Commission to exceed the FTC's authority regarding the use of Section 5 of the FTC Act. A decision to rescind the 2015 Enforcement Principles regarding the use of Section 5 appears to be the unfortunate first step toward that end.

V. Enforcement Investigations/ Omnibuses Procedures

Ed. Omitted

[23] *See generally* Christine S. Wilson, Remarks at Global Competition Law Lecture Series, Centre of European Law, Dickson Poon School of Law, King's College London, (Nov. 19, 2020), https://www.ftc.gov/system/files/documents/public_statements/1587210/remarks_of_commissioner_christine_s_wilson_at_kings_college_london.pdf.

[24] E.I. du Pont de Nemours & Co. v. FTC, 729 F.2d 128, 139 (2d Cir. 1984).

[25] Boise Cascade Corp. v. FTC, 637 F.2d 573, 582 (9th Cir. 1980).

[26] Official Airline Guides, Inc. v. FTC, 630 F.2d 920, 927 (2d Cir. 1980).

In February 2018, the Senate Commerce Committee held a confirmation hearing for Joe Simons, Noah Phillips, Rohit Chopra, and me. Each of us was asked to reiterate our commitment to a collaborative and bipartisan process. Indeed, the Senate Commerce Committee emphasized that it expected the FTC to continue its legacy of bipartisan cooperation. This is my third stint at the FTC, and I know that the Senate Commerce Committee was correct to seek this commitment from us. Collaboration makes the FTC stronger, improves our enforcement, and is a characteristic to be nurtured, not abandoned.

Process matters. I welcome a dialogue with our new Chair and my fellow Commissioners on substance, but encourage our Chair to conduct that dialogue with thought and care.

FTC Open Meeting (July 1, 2021) (video excerpts)

This is a very large file that does not stream and must be downloaded before viewing. Alternatively, go to the complete streaming version on the FTC web page, listen to the introduction up to the first issue and then skip to around 43:20 for the portion of the proceeding that deals with the withdrawal of the 1995 Policy Statement.

2022 FTC Section 5 Policy Statement

Policy Statement Regarding the Scope of Unfair Methods of Competition Under Section 5 of the Federal Trade Commission Act Commission File No. P221202

November 10, 2022

Section 5 of the Federal Trade Commission Act (FTC Act) prohibits "unfair methods of competition in or affecting commerce."[1] On July 1, 2021, the Federal Trade Commission (FTC) rescinded its 2015 Statement of Enforcement Principles Regarding "Unfair Methods of Competition" under Section 5 of the FTC Act.[2] This statement supersedes all prior FTC policy statements and advisory guidance on the scope and meaning of unfair methods of competition under Section 5 of the FTC Act.

I. Introduction

Pursuant to the FTC's analysis of the decided cases and prior enforcement actions, this policy statement describes the key principles of general applicability concerning whether conduct is an unfair method of competition. Consistent with the Supreme Court's interpretation of the FTC Act in at least twelve decisions, this statement makes clear that Section 5 reaches beyond the Sherman and Clayton Acts to encompass various types of unfair conduct that tend to negatively affect competitive conditions.[3]

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[1] Pub. L. No. 63-203, 38 Stat. 717; 15 U.S.C. § 45(a)(1).

[2] Fed. Trade Comm'n, Statement of the Commission on the Withdrawal of the Statement of Enforcement Principles Regarding "Unfair Methods of Competition" Under Section 5 of the FTC Act (July 9, 2021), https://www.ftc.gov/legal-library/browse/statement-commission-withdrawal-statement-enforcement-principles-regarding-unfair-methods.

[3] *See, e.g. Fed. Trade Comm'n v. Ind. Fed'n of Dentists*, 476 U.S. 447, 454 (1986) (holding that "[t]he standard of "unfairness" under the FTC Act is, by necessity, an elusive one, encompassing not only practices that violate the Sherman Act and the other antitrust laws"); *Fed. Trade Comm'n v. Sperry & Hutchinson Co.*, 405 U.S. 233, 242 (1972) (holding that "the Commission has broad powers to declare trade practices unfair."); *Fed. Trade Comm'n v. Texaco*, 393 U.S. 223, 262 (1968) (holding that "[i]n large measure the task of defining "unfair methods of competition" was left to the [FTC]. . . and that the legislative history shows that Congress concluded that the best check on unfair competition would be [a practical and expert administrative body] . . . [that applies] the rule enacted by Congress to particular business situations"); *Fed. Trade Comm'n v. Brown Shoe*, 384 U.S. 316, 321 (1966) (holding that the FTC "has broad powers to declare trade practices unfair[,] particularly . . . with regard to trade practices which conflict with the basic policies of the Sherman and Clayton Acts"); *Atlantic Refining Co. v. Fed. Trade Comm'n,* 381 U.S. 357, 369 (1965) (holding that all that is necessary is to discover conduct that runs counter to the public policy declared in the Act. . ." and that "there are many unfair methods of competition that do not assume the proportions of antitrust violations"); *Fed. Trade Comm'n v. Colgate-Palmolive et al.*, 380 U.S. 377, 384-85 (1965) (noting that the proscriptions in section 5 are flexible); *PAN AM v. United States*, 371 U.S. 296, 306 -308 (1963) ("[Section 5] was designed to bolster and strengthen antitrust enforcement[,] and the definitions are not limited to precise practices that can readily be catalogued. They take their meaning from the facts of each case and the impact of particular practices on competition and monopoly"); *Fed. Trade Comm'n v. Nat'l Lead Co.*, 352 U.S. 419, 428-29 (1957) (affirming past rulings finding that the commission is clothed with "wide discretion in. . . [bringing] an end to the unfair practices found to exist[;]. . . [is] 'the expert body to determine what remedy is necessary to eliminate the unfair or deceptive trade practices which have been disclosed[;] . . . has wide latitude for

This statement is intended to assist the public, business community, and antitrust practitioners by laying out the key general principles that apply to whether business practices constitute unfair methods of competition under Section 5 of the FTC Act. In considering whether conduct, either in a specific instance or as a category, constitutes an unfair method of competition, the Commission will directly consult applicable law. This statement does not pertain to any other statutory provision within the FTC's jurisdiction.[4]

II. Background and Legislative History of Section 5 of the FTC Act

A. The text, structure, and legislative history of Section 5 show that its mandate extends beyond the Sherman and Clayton Acts and reaches unfair conduct with a tendency to negatively affect competitive conditions

As the Commission explained in its July 2021 withdrawal of the previous policy statement, the text, structure, and history of Section 5 reaches more broadly than the antitrust laws.[5] Congress passed the FTC Act to push back against the judiciary's adoption and use of the open-ended rule of reason for analyzing Sherman Act claims,[6] which it feared would deliver inconsistent and unpredictable results and "substitute the court in the place of Congress."[7]

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judgment and[;]. . . [that] to attain the objectives Congress envisioned, [the FTC] cannot be required to confine its road block to the narrow lane the transgressor has traveled"); *American Airlines, Inc. v. North American Airlines, Inc*., 351 U.S. 79, 85 (1956) (finding that "[u]nfair or deceptive practices or unfair methods of competition". . . are broader concepts than the common-law idea of unfair competition"); *Fed. Trade Comm'n v. Motion Picture Advertising Service Co*., 344 U.S. 392, 394-95 (1953) (noting that "Congress advisedly left the concept [of unfair methods of competition] flexible . . . [and] designed it to supplement and bolster the Sherman Act and the Clayton Act[,] [so as] to stop . . . acts and practices [in their incipiency] which, when full blown, would violate those Acts[,]. . . as well as to condemn as "unfair methods of competition" existing violations of them"); *Fed. Trade Comm'n v. Cement Institute*, 333 U.S. 683, 708 (1948) (holding that conduct that falls short of violating the Sherman Act may violate Section 5); *Fed. Trade Comm'n v. R. F. Keppel & Bro., Inc.*, 291 U.S. 304, 310 (1934) (finding that unfair methods of competition not limited to those "which are forbidden at common law or which are likely to grow into violations of the Sherman Act").

[4] This statement does not address the Commission's authority to prevent unfair or deceptive acts or practices in 15 U.S.C. §§ 45(a),(n). This statement is limited to the scope of standalone unfair methods of competition Section 5 violations. Such standalone unfair methods of competition Section 5 claims may be brought under one or more of the theories set forth in this policy statement and combined with claims under other parts of the FTC Act or other statutes enforced by the Commission as warranted.
This statement does not address the language of 15 U.S.C. § 45(b), which states that the Commission will act when it has reason to believe such action is in the public interest. *See generally Hills Bros. v. Fed. Trade Comm'n*, 9 F.2d 481, 483–84 (9th Cir. 1926) ("the interest of the public, like the question whether the commission has reason to believe that any person, partnership, or corporation has been or is using any unfair method of competition in commerce, is committed to the discretion of the commission, is to be determined by the commission before proceedings are instituted, and is not thereafter a subject of controversy either before the commission or before the court, except in so far as the question of public interest is necessarily involved in the merits of the case, and, if the commission finds that the method of competition in question is prohibited by the act, no other or further finding on the question of public interest is required."); *see also Parke, Austin & Lipscomb, Inc., et al. v. Fed. Trade Comm'n*, 142 F.2d 437, 441 (2d Cir. 1944).

[5] Statement of Commission, *supra* note 2.

[6] *Standard Oil Co. of New Jersey v. United States*, 221 U.S. 1, 60 (1911).

[7] S. REP. NO. 62-1326, at 10 (1913) ("Cummins Report"). Senator Francis Newlands, one of the chief sponsors of the bill that became the FTC Act, expressed concern that *Standard Oil* left antitrust regulation "to the varying judgments of different courts." 47 CONG. REC. 1225 (1911). After analyzing a series of Supreme Court decisions

Congress therefore determined it would "establish[ ] a commission for the better administration of the law and to aid in its enforcement."[8] This led to the creation of the FTC in 1914 and to the enactment of a prohibition of "unfair methods of competition," a new standard in federal competition law.[9]

In enacting Section 5, Congress's aim was to create a new prohibition broader than, and different from, the Sherman and Clayton Acts. Congress purposely introduced the phrase, "unfair methods of competition," in the FTC Act to distinguish the FTC's authority from the definition of "unfair competition" at common law.[10] It also made clear that Section 5 was designed to extend beyond the reach of the antitrust laws.[11] Concluding that a static definition would soon become outdated,[12] Congress wanted to give the Commission flexibility to adapt to changing circumstances.[13]

The key function of the FTC in applying its mandate to combat unfair methods of competition, according to Congress, would be to identify *unfair* forms of competition.[14] The legislative record demonstrates that Congress enacted Section 5 to protect against various types of unfair or oppressive conduct in the marketplace.[15] During debates over the meaning of unfair

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interpreting the Sherman Act, a Senate committee feared that the rule of reason resulted in a situation where, "in each instance it [would be] for the court to determine whether the established restraint of trade is a due restraint or an undue restraint." Cummins Report, at 10. It lamented that the rule of reason had made it "impossible to predict with any certainty" whether courts would condemn the many "practices that seriously interfere with competition" and found it inconceivable that "the courts . . . be permitted to test each restraint of trade by the economic standard which the individual members of the court may happen to approve." *Id*. at 10, 12. The committee believed this would result in a loss of confidence by the public in the courts and eventually lead to a "repudiat[ion] [of] the fundamental principles of representative government." *Id*. at 11.

[8] *Id*. at 12.

[9] Federal Trade Commission Act of 1914, Pub. L. No. 63-203, 38 Stat. 717 (codified as amended at 15 U.S.C. § 41–58). *See* 51 CONG. REC. 12146 (1914) (statement of Sen. Hollis) ("The Sherman Act is adequate for the abolition of monopoly; it is, however, but imperfectly adequate for the regulation of competition. The present Congress is charged with the duty of supplying the defect in the law").

[10] *See* 51 CONG. REC. 12936 (1914) (statement of Sen. Reed) ("It is my opinion that if we employ the term "unfair competition" as it is employed in this bill, without adding anything to it, the courts will adopt as the meaning of Congress that meaning which has been affixed to the term by all of the law dictionaries and by a great many legal authorities."). *See also* 51 CONG. REC. 12814 (1914) (statement of Sen. George Sutherland).

[11] *See E.I. du Pont de Nemours v. Fed. Trade Comm'n* (*Ethyl)*, 729 F.2d 128, 136 (2d Cir. 1984) ("Congress' aim was to protect society against oppressive anti-competitive conduct and thus assure that the conduct prohibited by the Sherman and Clayton Acts would be supplemented as necessary and any interstices filled") (citing H.R. REP. NO. 63-1142, at 19 (1914) (Conf. Rep.)); 51 CONG. REC. 11236 (1914) (statement of Sen. Cummins) (stating that the purpose of Section 5 was "to make some things punishable, to prevent some things, that cannot be punished or prevented under the antitrust law").

[12] H.R. REP. NO. 63-1142, at 19.

[13] *See id.* at 18–19.

[14] *Id*. at 19.

[15] *Id*. at 2 (declaring "unfair and oppressive competition to be unlawful"); S. REP. NO. 63-597, at 17 (1914) (citing a previous version of the bill, S. 2941, which would allow the commission to revoke the registration of any corporation using "materially unfair or oppressive methods of competition"); 51 CONG. REC. 8861 (1914) (statement of Rep. Hinebaugh) (seeking to prevent "unfair or oppressive competition" and proceeding to list examples); *id*. at 8979 (statement of Rep. Murdock) (seeking to protect to protect "smaller, weaker business organizations from the oppressive and unfair competition of their more powerful rivals"); *id*. at 13117 (statement of Sen. Reed) ("intended to reach unfair, dishonest, crooked, oppressive, coercive acts. It is not intended to cover mere mistakes").

methods of competition, members of Congress had no difficulty identifying concrete examples.[16] One congressman noted that when it comes to unfair methods of competition, "[t]here is that in the common sense of fairness and right dealing which indicates plainly the distinction between close bargaining and oppression."[17] Both the House and Senate also expressed a common understanding that unfair methods of competition encompassed conduct that tended to undermine "competitive conditions" in the marketplace.[18]

Congress evinced a clear aim that "unfair methods of competition" need not require a showing of current anticompetitive harm or anticompetitive intent in every case. First, the legislative history is replete with statements to the effect that Congress wanted the FTC to stop monopolies in their "incipiency."[19] Requiring the FTC to show current anticompetitive effects,

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[16] For instance, a Senate report referenced practices "such as local price cutting, interlocking directorates, and holding companies intended to restrain substantial competition." S. REP. NO. 63-597, at 13. In considering what conduct should be prohibited, the House distinguished between "artificial bases" of monopolistic power and "natural bases." *See* H.R. REP. NO. 63-533, at 23–25. The House viewed artificial bases of monopolistic power to include, for instance, the acceptance of rates or terms of service from common carriers not granted to other shippers; price discrimination not justified by differences in cost or distribution; procuring the secrets of competitors by bribery or any illegal means; procuring conduct on the part of employees of competitors inconsistent with their duties to their employers; making oppressive exclusive contracts; the maintenance of secret subsidiaries or secretly controlled agencies held out as independent; the destruction or material lessening of competition through the use of interlocking directorates; and the charging of exorbitant prices where the seller has a substantial monopoly. *Id*. Natural bases included control of natural resources, transportation facilities, financial resources, or any other economic condition inherent in the character of the industry, such as patent rights. *Id*. *See also* 51 CONG. REC. 11084–86 (1914) (statement of Sen. Newlands) (discussing jurisprudence on unfair competition); *id*. at 14928-14931 (statement of Rep. Covington) (discussing jurisprudence on unfair competition); *id*. at 11108 (statement of Sen. Newlands) (providing specific examples of unfair competition, such as local price cutting and organizing "bogus independent concerns . . . for the purpose of entering the field of the adversary and cutting prices with a view to his destruction[,]" among other things); *id*. at 11230 (statement of Sen. Robinson) (providing examples of unfair competition).

[17] 51 CONG. REC. 8979 (statement of Sen. Murdock).

[18] *See* S. REP. NO. 1326, at 3–4 (stating that "Congress should maintain the policy established by the anti-trust law" to "'maintain[ ] competitive conditions," and that "every possible effort to create and preserve competitive conditions should be made"); *id.* at 2, 3-4, 11, & 13; S. REP. NO. 63-597, at 10 ("a commission is a necessary adjunct to the preservation of competition and to the practical enforcement of the law"); H.R. Rep. No. 63-533, at 2 (1914) (reported by Rep. Covington) ("The administration idea and the idea of business men generally, is for the preservation of proper competitive conditions in our great interstate commerce."). The FTC Act's legislative history makes it clear that Congress intended the statute to protect a broad array of market participants including workers and rival businesses. *See* 51 CONG. REC. 13312 (1914) (statement of Sen. Reed) ("it is not required to show restraint of trade or monopoly, but that the acts complained of hinder the business of another, or prohibit another from engaging in business, or restrain trade"); *id*. (statement of Sen. White) ("one of the main objects of this legislation is to prevent a rival in business from using unfair competition to drive his competitor out of business and to prevent this before the business is destroyed"); 51 CONG. REC. 8979 (1914) (statement of Rep. Murdock) (purpose of new Commission "is to protect the smaller, weaker business organizations from the oppressive and unfair competition of their more powerful rivals"). The goals of "protecting consumers against the high prices and [guarding] the interests of employees" were expressed by the House. *See* H.R. REP. NO. 533, 63d Cong., 2d Sess. 14 (1914) (quoting from the Preliminary Report of the Industrial Commission, submitted to Congress in 1900). *See also* 51 CONG. REC. 8854 (1914) (statement of Rep. Morgan) (among goals of Section 5 "to secure labor the highest wage, the largest amount of employment under the most favorable conditions and circumstances").

[19] H.R. REP. NO. 63-1142, at 19 ("[t]he most certain way to stop monopoly at the threshold is to prevent unfair competition"); 51 CONG. REC. 13118) (1914) (statement of Sen. Reed) ("the same class of conspiracies exactly as the Sherman Antitrust Act deals with, except that we propose to strike those acts in their incipiency instead of after

which are typically seen only after the monopoly has passed the "embryonic" stage, would undercut Congress's hope to prohibit unfair business practices prior to, or near, monopoly power.[20] In addition, many of the practices listed by Congress as patently unfair do not automatically carry with them measurable effects.[21] Second, in considering and rejecting a definition of "unfair methods of competition" that would have required a showing of intent, legislators noted that such a requirement would inappropriately restrict the new provision to the metes and bounds of the antitrust laws and place an undue burden on the Commission in proving its cases.[22]

Congress struck an intentional balance when it enacted the FTC Act. It allowed the Commission to proceed against a broader range of anticompetitive conduct than can be reached under the Clayton and Sherman Acts, but it did not establish a private right of action under Section 5, and it limited the preclusive effects of the FTC's enforcement actions in private antitrust cases under the Sherman and Clayton Acts.[23]

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they have been actually worked out into a complete system of monopoly or restraint of trade"); *id*. at 14941 (statement of Rep. Stevens) (noting that section five "[would] give to this commission the power of preventing in their conception and in their beginning some of these unfair processes in competition which have been the chief source of monopoly"); *id*. at 12030 (statement of Sen. Newlands) (remarking that a commission would "check monopoly in the embryo"); *id*. at 11455 (statement of Sen. Cummins) (stating that the new law would "seize the offender before his ravages have gone to the length necessary in order to bring him within the law that we already have"); *id*. at 11087 (statement of Sen. Newlands) (citing the Cummins Report, which anticipated that a commission "could be vastly more effectual than through the courts alone, which in most cases will take no cognizance of violations of the law for months or years after the violation occurred, and when the difficulty of awarding reparation for the wrong is almost insurmountable").

[20] 51 CONG. REC. 13118 (statement of Sen. Reed) (declaring that Congress intended "to do something that will strike a death blow to monopoly. . . to arrest it in its infancy . . . [and] to strike those acts in their incipiency instead of after they have been actually worked out into a complete system of monopoly or restraint of trade."); *id*. at 14927 (statement of Rep. Covington) ("the best and most, effective way to deal with the various practices of unfair or destructive competition which, if permitted to go on unchecked and uncontrolled, become potential for restraint of trade or monopoly"); *id*. at 14929 (statement of Rep. Covington) ("We are seeking . . . to deal, with those practices of unfair trade in their incipient stages which if left untrammeled and uncontrolled become the acts which constitute in their culmination restraint of trade and monopoly and the groundwork of the trusts which have menaced us industrially").

[21] 51 CONG. REC. 12217 (statement of Sen. Newlands) ("all you would have to prove would be an unfair method whose tendency was to stifle competition."); 51 CONG. REC. 13312 (statement of Sen. White) (stating that "one of the main objects of this legislation is to prevent a rival in business from using unfair competition to drive his competitor out of business and to prevent this before the business is destroyed" and that "the unfair acts and practices had to have the effect to destroy or unreasonably hinder the business of another would neutralize this useful feature of the enactment"); 51 CONG. REC. 13311 (statement of Sen. Cummins) ("if the effect is to restrain trade or to create a monopoly[,] we have a complete and perfect prohibition in the antitrust law"); 51 CONG. REC. 13312 (1914) (statement of Sen. Reed) ("it is not required to show restraint of trade or monopoly, but that the acts complained of hinder the business of another, or prohibit another from engaging in business, or restrain trade"); 51 CONG. REC. 8979 (statement of Rep. Murdock) (purpose of new Commission "is to protect the smaller, weaker business organizations from the oppressive and unfair competition of their more powerful rivals.").

[22] 51 CONG. REC. 13311 (1914) (statement of Sen. Cummins) ("[t]here can be unfair competition in which the public is interested without any intent as described in the amendment"); *id*. ("[i]f the effect is to restrain trade or to create a monopoly we have a complete and perfect prohibition in the antitrust law"); *id*. at 13312 (statement of Sen. White) ("but we will have to carry the additional burden of proving the specific intent . . . [t]he proof of the specific intent with which an act was done is, as all lawyers know difficult to make").

[23] Treble damages are not available under the FTC Act. Civil penalties and Section 19's monetary remedies are limited to unfair and deceptive acts or practices. *See* 15 U.S.C. § 45(m)(1)(A); 15 U.S.C. § 57b. A finding that

The Supreme Court has affirmed this same broad view of the scope of Section 5 on numerous occasions.[24] It has condemned coercive and otherwise facially unfair practices that have a tendency to stifle or impair competition.[25] The federal circuit courts have likewise consistently held that the FTC's authority extends not only to "the letter," but also to "the spirit" of the antitrust laws.[26]

B. Congress created the FTC as an expert body charged with elucidating the meaning of Section 5

Congress was careful and deliberate when it created the FTC, an independent agency. The five Commissioners would serve for terms of seven years, which would "give them an opportunity to acquire the expertness" needed to determine what constitutes an unfair method of competition.[27] The Commission would provide guidance to the business community on the legality of business practices (including by issuing advisory opinions),[28] serve as an aid to the courts,[29] and act as an enforcer against unfair methods of competition.[30] Congress gave the Commission powers to conduct quasi-judicial hearings,[31] directly seek injunctive relief in federal court,[32] pursue investigations, prepare reports, and make rules.[33] To balance the Commission's powers, Congress created checks to ensure that the FTC would be accountable to it[34] and that the

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conduct is an unfair method of competition under Section 5 is not given collateral estoppel effect in subsequent private antitrust actions. *Holloway v. Bristol-Myers Corp*., 485 F.2d 986 (D.C. Cir. 1973) (holding that private litigants cannot sue for violations of the FTC Act). *See also* 51 CONG. REC. 13115 (1914) (statement of Sen. Newlands) ("I do not believe in the principle, of assessing threefold damages."); *id*. at 11317 (statement of Sen. McCumber) (moving to strike treble damages provision).

[24] *See supra*, note 3.

[25] *Texaco*, 393 U.S. at 225–26 (citing *Atlantic Refining Co.,* 381 U.S. at 376).

[26] *Ethyl*, 729 F.2d at 136–37 (citing *Sperry & Hutchinson*, 405 U.S. at 239); *Grand Union Co. v. Fed. Trade Comm'n,* 300 F.2d 92, 98–99 (2d Cir. 1962)). *Cf*., *Chuck's Feed & Seed Co. v. Ralston Purina Co*., 810 F.2d 1289, 1292–93 (4th Cir. 1987) (describing Section 5 "as a kind of penumbra around the federal antitrust statutes").

[27] S. REP. NO. 63-597 at 11. *See also id*. at 11 (anticipating that the Commission would "build up a comprehensive body of information for the use and advantage of the Government and the business world"); *id*. at 22 ("we want trained experts; we want precedents; we want a body of administrative law built up.").

[28] *See id*. at 6–7 (citing an address by President Wilson, stating that "the business men of the country . . . desire the advice, the definite guidance and information which can be supplied by an administrative body."); *id*. at 10 (anticipating that the Commission would "aid the business public.").

[29] *See* H.R. REP. NO. 63-533, at 8 (anticipating that the commission would use its investigatory powers in "aid of the courts.").

[30] S. REP. NO. 63-597, at 10 (anticipating that the Commission would have "sufficient power ancillary to the Department of Justice to aid materially and practically in the enforcement of the Sherman law and to aid the business public as well, and, incidentally, to build up a comprehensive body of information for the use and advantage of the Government and the business world"). *See also* H.R. REP. NO. 63-533, at 9.

[31] 15 U.S.C. § 45(b) (providing for adjudicatory hearings).

[32] 15 U.S.C. § 53(b).

[33] *Id*. § 46(a),(b) (authorizing the Commission to investigate corporations and require reports); *id*. § 46(g) (authorizing the Commission to "make rules and regulations for the purpose of carrying out the provisions of this subchapter"); *Nat'l Petroleum Refiners Ass'n v. Fed. Trade Comm'n*, 482 F.2d 672, 673 (D.C. Cir. 1973) (holding that "the Federal Trade Commission is authorized to promulgate rules defining the meaning of the statutory standards of the illegality the Commission is empowered to prevent").

[34] *See, e.g.*, 15 U.S.C. § 46(d),(f),(h) (requiring reports to Congress); *Id*. § 57a(f)(7) (requiring annual reports to Congress); *Id*. § 57b-2(d)(1)(A) (providing for disclosure of protected information to Congress). Congress also holds

FTC's decisions would be reviewable by federal courts of appeal.[35] In the ensuing years, Congress has conducted vigorous oversight of the FTC and the courts have not hesitated to review Commission decisions.[36]

Congress intended for the FTC to be entitled to deference from the courts as an independent, expert agency.[37] Over the years, courts have consistently held that FTC determinations as to what practices constitute an unfair method of competition deserve "great weight,"[38] recognizing that the Commission is an expert agency, rather than "a carbon copy of the Department of Justice."[39]

Even when courts have rejected the Commission's factual conclusions, they have consistently reaffirmed the scope of its Section 5 authority.[40] For example, *Ethyl*, *Boise*, and *OAG* cited prior decisions of the Supreme Court that affirm the distinctive scope of Section 5,[41] but ultimately found that the particular facts at issue lacked evidence of unfairness, either "some indicia of oppressiveness"[42] or some evidence that the conduct tended to negatively affect the market.[43] All three appellate decisions reiterated the well-accepted principle that the Commission "is not confined to [the] letter" of the antitrust laws, and that "[i]t may bar incipient violations of

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the FTC accountable though the budgetary, appointment, and oversight processes, and through numerous statutory enactments and amendments relating to the FTC's powers over the course of the hundred-plus years since the passage of the Federal Trade Commission Act.

[35] 15 U.S.C. § 45(b). Respondents in adjudicative proceedings may receive judicial review of the Commission's decision in their circuit of residence or any circuit where they committed the conduct underlying the alleged violation: an unusually expansive form of judicial oversight. *See, e.g.,* J. Thomas Rosch Commissioner, Fed. Trade Comm'n, Three Questions About Part Three: Administrative Proceedings at the FTC, Remarks Before the American Bar Association Section of Antitrust Law Fall Forum, Washington, D.C. 18 (Nov. 8, 2012), https://www.ftc.gov/sites/default/files/documents/public_statements/three-questions-about-part-three-administrative-proceedings-ftc/121108fallforum.pdf.

[36] *See* William E. Kovacic, *The Federal Trade Commission and Congressional Oversight of Antitrust Enforcement*, 17 TULSA L.J. 587, 623–27 (1982). *See also Ethyl*, 729 F.2d at 137; *Boise Cascade Corp. v. Fed. Trade Comm'n*, 637 F.2d 573, 581–82 (9th Cir. 1980); *Official Airline Guides, Inc. v. Fed. Trade Comm'n (OAG)*, 630 F.2d 920, 927 (2d Cir. 1980).

[37] S. REP. NO. 63-597 at 11, 22.

[38] *OAG*, 630 F.2d at 927 (quoting *Cement Inst*itute, 333 U.S. at 720); *Atlantic Refining Co.*, 381 U.S. at 368; *Fed. Trade Comm'n v. R.F. Keppel & Bro., Inc.*, 291 U.S. 304, 314 (1934). *See also Ind. Fed'n of Dentists*, 476 U.S. at 455; *Texaco,* 393 U.S. at 226; *Motion Picture Advert. Serv. Co*., 344 U.S. at 396.

[39] *Fed. Trade Comm'n v. Dean Foods Co*., 384 U.S. 597, 618–19 (1966) (Fortas, J., dissenting). *See also* 51 CONG. REC. 12146 (statement of Sen. Henry Hollis) (observing that the DOJ would be able to focus on "the great task of prosecuting suits for the dissolution of monopolies, leaving to the trade commission the important service of policing competition, so as to protect small business men, keep an open field for new enterprise, and prevent the development of trusts").

[40] *See, e.g., Ethyl*, 729 F.2d at 128; *Boise*, 637 F.2d at 573; *OAG*, 630 F.2d at 920.

[41] *Boise,* 637 F.2d at 581; *Ethyl,* 729 F.2d at 136–37; *OAG,* 630 F.2d at 927.

[42] *Ethyl*, 729 F.2d at 139 (holding that "before business conduct in an oligopolistic industry may be labelled "unfair" within the meaning of § 5 a minimum standard demands that, absent a tacit agreement, at least some indicia of oppressiveness must exist"); *OAG,* 630 F.2d at 927–28 (finding that the monopolist had "no purpose to restrain competition or to enhance or expand his monopoly, and [did] not act coercively").

[43] *Boise*, 637 F.2d at 581 (finding that "without proof of anticompetitive effects" it could not assume that there was a "deliberate restraint on competition"). *Boise*'s applicability to cases outside the realm of delivered pricing is limited – the court's decision was driven by the Commission's inconsistent position on delivered pricing practices in prior statements, its shifting litigation strategy, and the Commission's failure to meets its own standard. *Id*. at 575–77, 582.

those statutes."[44] They also agreed that Section 5 reaches "conduct which, although not a violation of the letter of the antitrust laws, is close to a violation or is contrary to their spirit,"[45] and further recognized the importance of deference to the Commission where it acts against conduct that is unfair.[46]

III. Unfair Methods of Competition

Relying on the text, structure, legislative history of Section 5, precedent, and the FTC's experience applying the law, this statement describes the most significant general principles concerning whether conduct is an unfair method of competition under Section 5 of the FTC Act.[47]

1. The conduct must be a method of competition

Conduct must be a "method of competition" to violate Section 5. A method of competition is conduct undertaken by an actor in the marketplace—as opposed to merely a condition of the marketplace, not of the respondent's making, such as high concentration or barriers to entry.[48] The conduct must implicate competition, but the relationship can be indirect. For example, misuse of regulatory processes that can create or exploit impediments to competition (such as those related to licensing, patents, or standard setting) constitutes a method of competition.[49] Conversely, violations of generally applicable laws by themselves, such as environmental or tax laws, that merely give an actor a cost advantage would be unlikely to constitute a method of competition.

2. That is unfair

The method of competition must be unfair, meaning that the conduct goes beyond competition on the merits. Competition on the merits may include, for example, superior products or services, superior business acumen, truthful marketing and advertising practices,

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[44] *Ethyl,* 729 F.2d at 136. *See also Boise,* 637 F.2d at 581.
[45] *Ethyl,* 729 F.2d at 136–37.
[46] *Ind. Fed'n Dentists*, 476 U.S. at 454.
[47] Whether the conduct violates accepted norms of unfairness derived from external standards expressed in statutes, common law, and regulations outside of the federal antitrust laws may also be relevant to whether the conduct is an unfair method competition. *See Ind. Fed'n of Dentists*, 476 U.S. at 454 ("The standard of "unfairness" under the FTC Act …encompass[es] not only practices that violate the Sherman Act and the other antitrust laws. . . but also practices that the Commission determines are against public policy for other reasons."). *See also Sperry & Hutchinson*, 405 U.S. at 244; *Motion Picture Advertising Co.,* 344 U.S. at 395; *R.F. Keppel & Bro.*, 291 U.S. at 313. This framework will not be used to analyze matters that constitute a violation of the letter of the antitrust laws.
[48] *See Ethyl*, 729 F.2d at139.
[49] Statement of the Federal Trade Commission In the Matter of Google Inc., FTC File No. 121-0120 (Jan. 3, 2013), https://www.ftc.gov/system/files/documents/public_statements/410931/130103googlemotorolastmtofcomm.pdf; Statement of the Federal Trade Commission In the Matter of Robert Bosch GmbH, FTC. File No. 121-0081 (Apr. 24. 2013); Analysis of Proposed Consent Decree to Aid in Public Comment: In the Matter of Negotiated Data Solutions, LLC, FTC File No. 051-0094 (Jan. 23, 2008); *In re Dell Computer Corp*., 121 F.T.C. 616 (1996) (consent order). *Cf.*, *Walker Process Eqpt., Inc. v. Food Machinery Corp.*, 382 U.S. 172 (1965) (fraud on the patent office may constitute antitrust violation).

investment in research and development that leads to innovative outputs, or attracting employees and workers through the offering of better employment terms. [50]

There are two key criteria to consider when evaluating whether conduct goes beyond competition on the merits. First, the conduct may be coercive, exploitative, collusive, abusive, deceptive, predatory, or involve the use of economic power of a similar nature.[51] It may also be otherwise restrictive or exclusionary, depending on the circumstances, as discussed below. Second, the conduct must tend to negatively affect competitive conditions.[52] This may include, for example, conduct that tends to foreclose or impair the opportunities of market participants, reduce competition between rivals, limit choice, or otherwise harm consumers.

These two principles are weighed according to a sliding scale. Where the indicia of unfairness are clear, less may be necessary to show a tendency to negatively affect competitive conditions.[53] Even when conduct is not facially unfair, it may violate Section 5.[54] In these circumstances, more information about the nature of the commercial setting may be necessary to determine whether there is a tendency to negatively affect competitive conditions. The size, power, and purpose of the respondent may be relevant, as are the current and potential future effects of the conduct.

The second principle addresses the tendency of the conduct to negatively affect competitive conditions—whether by affecting consumers, workers, or other market participants. In crafting Section 5, Congress recognized that unfair methods of competition may take myriad forms and hence that different types of evidence can demonstrate a tendency to interfere with competitive conditions. Because the Section 5 analysis is purposely focused on incipient threats to competitive conditions,[55] this inquiry does not turn to whether the conduct directly caused

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[50] *See generally U.S. v. Grinnell Corp.*, 384 U.S. 563, 571 (1966) *(*distinguishing unlawful acquisition or maintenance of monopoly power from consequences of "a superior product, business acumen, or historic accident"); *U.S. v. Alum. Co. of America,* 148 F.2d 416, 430 (2d Cir. 1945) (distinguishing conduct based on "superior skill, foresight and industry.").

[51] *See e.g., Sperry & Hutchinson*, 405 U.S. at 905 (construing Section 5 to reach conduct shown to exploit consumers, citing *R.F. Keppel & Bro.*, 291 U.S. at 313); *Atlantic Refining Co.*, 381 U.S. at 369 (finding an unfair method of competition where the defendant "utilize[ed] … economic power in one market to curtail competition in another," which was "bolstered by actual threats and coercive practices")*; Texaco*, 393 U.S. at 228-29 (finding an unfair method of competition where the defendant used its "dominant economic power … in a manner which tended to foreclose competition")*; Ethyl, 729 F.2d* at 140 (finding that unfair methods of competition includes practices that are "collusive, coercive, predatory, restrictive, or deceitful" as well as "exclusionary").

[52] *See, e.g.,* S. REP. NO. 1326, at 3–4 (1913) (stating that "Congress should maintain the policy established by the anti-trust law" to "'maintain[ ] competitive conditions," and that "every possible effort to create and preserve competitive conditions should be made"). *Id.* at 2, 3-4, 11, & 13; *see also* H.R. Rep. No. 63-533, at 2 (1914) (reported by Rep. Covington) (The administration idea and the idea of business men generally, is for the preservation of proper competitive conditions in our great interstate commerce").

[53] *Ethyl*, 729 F.2d at 137-39.

[54] *Hastings Mfg. Co. v. Fed. Trade Comm'n*, 153 F.2d 253, 257 (6th Cir. 1946).

[55] *See generally supra* notes 11 & 18. *See also Fashion Originators' Guild Am. v. Fed. Trade Comm'n (FOGA)*, 312 U.S. 457, 466 (1941) (holding that it was not determinative that petitioners had not yet "achieved a complete monopoly"; rather it was "sufficient if it really tends to that end, and to deprive the public of the advantages which flow from free competition").

actual harm in the specific instance at issue.[56] Instead, the second part of the principle examines whether the respondent's conduct has a tendency to generate negative consequences; for instance, raising prices, reducing output, limiting choice, lowering quality, reducing innovation, impairing other market participants, or reducing the likelihood of potential or nascent competition. These consequences may arise when the conduct is examined in the aggregate along with the conduct of others engaging in the same or similar conduct,[57] or when the conduct is examined as part of the cumulative effect of a variety of different practices by the respondent.[58] Moreover, Section 5 does not require a separate showing of market power or market definition when the evidence indicates that such conduct tends to negatively affect competitive conditions.[59] Given the distinctive goals of Section 5, the inquiry will not focus on the "rule of reason" inquiries more common in cases under the Sherman Act, but will instead focus on stopping unfair methods of competition in their incipiency based on their tendency to harm competitive conditions.

IV. Potential Cognizable Justifications

In the event that conduct *prima facie* constitutes an unfair method of competition, liability normally ensues under Section 5 absent additional evidence. There is limited caselaw on what, if any, justifications may be cognizable in a standalone Section 5 unfair methods of competition case, and some courts have declined to consider justifications altogether.[60] In instances where a party chooses to assert justifications as an affirmative defense, the FTC can

[56] *See Sperry & Hutchinson*, 405 U.S. at 244 (explaining that "unfair competitive practices [are] not limited to those likely to have anticompetitive consequences after the manner of the antitrust laws"); *Ethyl*, 729 F.2d at 138 (finding that evidence of actual harm can be "a relevant factor in determining whether the challenged conduct is unfair" but is not required); *Boise*, 637 F.2d at 581-82. *In re Coca-Cola Co.*, 117 F.T.C. 795, 915 (1994) (rejecting argument that Section 5 violation requires showing "anticompetitive effects"). *See also supra* notes 19-21 and accompanying text (explaining that a showing of an actual anticompetitive injury is unnecessary to prove a violation of Section 5 because that section was designed to stop in their incipiency acts and practices that could lead to violations of the Sherman and Clayton Acts).

[57] *Motion Picture Advertising*, 344 U.S. at 395.

[58] Consent Order, Statement in Support of Consent, *In the Matter of Intel Corp*., File No. 061-0247 (Dkt. 9341) (July 28, 2010); *The Vons Co.*, FTC Complaints and Order, 1987-1993 Transfer Binder, Trade Reg. Rep. (CCH) ¶ 23,200 (Aug. 7, 1992).

[59] *Atlantic Refining Co.,* 381 U.S. at 371 ("unnecessary to embark upon a full scale economic analysis of competitive effects."); *Texaco*, 393 U.S. at 230 (holding that "[i]t is enough that the Commission found that the practice in question unfairly burdened competition for a not insignificant volume of commerce."); *L.G. Balfour Co. v. Fed. Trade Comm'n*, 442 F.2d 1, 19-20 (7th Cir. 1971) (No proof of foreclosure necessary in an exclusive dealing contract case under Section 5 (citing *Brown Shoe*).

[60] *Atlantic Refining Co.*, 381 U.S. at 371 (considering the defendant's argument that the distribution contracts at issue "may well provide Atlantic with an economical method of assuring efficient product distribution among its dealers" and nonetheless holding that the "Commission was clearly justified in refusing the participants an opportunity to offset these evils by a showing of economic benefit to themselves"); *Texaco*, 393 U.S. at 230 (following the same reasoning as *Atlantic Refining* and finding that the "anticompetitive tendencies of such system [were] clear"); *Balfour*, 442 F.2d at 15 (while relevant to consider the advantages of a trade practice on individual companies in the market, this cannot excuse an otherwise illegal business practice). For provisions of the antitrust laws where courts have not accepted justifications as part of the legal analysis, the Commission will similarly not accept justifications when these claims are pursued through Section 5.

draw on the Commission's long experience evaluating asserted justifications when enforcing Section 5, as well as its review of decided cases and past enforcement actions.[61]

First, it would be contrary to the text, meaning, and case law of Section 5 to justify facially unfair conduct on the grounds that the conduct provides the respondent with some pecuniary benefits.[62] At the same time, some practices may impact competitive conditions in a manner that both harms and benefits market participants other than the party; at times, the harms and benefits may redound to the same participants, and at times they may be disparately distributed – that is, a practice may harm some market participants while simultaneously providing legitimate benefits to others.

If parties in these cases choose to assert a justification, the subsequent inquiry would not be a net efficiencies test or a numerical cost-benefit analysis. The unfair methods of competition framework explicitly contemplates a variety of non-quantifiable harms, and justifications and purported benefits may be unquantifiable as well. The nature of the harm is highly relevant to the inquiry; the more facially unfair and injurious the harm, the less likely it is to be overcome by a countervailing justification of any kind.[63] In addition, whether harmed parties share in the purported benefits of the practice may be relevant to the inquiry.

Some well-established limitations on what defenses are permissible in an antitrust case apply in the Section 5 context as well. It is the party's burden to show that the asserted justification for the conduct is legally cognizable,[64] non-pretextual,[65] and that any restriction used to bring about the benefit is narrowly tailored to limit any adverse impact on competitive

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[61] *See supra* § II (B) (discussing Congressional intent to create an expert Commission entitled to deference for its determinations).
[62] *Supra* note 51.
[63] *See FOGA*, 312 U.S. at 467-68 (finding the Commission did not need to hear evidence of justifications where "[t]he purpose and object of this combination, its potential power, its tendency to monopoly, the coercion it could and did practice upon a rival method of competition, all brought it within the policy of the prohibition declared by the Sherman and Clayton Acts").
[64] *See, e.g. Ind. Fed. Dentists*, 476 U.S. at 463 (making clear that justifications that run directly counter to the "basic policy of the Sherman Act," in this instance, limiting consumer access to relevant information because "an unrestrained market in which consumers are given access to the information they believe to be relevant to their choices will lead them to make unwise, and even dangerous, choices" are not cognizable); *id.* at 464 (affirming Commission's finding that there was insufficient evidence that the restraint conferred the claimed benefit at all). *See also Fed. Trade Comm'n v. Superior Ct. Trial Lawyers Ass'n*, 493 U.S. 411, 423-24 (1990); *NCAA v. Board of Regents*, 468 U.S. 85, 113-15 (1984); *United States v. Addyston Pipe Steel Co.* 85 F. 271 (6th Cir. 1898), *aff'd* 175 U.S. 211 (1899).
[65] Pretextual justifications include those that are not set forth in documents prior to, or contemporaneous with, the introduction of the conduct, or not plausibly based on the known facts. *See, e.g. Ind. Fed'n of Dentists*, 476 U.S. at 464 (affirming the Commission's finding that there was insufficient evidence that the restraint conferred the claimed benefit at all). *See also United States v. Microsoft Corp.*, 253 F.3d 35, 62-64, 72, 74, 76-77 (D.C. Cir. 2001); *Eastman Kodak Co. v. Image Technical Tech. Svcs*, 504 U.S. 541, 472, 484-85 (1992); *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 608-10 (1985); *Texas Specialty Physicians v. Fed. Trade Comm'n*, 528 F.3d 346, 368-70 (5th Cir. 2008); *United States v. Dentsply Int'l, Inc.*, 399 F.3d 181, 196-97 (3d Cir. 2005). *See also* Fed. Trade Comm'n & U.S. Dep't of Justice, Antitrust Guidelines for Collaboration Among Competitors §3.36a (2000) (2000 Collaboration Guidelines) ("Efficiency claims are not considered if they are vague or speculative or otherwise cannot be verified by reasonable means").

conditions.[66] In addition, the asserted benefits must not be outside the market where the harm occurs.[67] Finally, it is the party's burden to show that, given all the circumstances, the asserted benefits outweigh the harm and are of the kind that courts have recognized as cognizable in standalone Section 5 cases.[68]

V. Historical Examples of Unfair Methods of Competition

For the purpose of providing further guidance, the FTC lists here a non-exclusive set of examples and citations of past decisions and consent decrees based on Section 5, and, where applicable, other antitrust laws, focusing on conduct that constitutes an incipient violation of the antitrust laws or that violates the spirit of the antitrust laws. These illustrative examples are drawn from case law and from FTC experience.

A non-exclusive set of examples of conduct that have been found to violate Section 5 include:

- Practices deemed to violate Sections 1 and 2 of the Sherman Act or the provisions of the Clayton Act, as amended (the antitrust laws).[69]

- Conduct deemed to be an incipient violation of the antitrust laws. Incipient violations include conduct by respondents who have not gained full-fledged monopoly or market power, or by conduct that has the tendency to ripen into violations of the antitrust laws.[70] Past examples of such use of Section 5 of the FTC Act include:

    - invitations to collude,[71]

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[66] *NCAA v. Alston*, 141 S. Ct. 2141, 2162-64 (2021); *Polygram Holding, Inc. v. Fed. Trade Comm'n*, 416 F.3d 29, 38 (D.C. Cir. 2005); 2000 Collaboration Guidelines § 3.36b.
[67] *United States v. Philadelphia Nat'l Bank*, 374 U.S. 321, 370-71 (1963); 2000 Collaboration Guidelines § 3.36a.
[68] At all times, the burden of persuasion would remain with the Commission in administrative proceedings pursuant to 5 U.S.C. §556(d).
[69] *Motion Picture Advertising*, 344 U.S. at 395 (conduct fell "within the prohibitions of the Sherman Act and is therefore an unfair method of competition within the meaning of s. 5(a)."); *Cement Institute*, 333 U.S. at 683; *FOGA,* 312 U.S. at 463; *Fed. Trade Comm'n v. Pacific States Paper Trade Ass'n*, 273 U.S. 52 (1926).
[70] *FOGA*, 312 U.S. at 466 (FTC may challenge combinations "not merely in their fruition, but also in their incipiency combinations which could lead to . . .trade restraints and practices deemed undesirable"); *Motion Picture Advertising*, 344 U.S. at 394-95 ("[i]t is also clear that the Federal Trade Commission Act was designed to supplement and bolster the Sherman and the Clayton Act. . . to stop in their incipiency acts and practices which, when full blown, would violate those Acts."); *Cement Institute*, 333 U.S. at 708; *Triangle Conduit & Cable Co. v. Fed. Trade Comm'n*, 168 F.2d 175, 181 (7th Cir. 1948).
[71] The Commission has challenged both public and private invitations to collude as unfair methods of competition. This type of conduct, if consummated would constitute a per se violation of the antitrust laws. Invitations to collude, even if unaccepted, represent both an incipient violation as well as a violation of the spirit of the antitrust laws within the meaning of the 2022 Section 5 policy statement. Under either theory, an invitation to collude constitutes an unfair method of competition under Section 5. *In Re Quality Trailer Products Corp.,* 115 F.T.C. 944 (1992) (consent); *In re Valassis Communs*., Dkt. C-4160, 2006 FTC LEXIS 25 (2006) (consent); *In re A.E. Clevite*, 116 F.T.C. 389 (1993) (consent); *In re YKK (USA)*, 108 F.T.C. 628 (1993) (consent); *In re Precision Moulding Co.*, 122 F.T.C. 104 (1996) (consent); *In re Stone Container Corp.*, 125 F.T.C. 853 (1998) (consent); *In re U-Haul Int'l, Inc.*, File No. 081-0157, 6 (2010) (consent); *In re Delta/AirTran Baggage Fee Antitrust Litig.*, 245 F.Supp. 2d 1343,

- mergers, acquisitions, or joint ventures that have the tendency to ripen into violations of the antitrust laws,[72]
- a series of mergers, acquisitions, or joint ventures that tend to bring about the harms that the antitrust laws were designed to prevent, but individually may not have violated the antitrust laws,[73] and
- loyalty rebates, tying, bundling, and exclusive dealing arrangements that have the tendency to ripen into violations of the antitrust laws by virtue of industry conditions and the respondent's position within the industry.[74]

- Conduct that violates the spirit of the antitrust laws. This includes conduct that tends to cause potential harm similar to an antitrust violation, but that may or may not be covered by the literal language of the antitrust laws or that may or may not fall into a "gap" in those laws.[75] As such, the analysis may depart from prior precedent based on the provisions of the Sherman and Clayton Acts. Examples of such violations, to the extent not covered by the antitrust laws, include:
  - practices that facilitate tacit coordination,[76]
  - parallel exclusionary conduct that may cause aggregate harm,[77]

1369-70 (N.D. Ga. 2017), *aff'd sub. Nom.*, *Siegel v. Delta Air Lines, Inc.*, 714 F. App'x 986 (11th Cir. 2018), *cert. denied*, 139 S. Ct. 827 (2019). Depending on the circumstances, an invitation to collude may also constitute attempted monopolization under Section 2 of the Sherman Act, *United States v. American Airlines*, 743 F.2d 1114 (5th Cir. 1984), or wire fraud, *United States v. Ames Sintering*, 927 F.2d 232 (6th Cir. 1990).
Under appropriate circumstances, the Commission will refer evidence of per se illegal cartel agreements to the Department of Justice for criminal prosecution. *See* Commission Statement Regarding Criminal Referral and Partnership Process, File No. P094207 (Nov. 18, 2021), https://www.ftc.gov/system/files/documents/public_statements/1598439/commission_statement_regarding_criminal_referrals_and_partnership_process_updated_p094207.pdf.

[72] *Yamaha Motor Co. v. Fed. Trade Comm'n*, 657 F.2d 971 (8th Cir. 1981), *cert. denied*, 456 U.S. 915 (1982).

[73] *Vons*, 1987-1993 Transfer Binder ¶ 23,200. Such series of acquisitions or related conduct may also constitute an unfair method competition as a violation of the spirit of the antitrust laws. *See infra* note 82 and cases cited therein.

[74] *Luria Bros. v. Fed. Trade Comm'n*, 389 F.2d 847, 864 (3d Cir. 1968), *cert. denied*, 393 U.S. 829 (1968).

[75] Remarks of Jon Leibowitz, Comm'r, Fed. Trade Comm'n, "Tales from the Crypt" Episodes '08 and '09: The Return of Section 5 ("Unfair Methods of Competition in Commerce are Hereby Declared Unlawful"), Section 5 Workshop, at 4 (Oct. 17, 2008), https://www.ftc.gov/sites/default/files/documents/public_events/section-5-ftc-act-competition-statute/jleibowitz.pdf ("Simply put, consumers can still suffer plenty of harm for reasons not encompassed by the Sherman Act as it is currently enforced in the federal courts.").

[76] *Cement Institute*, 333 U.S. at 709-21 (multiple basing point pricing system contributed to unlawful coordinated pricing); Analysis to Aid Public Comment, *In re BMG Music et. al*, 65 Fed. Reg. 31,319 (2000), Docket No. C-3973 (2000) (Decision & Order) (distributors of pre-recorded music, acting in parallel but without agreement, impose identical coercive limits on retailer advertising of discounts). *See generally* William E. Kovacic, *Antitrust Policy and Horizontal Collusion in the 21st Century*, 9 LOY. CONSUMER L. REV. 97, 107 (1997) ("[T]he FTC remains perhaps the best vehicle for articulating standards designed to discourage anticompetitive coordination among competitors.").

[77] *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877, 897 (2007) (holding that the extent of adoption of resale price maintenance across the industry is relevant to legality); *Motion Picture Advertising*, 344 U.S. at 395

- conduct by a respondent that is undertaken with other acts and practices that cumulatively may tend to undermine competitive conditions in the market,[78]

- fraudulent and inequitable practices that undermine the standard-setting process or that interfere with the Patent Office's full examination of patent applications,[79]

- price discrimination claims such as knowingly inducing and receiving disproportionate promotional allowances against buyers not covered by Clayton Act,[80]

- de facto tying, bundling, exclusive dealing, or loyalty rebates that use market power in one market to entrench that power or impede competition in the same or a related market,[81]

- a series of mergers or acquisitions that tend to bring about the harms that the antitrust laws were designed to prevent, but individually may not have violated the antitrust laws,[82]

- mergers or acquisitions of a potential or nascent competitor that may tend to lessen current or future competition,[83]

("respondent and the three other major companies have foreclosed to competitors 75 percent of all available outlets."); *Standard Oil Co. of California v. United States*, 337 U.S. 293, 309, 314 (1949) (taking into account extent of industry use of similar practices). *See also* C. Scott Hemphill & Tim Wu, *Parallel Exclusion*, 122 YALE L.J. 1182, 1243-45 (2012) ("parallel exclusion is a suitable subject for FTC enforcement under Section 5 of the FTC Act.").

[78] Intel Consent Order at 9341; *Vons*, 1987-1993 Transfer Binder ¶ 23,200.

[79] U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N, ANTITRUST GUIDELINES FOR THE LICENSING OF INTELLECTUAL PROPERTY § 6 (2017); *In re American Cyanamid Co.*, 72 F.T.C. 623, 684-85, *aff'd sub nom*, *Charles Pfizer & Co.*, 401 F.2d 574 (6th Cir. 1968), *cert. denied*, 394 U.S. 920 (1969) (actual or attempted enforcement of patents obtained by inequitable conduct falling short of fraud).

[80] *Alterman Foods v. Fed. Trade Comm'n*, 497 F.2d 993 (5th Cir. 1974); *Colonial Stores v. Fed. Trade Comm'n*, 450 F.2d 733 (5th Cir. 1971); R.H. *Macy & Co. v. Fed. Trade Comm'n*, 326 F.2d 445 (2d Cir. 1964); *American News Co. v. Fed. Trade Comm'n*, 300 F.2d 104 (2d Cir. 1962); *Grand Union Co. v. Fed. Trade Comm'n*, 300 F.2d 92 (2d Cir. 1962); *In re Foremost-McKesson, Inc.*, 109 F.T.C. 127 (1987).

[81] *Atlantic Refining Co.*, 381 U.S. at 357; *Texaco, Inc*., 393 U.S. at 223; *Shell Oil Co. v. Fed. Trade Comm'n,* 360 F.2d 470 (5th Cir. 1966); *Brown Shoe*, 384 U.S. at 316.

[82] *The Vons Cos.,* 1987-1993 Transfer Binder ¶ 23,200. Section 5 has also been used to challenge individual transactions that do not meet the technical requirements of Section 7. *In re Beatrice Foods*, 67 F.T.C. 473 (1965), supplemented, 68 F.T.C. 1003 (1965), modified, 71 F.T.C. 797 (1967); *In re Dean Foods, Co.*, 70 F.T.C. 1146 (1966); *In re Foremost Dairies, Inc.*, 60 F.T.C. 944 (1962).

[83] *See, e.g., Fed. Trade Comm'n v. Facebook*, 581 F.Supp. 3d 34 (D.D.C. 2022) (denying motion to dismiss challenging acquisition of WhatsApp and Instagram); Analysis of Agreement Containing Consent Orders to Aid Public Comment, In the Matter of Novartis AG, File No. 141-0141 (consent decree requiring divestiture in transaction eliminating future competition in oncology compounds); Analysis of Agreement Containing Consent Orders to Aid Public Comment, *In the Matter of Össur Americas Holdings, Inc*., File No. 191-0177 (consent decree requiring divestiture in transaction eliminating future competition in myoelectric elbows). *See also Fed. Trade Comm'n v. Procter & Gamble Co*., 386 U.S. 568 (1967) (barring acquisition of leading firm where acquirer was most likely potential entrant). *See generally* PHILIP AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW: AN ANALYSIS OF ANTITRUST PRINCIPLES AND THEIR APPLICATION ¶ 701at p. 200 (4th ed. 2015) (acquisition of "an

- using market power in one market to gain a competitive advantage in an adjacent market by, for example, utilizing technological incompatibilities to negatively impact competition in adjacent markets,[84]

- conduct resulting in direct evidence of harm, or likely harm to competition, that does not rely upon market definition,[85]

- interlocking directors and officers of competing firms not covered by the literal language of the Clayton Act,[86]

- commercial bribery and corporate espionage that tends to create or maintain market power,[87]

- false or deceptive advertising or marketing which tends to create or maintain market power,[88] or

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actual or likely potential competitor is properly classified, for it tends to augment or reinforce the monopoly by means other than competition on the merits."); C. Scott Hemphill & Tim Wu, *Nascent Competitors*, 168 U. PA. L. REV. 1879 (2020).

[84] *Eastman Kodak*, 504 U.S. at 451; *Newcal Industries v. Ikon Office Solution*, 513 F.3d 1038 (9th Cir. 2008); *SmithKline Corp. v. Eli Lilly & Co.*, 575 F.2d 1056 (3d Cir. 1978); *LePage's v. 3M Co.*, 324 F.3d 141 (3d Cir. 2003) (en banc).

[85] *Ind. Fed'n of Dentists*, 476 U.S. at 460-61 (finding of sustained effects legally sufficient even in absence of elaborate market analysis); *Toy's "R" Us v. Fed. Trade Comm'n*, 221 F.3d 928, 937 (7th Cir. 2000) (finding "sufficient proof of anticompetitive effects [such] that no more elaborate market analysis was necessary"). *Cf.*, *Fed. Trade Comm'n v. Staples, Inc.*, 970 F.Supp. 1066, 1075-6 (D.D.C. 1997) (relying in part on direct evidence that pricing for key products from office superstores lower where three such stores exist in same metropolitan area and higher where only one or two such stores present).

[86] *Perpetual Federal Savings & Loan*, 90 F.T.C. 608 (1977) (complaint dismissed due to subsequent legislation). *Cf.*, *TRW, Inc. v. FTC,* 647 F.2d 942 (9th Cir. 1981) (noting automatic nature of liability under Clayton §8 when prerequisites of statute established).

[87] *See* Policy Statement of the Federal Trade Commission on Rebates and Fees in Exchange for Excluding Lower-Cost Drug Products (2022), at 6 n. 27 ("The Commission has a long history of addressing commercial bribery and will continue to do so."), https://www.ftc.gov/legal-library/browse/policy-statement-federal-trade-commission-rebates-fees-exchange-excluding-lower-cost-drug-products; See Hon. Garland S. Ferguson, Jr., Chairman, Fed. Trade Comm'n, Commercial Bribery: An Address to the Conf. on Com. Bribery to the Comm. Standards Council and the Better Bus. Bureau of N.Y. (Oct. 17, 1930) (explaining the Commission's focus on commercial bribery as an unfair method of competition even before it gained authority under the Robinson-Patman Act); *see also* Donald S. Clark, Sec'y, Fed. Trade Comm'n, Remarks Regarding The Robinson-Patman Act: Annual Update, Before the Robinson Patman Act Comm., Section of Antitrust Law, 46th Annual Spring Meeting (Apr. 2, 1998), *See e.g.*, *In re Lockheed Corp.*, 92 F.T.C. 968 (1978) (commercial bribery).

[88] *In re Coleco Industries*, 111 F.T.C. 651 (1989) (consent decree barring claims of product availability unless actually available or company has reasonable basis for such claim); *In re Xerox Corp.*, 86 F.T.C. 364 (1975) (repeated publicizing release date of new products with knowledge that products would not be available by that date); Analysis of Proposed Consent Order to Aid Public Comment: *In the Matter of Intel Corp*., Dkt No. 9341 at 5-6 (describing acts of deception in Commission complaint). *Cf, Microsoft*, 253 F.3d at 76-77 (acts of deception relating to compatibility of Microsoft version of Java with competing software applications as unlawful monopoly maintenance under the Sherman Act). *See generally* Maurice E. Stucke, *When a Monopolist Deceives*, 76 ANTITRUST L.J. 823 (2010). *See also* DANIEL A. CRANE, THE INSTITUTIONAL STRUCTURE OF ANTITRUST ENFORCEMENT 138 (2011) (The Commission is on strongest ground when challenging market power created by fraud or deception).

- discriminatory refusals to deal which tend to create or maintain market power.[89]

VI. The Path Forward

The FTC is committed to faithfully discharging its statutory obligations, including through enforcing and administering the prohibition against "unfair methods of competition" on a standalone basis, as laid out in Section 5 of the FTC Act, or in conjunction with its other statutory authorities.

[89] *Aspen*, 472 U.S. at 610-11 (affirming antitrust liability for termination of joint venture where no legitimate business justification present for such conduct); *Eastman Kodak*, 504 U.S. at 483-85 (denying summary judgment where defendant manufacturer of copiers refused to deal with third party service providers); *In re Grand Caillou Packing Co*., 65 F.T.C. 799 (1964), *aff'd in part and rev'd in part sub nom*., *LaPeyre v. Fed. Trade Comm'n*, 366 F.2d 117 (5th Cir. 1966) (violation of Section 5 for monopoly manufacturer of shrimp peeling machines to lease machines at substantially different rates in different regions of the US); Analysis of Proposed Consent Order to Aid Public Comment: In the Matter of Intel Corp., Dkt No. 9341 at 4 (describing alleged threatens of refusal to deal with customers who purchased non-Intel CPUs). *See generally* Brett Frischmann & Spencer Weber Waller, *Revitalizing Essential Facilities*, 75 ANTITRUST L.J. 1 (2008).

UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
WASHINGTON, D.C. 20580

Dissenting Statement of Commissioner Christine S. Wilson

Regarding the "Policy Statement Regarding the Scope of Unfair Methods of Competition Under Section 5 of the Federal Trade Commission Act"

Commission File No. P221202

November 10, 2022

In July 2021, the newly-minted majority at the Commission abruptly withdrew the bipartisan Statement of Enforcement Principles Regarding "Unfair Methods of Competition" Under the FTC Act ("2015 Statement").[1] The 2015 Statement had been adopted on a bipartisan basis by the Commission six years prior because it embodied a sound approach to antitrust law that reflected decades of legal precedent and economic learning. I dissented from the decision to rescind the 2015 Statement not only because it reflected a repudiation of the consumer welfare standard and the rule of reason, but also because withdrawing the 2015 Statement without issuing new guidance left businesses in the dark on how to structure their conduct to avoid a challenge by the Commission.[2] Due process demands that the lines between lawful and unlawful conduct be drawn clearly;[3] this interest is heightened when the enforcer at issue promises a new era of aggressive action.[4]

Today, the Commission issues a Policy Statement Regarding the Scope of Unfair Methods of Competition Under Section 5 of the Federal Trade Commission Act ("Policy Statement"). Unfortunately, instead of providing meaningful guidance to businesses, the Policy

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[1] *See* Statement of the Commission on the Withdrawal of the Statement of Enforcement Principles Regarding "Unfair Methods of Competition" Under Section 5 of the FTC Act (July 9, 2021), https://www.ftc.gov/system/files/documents/public_statements/1591706/p210100commnstmtwithdrawalsec5enforcement.pdf.

[2] *See* Noah Joshua Phillips & Christine S. Wilson, Comm'rs, Fed. Trade Comm'n, Dissenting Statement on the "Statement of the Commission on the Withdrawal of the Statement of Enforcement Principles Regarding 'Unfair Methods of Competition' Under Section 5 of the FTC Act" (July 9, 2021), https://www.ftc.gov/system/files/documents/public_statements/1591710/p210100phillipswilsondissentsec5enforcementprinciples.pdf.

[3] *See* Connally v. Gen'l Construction Co., 269 U.S. 385 (1926).

[4] *See* Lina M. Khan, Chair, Fed. Trade Comm'n, Memorandum to [Federal Trade] Commission Staff and Commissioners regarding Vision and Priorities for the FTC, (Sept. 22, 2021), https://www.ftc.gov/system/files/documents/public_statements/1596664/agency_priorities_memo_from_chair_lina_m_khan_9-22-21.pdf

Statement announces that the Commission has the authority summarily to condemn essentially any business conduct it finds distasteful.

In the past, both the FTC and its sister agency, the Antitrust Division of the Department of Justice, have issued clear and constructive guidance on enforcement policies and practices.[5] The Policy Statement that the Commission issues today takes a very different approach. Instead of a law enforcement document, it resembles the work of an academic or a think tank fellow who dreams of banning unpopular conduct and remaking the economy. It does not reflect the thinking of litigators who know that legal precedent cannot be ignored, case-specific facts and evidence must be analyzed, and the potential for anticompetitive effects must be assessed. It does not reflect the approach of experienced policy makers who recognize the necessity of considering the business rationales for, and benefits of, conduct so that agency action does not harm consumers and the economy. And it does not exhibit the input of those with counseling and in-house experience who understand the need to provide workable rules so that "honest businesses"[6] can map the boundaries of lawful conduct.

The Second Circuit explained that "the Commission owes a duty to define the conditions under which conduct . . . would be unfair so that businesses will have an inkling as to what they can lawfully do rather than be left in a state of complete unpredictability."[7] Instead of heeding this admonition, the Policy Statement adopts an "I know it when I see it" approach premised on a list of nefarious-sounding adjectives, many of which have no antitrust or economic meaning. It provides no methodology to explain which adjectives may apply in any given set of circumstances. The only crystal-clear aspect of the Policy Statement pertains to the process following invocation of an adjective: after labeling conduct "facially unfair," the Commission plans to skip an in-depth examination of the conduct, its justifications, and its potential consequences. The instructions in the iconic Monopoly game provide an apt analogy: the respondent essentially will be told, "Go to jail. Go directly to jail. Do not pass go. Do not collect $200."[8]

But these concerns are only the tip of the iceberg. As explained below in more detail, the Policy Statement affirmatively takes several steps with sweeping implications.

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[5] Fed. Trade Comm'n & U.S. Dep't of Just., Horizontal Merger Guidelines (Aug. 19, 2010), https://www.ftc.gov/sites/default/files/attachments/merger-review/100819hmg.pdf; Fed. Trade Comm'n & U.S. Dep't of Just., Vertical Merger Guidelines (June 30, 2020), https://www.ftc.gov/system/files/documents/reports/us-department-justice-federal-trade-commission-vertical-mergerguidelines/vertical_merger_guidelines_6-30-20.pdf; Fed. Trade Comm'n & U.S. Dep't of Just., antitrust Guidelines for International Enforcement and Cooperation (Jan. 13, 2017), https://www.ftc.gov/system/files/documents/public_statements/1049863/international_guidelines_2017.pdf; Fed. Trade Comm'n & U.S. Dep't of Just., Statements of Antitrust Enforcement Policy in Health Care (Aug. 1996), https://www.ftc.gov/system/files/attachments/competition-policy-guidance/statements_of_antitrust_enforcement_policy_in_health_care_august_1996.pdf.

[6] Memorandum from Chair Lina M. Khan to [Federal Trade] Commission Staff and Commissioners, *supra* note 4, at 1.

[7] E.I. du Pont de Nemours & Co. v. F.T.C., 729 F.2d 128, 139 (2d Cir. 1984) ("*Ethyl*").

[8] The analogy is imperfect, as the FTC does not have criminal authority. But I trust that the reader gets the point.

- First, the Policy Statement abandons the rule of reason, which provides a structured analysis of both the harms and benefits of challenged conduct. The majority prefers a near-per se approach that discounts or ignores both the business rationales underlying challenged conduct and the potential efficiencies that the conduct may generate.

- Second, the Policy Statement repudiates the consumer welfare standard and ignores the Supreme Court's admonition that antitrust "protects competition, not competitors."[9] The Commission will now seek to advance the welfare of inefficient competitors, "workers," and other unnamed but politically favored groups – at the expense of consumers.

- Third, the Policy Statement rejects a vast body of relevant precedent that requires the agency to demonstrate a likelihood of anticompetitive effects, consider business justifications, and assess the potential for procompetitive effects before condemning conduct.

In other words, the Policy Statement abandons bedrock principles of antitrust that long have been accepted by the Commission, the courts, the business community, and enforcers across the globe.

It is also necessary to consider what the Policy Statement does *not* do.

- First, as noted in the preceding paragraphs, the Policy Statement does not provide clear guidance to businesses seeking to comply with the law.

- Second, the Policy Statement does not establish an approach for the term "unfair" in the competition context that matches the economic and analytical rigor that Commission policy offers for the same term, "unfair," in the consumer protection context.

- Third, the Policy Statement does not provide a framework that will result in credible enforcement. Instead, Commission actions will be subject to the vicissitudes of prevailing political winds.

- Fourth, the Policy Statement does not address the legislative history that both demands economic content for the term "unfair" and cautions against an expansive approach to enforcing Section 5.

On a procedural note, I believe the Policy Statement should be issued for public comment rather than adopted as a final Commission policy at this time. Chair Khan announced a commitment to foster transparency and democratize the FTC.[10] Obtaining public input on the

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[9] Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 488 (1977) (quoting Brown Shoe Co. v. United States, 370 U.S. 294, 320 (1962) (the antitrust laws "were enacted for the protection of competition, not competitors")).

[10] *See* Prepared Statement of the Federal Trade Commission Before the United States Senate Committee on the Judiciary Subcommittee on Antitrust, Competition Policy and Consumer Rights, "*Oversight of the Enforcement of the Antitrust Laws*" 14-15 (Sept. 20, 2022), https://www.ftc.gov/system/files/ftc_gov/pdf/P210100SenateAntitrustTestimony09202022.pdf, (describing FTC efforts to prioritize public participation);

new Policy Statement would be consistent with that commitment. The majority likely will point out that when the now-rescinded 2015 Statement was issued, the Commission did not solicit public comment. But there are significant differences between the 2015 Statement and today's Policy Statement that warrant a different procedure. The 2015 Statement described the enforcement approach that the Commission had followed for many decades; it was consistent with long-standing Commission practice, as well as legal precedent and economic learning. In contrast, the Policy Statement announced today represents a radical departure from the Commission's recent enforcement efforts, and a dramatic expansion of the agency's purported authority. Given these circumstances, hearing from the public is essential.

Below, I first explain the enforcement approach laid out in the Policy Statement. I then elaborate on my concerns about the affirmative steps that the Policy Statement takes. I close with a discussion of the four tasks the Policy Statement does not accomplish.

For all of these reasons, I dissent.

I. The Policy Statement's Framework

The Policy Statement establishes a framework to identify unfair methods of competition under Section 5 of the FTC Act. First, under the Policy Statement, conduct must be "a method of competition," defined as conduct by a marketplace actor that implicates competition, even if only indirectly. Second, the method of competition must be "unfair," defined as going beyond competition on the merits.

To determine whether the method of competition is "unfair," the Policy Statement provides two relevant criteria. Under the first criterion, conduct may be "coercive, exploitive, collusive, abusive, deceptive, predatory, or involve the use of economic power of a similar nature," or "otherwise restrictive or exclusionary."[11] Under the second criterion, "the conduct must tend to negatively affect competition conditions" by "affecting consumers, workers or other market participants."[12] These two criteria are weighed using a sliding scale. When conduct is labeled "facially unfair" pursuant to the first criterion, the second criterion is rendered essentially irrelevant. If conduct is not labeled "facially unfair," pursuant to the second criterion, the conduct must be shown to have a "tendency to negatively affect market conditions."

But the Policy Statement explains how little is needed to satisfy the second criterion; in fact, it expressly rules out what must be shown. There need be no showing of actual effects; it is enough to assert that there is a "tendency" for the conduct to generate negative consequences.[13] Also, that "tendency" need not be attributable to the particular conduct at issue, or even the conduct of the particular market actor under investigation; the tendency for negative "consequences may arise when the conduct is examined in the aggregate along with the conduct

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Memorandum from Chair Lina M. Khan to [Federal Trade] Commission Staff and Commissioners, *supra* note 4, at 2.

[11] Policy Statement at 9.

[12] *Id.*

[13] *Id.* at 10.

of others . . ., or when the conduct is examined as a part of the cumulative effect of a variety of different conduct by the respondent."[14] Finally, it is unnecessary to show market power,[15] a common tool in antitrust cases to predict or infer likely effects from conduct.

After a prima facie case has been established, the respondent has little recourse.[16] Under the Policy Statement, the Commission will not employ a rule of reason analysis,[17] which provides a well-defined framework to analyze competitive impact. A respondent can assert a justification for the conduct but, according to the Policy Statement, the Commission's "inquiry would not be a net efficiencies test or a numerical cost benefit analysis"[18] and "the more facially unfair or injurious the harm, the less likely it is to be overcome by a countervailing justification of any kind."[19] For a respondent to be heard, the justification must show that the benefits of the conduct redound to market participants other than the respondent,[20] those benefits must be in the same market where the harm occurs[21] (even though market definition is unnecessary to find competitive harm[22]), and the respondent has the "burden to show that the asserted justification for the conduct is legally cognizable, that it is nonpretextual, and that any restriction used to bring about the benefit is narrowly tailored to limit any impact on competitive conditions."[23]

II. The Policy Statement Rejects Longstanding Antitrust Policies and Legal Precedent, Instead Embracing an Unstructured "I Know It When I See It" Approach

A. The Policy Statement Replaces the Rule of Reason With an Open-Ended and Near-Per Se Approach

The Policy Statement abandons the structured analysis of the rule of reason because, it asserts, Section 5 has "distinctive goals" and was enacted to overcome concerns in 1914 about the application of the rule of reason.[24] When it withdrew the 2015 Statement, the Commission majority explained that the rule of reason "hamstrings [the FTC's] enforcement mission with an approach that poses significant administrability concerns" because courts assess whether

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[14] *Id.*

[15] *Id.*

[16] *Id.* at 10 (When "conduct prima facie constitutes an unfair method of competition, liability normally ensues under Section 5 absent additional evidence.").

[17] *Id.* at 10 ("Given the distinctive goals of Section 5, the inquiry will not focus on the 'rule of reason' inquiries more common in cases under the Sherman Act").

[18] *Id.* at 11.

[19] *Id.*

[20] *Id.*

[21] *Id.* at 12.

[22] *Id.* at 10.

[23] *Id.* at 11-12.

[24] *Id.* at 10.

procompetitive effects outweigh anticompetitive harm.[25] Put plainly, too many practices can be justified by legitimate business rationales and procompetitive effects. But, as described below, the rule of reason played a role in Section 5's legislative history and benefits sound enforcement by providing a structured framework for examining challenged conduct.[26] Moreover, contrary to the concerns expressed by the Commission majority, most rule of reason cases are decided at the early stages of the analysis, sparing the court the need to balance procompetitive benefits against anticompetitive effects.[27]

Eschewing the structured approach of the rule of reason, the Policy Statement instead adopts an open-ended inquiry. Under the new framework, the Commission will consider the effects of conduct on consumers, labor, competitive rivals, and unnamed others. The Policy Statement provides no content for the list of adjectives that may signal the presence of "unfair" methods of competition. There is no methodology for the adjective-labeling exercise. Ultimately, there is no meaningful guidance for courts and businesses to analyze unfair methods of competition.

The Policy Statement not only abandons the rule of reason, it applies a quick look analysis that approximates per se condemnation. Specifically, the Policy Statement advances a framework that condemns conduct with little showing necessary to establish a prima facie case while also ruling out meaningful consideration of efficiencies and other benefits or justifications. This approach is inconsistent with antitrust principles. Per se rules are reserved for conduct that is so inherently and commonly understood to be unreasonable that courts dispense with a rule of reason analysis.[28] Although courts have eliminated the dichotomy between per se and rule of reason analysis, and endorsed abbreviated analysis,[29] courts have not summarily condemned conduct without considering likely competitive effects in some manner. As the Commission has explained, an abbreviated analysis is reserved for conduct that is "inherently suspect owing to its likely tendency to suppress competition. Such conduct ordinarily encompasses behavior that past judicial experience and current economic learning have shown to warrant summary condemnation."[30]

Prudential concerns abound. Summary condemnation should require experience; academic learning, empirical insights, and judicial experience should be demanded. Here, however, the Policy Statement provides that merely labeling conduct with an appropriate adjective can establish liability. Even when conduct is found to be unfair based on a tendency for

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[25] Statement of the Commission on the Withdrawal of the Statement of Enforcement Principles Regarding "Unfair Methods of Competition" Under Section 5 of the FTC Act 5, *supra* note 1.

[26] *See* Ohio v. American Express Co., 138 S. Ct. 2274, 2284 (2018). The plaintiff has the initial burden of proving that conduct has had or is likely to have a substantial adverse effect on competition. If this burden is met, the burden shifts to the defendant to produce evidence of procompetitive benefits. If there is such evidence, the plaintiff must show that the conduct is not reasonably necessary to achieve the objective or that the anticompetitive effects outweigh the benefits. *Id.*

[27] *See* Michael A. Carrier, *The Rule of Reason: Bridging the Disconnect*, 1999 BYU L. Rev. 1265, 1364 (1999).

[28] *See, e.g.*, Northern Pac. Ry. Co. v. United States, 356 U.S. 1 (1958).

[29] *See, e.g.*, California Dental Ass'n v. Fed. Trade Comm'n, 526 U.S. 756 (1999).

[30] Polygram Holding, Inc., 136 F.T.C. 310, 344-45 (2003).

anticompetitive effects, the Policy Statement is silent regarding whether accepted scholarly support or judicial experience must undergird the claim that there is a tendency for harm (after all, actual harm need not be shown). In fact, the concern is greater because the Policy Statement expressly states that it is willing to disregard judicial experience.[31] In other words, under the Policy Statement, the Commission majority will challenge as "unfair methods of competition" practices that courts previously, and repeatedly, have found to be legal. In these cases, the Commission's invocation of nefarious-sounding adjectives and conclusory assertions of a "tendency" for harm will trump sometimes substantial judicial experience regarding the likelihood of competitive harm.

The unbounded application of Section 5 that is heralded by the Policy Statement is inconsistent with the Commission's authority to impose a broad set of remedies. The Policy Statement discusses the balance struck by Congress in the FTC Act: namely, while the FTC Act enables the Commission to challenge a broader range of conduct than that covered by the Sherman and Clayton Acts, it did not create a private right of action and it limited the preclusive effect of FTC enforcement in private antitrust cases.[32] In fact, the bargain went further than the Policy Statement acknowledges; Commission remedies were limited to cease-and-desist orders in exchange for the ability to challenge this broader range of conduct. It is appropriate to attach severe remedies to well-defined prohibitions, and less severe remedies to more amorphous prohibitions. But it is inappropriate to couple a broad range of remedies with the authority to challenge a broad (and nebulously defined) universe of conduct. For this reason, I have explained that any Congressional response to the Supreme Court's decision in *AMG*[33] must include guardrails to limit the range of conduct subject to disgorgement or restitution.[34]

B. The Policy Statement Rejects the Consumer Welfare Standard to Protect and Reward Politically Favored Groups

The Policy Statement abandons the long- and widely-accepted consumer welfare standard and instead adopts a standard that seeks to pursue multiple goals. Enforcement decisions are not predictable in a regime that seeks to advance many goals, including potentially conflicting ones, simultaneously.[35] Under the consumer welfare standard, enforcers and businesses understood

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[31] Policy Statement at 13-14 (explaining that Commission's analysis regarding liability "may depart from prior precedent based on the provisions of the Sherman and Clayton Acts" and identifying conduct that is not currently illegal under the antitrust laws that will be subject to challenge as unfair methods of competition as violations of "the spirit of the antitrust laws").

[32] Policy Statement at 5.

[33] AMG Cap. Mgmt, LLC v. FTC, 141 S. Ct. 1341 (2021).

[34] For instance, the limitations on the use of monetary equitable remedies in competition cases provided by the Commission's 2003 Policy Statement are appropriate. *See* Policy Statement on Monetary Equitable Remedies in Competition Cases, 68 Fed. Reg. 45,820 (Aug. 4, 2003), https://www.ftc.gov/system/files/documents/public_statements/410451/030804policystatementequitable.pdf.

[35] *See* Christine S. Wilson, Thomas J. Klotz & Jeremy A. Sandford, *Recalibrating the Dialogue on Welfare Standards: Reinserting the Total Welfare Standard into the Debate*, 26 Geo. Mason L. Rev. 1435, 1454 (2019) ("if the list of goals and the weights assigned to each is indeterminate, then firms contemplating particular conduct will not be able to predict reliably whether antitrust enforcement is likely in a particular case. . . . The indeterminacy of

that there was one goal – enforcement protected consumers – and the analysis followed accepted economic theory and principles. The Policy Statement emphasizes that when it enacted Section 5, "Congress wanted to give the Commission flexibility to adapt to changing circumstances."[36] Ironically, the very tools that the Policy Statement rejects, the consumer welfare standard and the rule of reason, facilitate a flexible approach to assessing conduct that adapts to changing markets, emerging technologies, new business models, and evolving economic analysis – while still providing clarity and consistency in enforcement.

In contrast, the Policy Statement establishes a model that will provide neither clarity nor consistency in enforcement. Conduct may be challenged as an unfair method of competition if it might negatively impact consumers, workers, competitors, and other market participants. No clarity is provided regarding which other market participants may be considered, or how this array of interests will be prioritized or balanced. And it is mathematically impossible to maximize more than one value, so the pursuit of one goal will require tradeoffs that adversely impact other competing interests. Oddly, the Commission majority claims that the rule of reason is not administrable because it requires balancing, but the approach embodied in the Policy Statement is far worse. It requires balancing among multiple goals without identifying the complete array of special interests to be protected, or the weights to be assigned to any of them. In short, the lack of identified priorities and rules for balancing interests means that enforcement will be subject to the whims and political agendas of sitting Commissioners.[37] But this outcome is consistent with Chair Khan's assertion that all enforcement decisions are political.[38]

Equally important, the Policy Statement's abandonment of the consumer welfare standard demonstrates that the Commission majority will support higher prices for consumers so that it may protect or reward political favorites. The consumer welfare standard protects consumers, resulting in lower prices, higher quality, and more innovation.[39] Efforts to protect other groups, including inefficient rivals and labor, necessarily will require tradeoffs that will harm consumers. Simply put, it is impossible to serve two masters. Protecting inefficient firms or labor will be "broadly redistributive, although consumers are not the beneficiaries. Rather the benefits flow to smaller firms or those that are wed to older technologies that have been displaced or threatened

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the goals and weights inherent in a multiple goals standard would make antitrust enforcement more susceptible to political whims and influence.").

[36] Policy Statement at 3.

[37] 1 PHILLIP AREEDA & DONALD TURNER, ANTITRUST LAW 25 (1978) (antitrust enforcement that seeks to pursue conflicting interests "would involve courts in essentially political decision-making for which there are no appropriate legal criteria and in a regulatory, supervisory role for which they are ill-suited.")

[38] Fox Business Networks, *Break Up Amazon as a Monopoly?*, YOUTUBE (June 23, 2017), https://youtu.be/VI_DEYqWxqs (Varney asks Lina Khan at the 2:33 mark: "To go after Amazon would be a political decision. Not a market decision. Not an economic decision. A politician would have to instigate this." Khan replies, "I think all decisions are political in so far as government agencies are bringing them.").

[39] Herbert Hovenkamp, *Is Antitrust's Consumer Welfare Principle Imperiled*, 45 J. Corp. L. 101, 103 (2019) ("Antitrust's consumer welfare principle is best regarded as taking a 'middle man' approach to markets, reacting aggressively to unambiguous harms . . . and more circumspectively to single-firm conduct or other practices that have a significant potential to benefit consumers. The overall goal is clear, however, which is to encourage markets in which output, measured by quantity, quality, or innovation, is as large as possible consistent with sustainable competition.").

by newer ones[.]”[40] American consumers are unlikely to support antitrust enforcement that chooses to eliminate low prices, whether in the interest of protecting small businesses that wish to charge higher prices or to protect jobs at firms that are acknowledged to be inefficient.

The Policy Statement does not justify the rejection of the consumer welfare standard with references to existing case law. Like the enforcement decisions that will flow from this Policy Statement, it is a political decision.

C. The Policy Statement Rejects Precedent

Although the adjectives that the Policy Statement uses to signal the existence of “unfair methods of competition” can be found in cases, it is worth noting that those adjectives generally do not provide the basis for the holdings in those cases.[41] Instead, courts indicate that the conduct at issue is *not* described by those adjectives; courts then proceed to examine evidence of anticompetitive effects and procompetitive justifications for the challenged conduct. In other words, modern cases are diametrically opposed to the approach adopted by the Policy Statement; they reject labels and instead look to the evidence to consider liability. Moreover, even the old cases cited by the Policy Statement do not adopt the array of shortcuts in the Policy Statement, including foregoing the need to show anticompetitive harm and ignoring the role of procompetitive justifications. A fair reading of the cases reveals that the approach of the Policy Statement is inconsistent with the law.

1. The Policy Statement Ignores Precedent Regarding the Need to Demonstrate Anticompetitive Effects

When enforcement of Section 5 would require a showing of anticompetitive effects under the second criterion because the conduct is not facially unfair, the Policy Statement minimizes the necessary showing. The Policy Statement asserts that Section 5 “analysis is purposely focused on incipient threats to competitive conditions” and focuses the analysis on “whether the respondent’s conduct has a tendency to generate negative consequences.”[42] It further claims that it is unnecessary to prove actual harm, market power, or market definition,[43] but admits that the “size, power, and purpose of the respondent may be relevant.”[44] As a consequence, the Policy Statement discounts the showing of anticompetitive effects required to allege a law violation.

In support of this claim that only a limited showing is necessary, the Policy Statement and Explanatory Guide point only to the legislative history and the Commission’s 1941 case

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[40] *Id.* at 117.

[41] *See* E.I. du Pont de Nemours & Co. v. FTC, 729 F.2d at 140 (“in the absence of proof of a violation of the antitrust laws or evidence of collusive, coercive, predatory, or exclusionary conduct, business practices are not ‘unfair’ in violation of § 5 unless those practices either have an anticompetitive purpose or cannot be supported by an independent legitimate reason” and finding “no evidence of coercive or predatory conduct.”).

[42] Policy Statement at 9-10.

[43] *Id.* at 10

[44] *Id.*

against the Fashion Originators Guild of America.[45] But in *Fashion Originators Guild of America v. FTC*, the Supreme Court determined that the Commission found that there was market power and that the challenged conduct excluded manufacturers and distributors, which "tend[ed] to create . . . a monopoly in the said industries."[46] In short, the Court determined that the Commission found evidence of anticompetitive effects.

The Policy Statement also ignores the showing of competitive effects demanded by later cases. In *Boise Cascade Corp. v. FTC*,[47] the Ninth Circuit found that a Section 5 violation was not supported by substantial evidence when "the Commission . . . provided [the court] with little more than a theory of the likely effect of the challenged . . . practices.[48] The Ninth Circuit found that "[t]here is a complete absence of meaningful evidence in the record that price levels . . . reflect an anticompetitive effect"[49] and data on costs and profits were not informative because they were "largely a deduction from the Commission's reasoning about the tendencies of the challenged practice."[50] Despite the Commission's argument that a greater showing was not required because Section 5 addressed incipient conduct, the court concluded, "where there is a complete absence of evidence implying overt conspiracy, to allow a finding of a [S]ection 5 violation on the theory that the mere widespread use of the practice makes it an incipient threat to competition would be to blur the distinction between guilty and innocent commercial behavior."[51]

The decision in *Boise Cascade* is not an anomaly. The Commission enforces Section 7 of the Clayton Act, which employs an incipiency standard for merger enforcement.[52] While courts generally do not require proof of actual effects for unconsummated mergers, courts expect evidence of likely anticompetitive effects, perhaps shown by evidence of market power and market definition.[53] The Commission's experience challenging anticompetitive mergers counsels against the discounted showing of likely competitive effects that the Policy Statement envisions.

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[45] Fashion Originators' Guild of America, Inc. v. FTC, 312 U.S. 457 (1941).

[46] *Id.* at 466-67.

[47] Boise Cascade Corp. v. FTC, 637 F.2d 573 (9th Cir. 1980).

[48] *Id.* at 578.

[49] *Id.* at 579.

[50] *Id.* at 580.

[51] *Id.* at 582.

[52] The Policy Statement asserts that Section 5 enables the Commission to challenge incipient violations of the antitrust laws. Incipient violations of Section 7 of the Clayton Act would constitute an incipient violation of an incipiency standard, which is nonsensical. Unfortunately, the Policy Statement indicates that the Commission will use Section 5 to challenge mergers and acquisitions that do not violate the antitrust laws.

[53] *See, e.g.*, FTC v. Thomas Jefferson Univ., 505 F.Supp.3d 522, 528 (E.D. Pa 2020) ("To establish its prima facie case, the Government must put forth enough evidence to prove that the insurers would not avoid a price increase in any one of the government's proposed markets by looking to hospitals outside those markets. The government has not met this burden."); FTC v. RAG-Stiftung, 436 F.Supp.3d 278, 287 (D.D.C. 2020) ("the FTC has not made out its prima facie case, which requires it to show undue concentration for a particular product in a particular geographic area, and it has not otherwise shown a likelihood that the proposed . . . merger will substantially harm competition.").

Also, the Policy Statement's position that incipiency allegations negate a need to demonstrate likely anticompetitive effects is inconsistent with Commission opinion. The Commission expressly refused to rely on an incipiency standard for its findings about competitive effects in *General Foods Corp.*[54] The Commission rejected the argument that Section 5 could prohibit conduct by a firm with market power even when there was no dangerous probability that the firm could obtain monopoly power.[55] In short, the Commission found that the showing of likely anticompetitive effect required under Section 5 is no lower than the showing required to prove allegations of attempted monopolization under the Sherman Act.

2. The Policy Statement Ignores Precedent Requiring Consideration of Business Justifications

The Policy Statement hedges on whether business justifications for conduct will be considered.[56] It points to language from cases decided in the 1960s and early 1970s to suggest there is no role for business justifications in the analysis of unfair methods of competition. This language is inconsistent with subsequent cases and modern analysis. In all recent cases, justifications – even if rejected – were considered; the Commission and courts do not affirmatively choose to ignore relevant evidence.[57] In fact, courts expressly have identified business justifications as part of the test for unfair methods of competition.[58] For instance, the Second Circuit in *Ethyl* summarized its test, "in the absence of proof of a violation of the antitrust laws or evidence of collusive, coercive, predatory, or exclusionary conduct, business practices are not 'unfair' in violation of § 5 unless those practices either have an anticompetitive purpose or cannot be supported by an independent legitimate reason."[59]

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[54] General Foods Corp., 103 F.T.C. 204 (1984).

[55] *Id.* at 365-66 ("To distinguish between an attempt to monopolize and an incipient attempt on the basis of potential market power is to engage in such fine distinctions as to challenge the legal philosopher, let alone the competitor trying to conform its conduct to the law. If the conduct at issue here cannot reach the early threshold of doubt under the Sherman Act, we will not condemn it under the FTC Act.").

[56] Policy Statement at 10 ("There is limited caselaw on what, *if any*, justifications may be cognizable in a standalone Section 5 unfair methods of competition case.) (emphasis added).

[57] *See*, *e.g.*, Valassis Communications, Inc., File No. 051-0008, complaint at ¶14 (2006), https://www.ftc.gov/sites/default/files/documents/cases/2006/04/0510008c4160valassiscomplaint.pdf; Intel Corp., File No. 061-0247, complaint at ¶¶ 91, 96 (2010), https://www.ftc.gov/sites/default/files/documents/cases/091216intelcmpt.pdf; Boise Cascade Corp. v. FTC, 637 F.2d 573, 580-81 (9th Cir. 1980 (conduct explained by "common-sense proposition" regarding pricing practice as a "natural competitive response to buyer preference"); Official Airlines Guides, Inc. v. FTC, 630 F.2d 920, 923 (2d Cir. 1980) (Commission reversed ALJ on 2 counts, "holding that [respondent] had sufficient business justification for" challenged conduct).

[58] Consequently, despite any instruction from the Commission in the Policy Statement, courts will consider business justifications.

[59] E.I. du Pont de Nemours & Co. v. FTC, 729 F.2d at 140. *See also id.* at 139 (noting that "before business conduct in an oligopolistic industry may be labelled 'unfair' within the meaning of § 5 a minimum standard demands that, absent a tacit agreement, at least some indicia of oppressiveness must exist such as (1) evidence of anticompetitive intent or purpose on the part of the producer charged, or (2) the absence of an independent legitimate business reason for its conduct. and finding, on the facts of the case that "the evidence is overwhelming and undisputed . . . that each petitioner independently adopted its practices for legitimate business reasons.").

Precedent establishes that conduct may not be labelled "unfair" without considering whether there is an absence of a business justification; that is, a business justification is not considered only to be a defense. Even cases cited by the Policy Statement do not suggest that conduct may be declared unfair without considering the legitimate business justifications. *Atlantic Refining Co. v. FTC* only acknowledged the unremarkable principle that defendants may not justify anticompetitive conduct by showing "economic benefit to themselves."[60] In *Fashion Originators Guild of America v. FTC*, the Court held that the FTC did not need to consider justifications in light of the egregious facts of that case where the guild had "aim[ed]" for the "intentional destruction of one type of manufacture and sale which competed with Guild members."[61]

In addition, there are important reasons to consider business justifications for conduct. Business rationales for undertaking challenged practices not only provide context for those choices, but also illuminate the likely competitive effects of the practices at issue. Particularly when the Commission is examining conduct in its incipiency – in other words, before competitive outcomes are known – business explanations and justifications for the practices at issue constitute important predictors of the likely outcomes. As the Supreme Court and the Commission have explained in numerous opinions, while intent generally does not constitute an element of most antitrust violations, it is informative concerning the likely effects on the market.[62]

Finally, in Section 5 of the FTC Act, the Commission is instructed to bring cases only when they are in the public interest.[63] Consequently, it is essential that the Commission consider the business justification, potential efficiencies, and other procompetitive outcomes of the challenged conduct. The Policy Statement's position that the Commission will not consider whether conduct yields net benefits means the Commission likely will challenge conduct that is beneficial to consumers and the U.S. economy, merely to protect the interests of politically favored groups. That approach is inconsistent with the FTC Act, as well as with principles of good government.

[60] Atlantic Refining Co. v. FTC, 381 U.S. 357, 371 (1965).

[61] Fashion Originators' Guild of Am. v. FTC, 312 U.S.at 467-68.

[62] Chicago Board of Trade v. United States, 246 U.S. 231, 238 (1918) (J. Brandeis) ("the history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be attained, are all relevant facts. This is not because a good intention will save an otherwise objectionable regulation or the reverse; but because knowledge of intent may help the court interpret facts and to predict consequences."); In re McWane, Inc. 157 F.T.C. 108, 144 n.11 (2014) (quoting United States v. Microsoft, 253 F.3d 34, 59 (D.D.C. 2001) ("while our aim is to ascertain the effect of McWane's [conduct], evidence of McWane's intent is relevant 'to the extent it helps us understand the likely effect of [McWane's] conduct.'").

[63] 15 U.S.C. § 45(b) ("Whenever the Commission shall have reason to believe that any such person, partnership, or corporation has been or is using any unfair method of competition . . . in or affecting commerce, and if it shall appear to the Commission that a proceeding by it in respect thereof would be to the interest of the public, . . .").

III. The Policy Statement Fails to Provide a Predictable, Credible Enforcement Approach for Unfair Methods of Competition

A. The Policy Statement Does Not Provide Guidance to Businesses That Seek to Comply with the Law

The framework described by the Policy Statement cannot be turned into workable rules for businesses. The list of adjectives that may be invoked to establish facially unfair competition is lengthy, and includes "coercive," "exploitive," "collusive," "abusive," "deceptive," "predatory," "restrictive," and "exclusionary".[64] These labels require subjective interpretation, and frequently lack established antitrust or economic meanings. But the Policy Statement does not provide content to the adjectives. Consequently, identifying whether conduct falls under one of the labels depends on the whims and political worldviews of three sitting Commissioners. As the composition of the Commission changes, so too will the application of Section 5. The subjective nature of the labeling process to determine liability means that it is not possible for businesses to know in advance whether their conduct will be considered unfair. In other words, the approach articulated in the Policy Statement does not allow businesses to structure their conduct to avoid possible liability.

Not only does the Policy Statement withhold meaningful guidance, it significantly increases uncertainty for businesses. When the Commission decides that particular conduct "tends to cause potential harm similar to an antitrust violation" – despite contrary precedent – the Policy Statement provides that the "analysis may depart from prior precedent based on" the antitrust laws.[65] In other words, conduct that courts repeatedly have refused to condemn may now be subject to summary condemnation under the Commission's open-ended approach. Newly condemned conduct may include tacit coordination; parallel conduct; price discrimination not covered by the Robinson-Patman Act; de facto tying, bundling, exclusive dealing, and loyalty rebates; mergers that do not violate the Clayton Act; and interlocking directorates not covered by the Clayton Act.[66] Which precedent will be embraced, and which precedent will be rejected, is unclear, and will vary depending on the composition of the Commission. Businesses are left with no navigational tools to map the boundaries of lawful and unlawful conduct.

Also, as previously described, the Policy Statement rejects the consumer welfare standard in favor of pursuing multiple (and sometimes competing) goals. When enforcement decisions may be premised on the furtherance of many and sometimes conflicting interests, and no guidance is provided regarding how those potential goals will be balanced, enforcement outcomes will be unpredictable. Businesses cannot know how to structure their conduct when they do not know which interest(s) will drive a Commission decision in any particular circumstance.

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[64] Policy Statement at 9.

[65] Policy Statement at 13.

[66] *See id.* at 13-15.

Courts have been unwilling to find violations of Section 5 beyond the limits of the Sherman, Clayton, and Robinson-Patman Acts[67] when the Commission's theory of liability cannot be turned into workable rules or standards that can guide the conduct of businesses. In *Ethyl*,[68] the Second Circuit explained that when conduct "does not violate the antitrust or other laws and is not collusive, coercive, predatory or exclusionary in character, standards for determining whether it is 'unfair' within the meaning of § 5 must be formulated to discriminate between normally acceptable business behavior and conduct that is unreasonable or unacceptable. Otherwise the door would be open to arbitrary or capricious administration of § 5[.]"[69] Consequently, the Second Circuit explained that "the Commission owes a duty to define the conditions under which conduct . . . would be unfair so that businesses will have an inkling as to what they can lawfully do rather than be left in a state of complete unpredictability."[70] Accordingly, the court explained that "[r]eview by the courts was essential to assure that the Commission would not act arbitrarily or without explication but according to definable standards that would be properly applied."[71] Sadly, today's Policy Statement does not offer definable standards.

Similarly, in *Official Airlines Guides, Inc. v. FTC*, the Second Circuit recognized the practical difficulty of applying the Commission's expansive theory of liability in that case and refused to endorse an FTC order challenging an alleged monopolist's conduct. The Second Circuit explained that "enforcement of the FTC's order . . . would give the FTC too much power to substitute its own business judgment for that of the monopolist in any decision that arguably affects competition in another industry. Such a decision would permit the FTC to delve into . . . 'social, political, or personal reasons' for a monopolist's" conduct.[72] In explaining its decision, the appeals court said it was "weighing benefits to competition in the other field [where the firm did not operate] against the detrimental effect of allowing the Commission to pass judgment on many business decisions of the monopolist that arguably discriminate among customers in some way."[73] The concerns of the Second Circuit are magnified under the Policy Statement. In *Official Airlines Guides*, the respondent was arguably a monopolist. In contrast, the Policy Statement's approach will be applied to all businesses regardless of market status, because the emphasis is on foreclosing growth and evidence of market power is unnecessary.

Despite this concern by courts that firms be given "an inkling as to what they can lawfully do rather than be left in a state of complete unpredictability," the Policy Statement

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[67] It is striking that the Policy Statement proposes to use Section 5 as a gap-filler for the much-maligned Robinson-Patman Act. Not satisfied with resuscitating Robinson-Patman enforcement, the majority now seeks to expand the scope of that law beyond Congressional intent.

[68] E.I. du Pont de Nemours & Co. v. F.T.C., 729 F.2d 128 (2d Cir. 1984).

[69] *Id.* at 138.

[70] *Id.* at 139.

[71] *Id.* at 136.

[72] Official Airlines Guides, Inc. v. FTC, 630 F.2d 920, 927 (2d Cir. 1980).

[73] *Id.* (explaining that the FTC's theory of liability would enable the FTC to require a supermarket that was the only grocery in town to stock a particular brand of frozen vegetables if the Commission found that brand had been competitively disadvantaged when the supermarket chose to stock a different brand).

provides a subjective inquiry that leaves businesses in the dark. In fact, the Policy Statement utterly fails to deliver on its promise that it will "assist the public, business community, and antitrust practitioners by laying out the key general principles that apply to whether business practices constitute unfair methods of competition under Section 5 of the FTC Act."[74]

B. The Policy Statement Fails to Provide the Rigor Demonstrated by the Approach to the Term "Unfair" for Challenging Unfair and Deceptive Acts and Practices Under Section 5 of the FTC Act

The term "unfair" appears in Section 5 more than once; Section 5 also prohibits "unfair and deceptive acts and practices"[75] to address consumer protection issues. The Commission's current interpretation of "unfair" in its consumer protection mission has been lauded for its flexibility to address a myriad of harmful practices while still providing businesses clarity and certainty about the boundaries of lawful conduct. The Policy Statement does not offer that level of rigor and clarity regarding unfair methods of competition.

Consider the intentional approach to defining the boundaries of unfairness for consumer protection purposes under Section 5, and contrast it with today's Policy Statement. Before the current interpretation of "unfairness" for consumer protection issues was adopted, the Commission interpreted "unfair" to have few restraints, and Congress responded. Before 1980, the Commission attempted to condemn a wide variety of conduct by asserting that a practice was unfair – as a consumer protection offense – when it offended public policy.[76] The Commission engaged in numerous rulemaking efforts in the 1970s in which it relied on public policy as a substitute for analysis and evidence.[77] This rulemaking crusade nearly led to the demise of the agency.[78] The misuse of unfairness drove Congress to shut down the agency for several days, decline to reauthorize the agency for fourteen years, and pass the Federal Trade Commission Improvements Act of 1980, which imposed additional procedural obligations on trade regulation

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[74] Policy Statement at 2.

[75] 15 U.S.C. § 45, as amended by the Wheeler-Lea amendment, 52 Stat. 111 (1938).

[76] A footnote in *FTC v. Sperry & Hutchinson Co*., appeared to adopt the Commission's articulation of unfairness from the Statement of Basis and Purpose for Unfair or Deceptive Advertising and Labeling of Cigarettes in Relation to the Health Hazards of Smoking Trade Regulation Rule. The rule posed three factors the Commission considers when determining whether a practice that neither violates the antitrust laws nor is deceptive is nonetheless unfair: "(1) whether the practice, without necessarily having been previously considered unlawful, offends public policy as it has been established by statutes, the common law, or otherwise—whether, in other words, it is within at least the penumbra of some common-law, statutory, or other established concept of unfairness; (2) whether it is immoral, unethical, oppressive, or unscrupulous; (3) whether it causes substantial injury to consumers (or competitors or other businessmen)." 405 U.S. 233, 244 n.5 (1972).

[77] *See* TIMOTHY J. MURIS & HOWARD BEALES, III, THE LIMITS OF UNFAIRNESS UNDER THE FEDERAL TRADE COMMISSION ACT 13 (1991).

[78] The Commission explored a broad swath of trade regulation rules in the 1970s, including proposing rules that regulated warranty terms and performance of mobile home manufacturers, required detailed disclosures in food advertisements that discussed a product's nutritional characteristics, required antacid advertising disclosures, mandated that over-the-counter drug advertising mirror the precise language on FDA-approved labels, and required free trial periods for purchased hearing aids. The FTC also proposed rules based on public policy arguments, to ban all advertising directed to children. *Id.* at 3, 12-15.

rulemaking efforts.[79] That is, legislative history shows that Congress rejected an open-ended interpretation of "unfair" in the Commission's consumer protection enforcement efforts.

Congress not only retaliated against the FTC broadly, it codified a more limited interpretation of "unfair" for consumer protection matters. Congressional condemnation of the FTC's overreaching rulemaking proposals of the 1970s led to the Commission's 1980 Unfairness Policy Statement that clarified the reach of the unfairness theory in consumer protection matters. The Unfairness Policy Statement declared that "[u]njustified consumer injury is the primary focus of the FTC Act"[80] and developed a three-part test to determine whether a consumer injury is unfair.[81] A subsequent 1982 Commission letter to Senators Bob Packwood and Bob Kasten recommended codifying a definition of unfair practices and clarified that public policy was not an independent basis for a finding of unfairness.[82] The Commission emphasized that consumer injury is the proper focus for unfairness and that public policy served "as an important check on the overall reasonableness of the Commission's action."[83] The three-part analysis that requires clear consideration of consumer injury was codified into law in 1994, establishing a precise test with factors to weigh.[84] For consumer protection purposes, the unfairness test provides guardrails based on a quantitative cost-benefit analysis.[85]

This history of unfairness for consumer protection issues provides context that is relevant for evaluating "unfair" methods of competition. First, Congress rejected an expansive interpretation of unfairness that relied on general public policy considerations. Second, the Commission explained that the term "unfair" has economic content and is focused on consumer

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[79] J. Howard Beales, III, Director, Bureau of Consumer Protection., Fed. Trade Comm'n, *The FTC's Use of Unfairness Authority: Its Rise, Fall, and Resurrection* (June 2003), *available at* https://www.ftc.gov/news-events/news/speeches/ftcs-use-unfairness-authority-its-rise-fall-resurrection; Dissenting Statement of Commissioners Christine S. Wilson & Noah Joshua Phillips regarding the "Commission Statement on the Adoption of Revised Section 18 Rulemaking Procedures" (July 9, 2021), https://www.ftc.gov/system/files/documents/public_statements/1591702/p210100_wilsonphillips_joint_statement_-_rules_of_practice.pdf

[80] FTC Policy Statement on Unfairness, Letter from Michael Pertschuk, Chairman, Fed. Trade Comm'n to Wendell H. Ford, Chairman, and John C. Danforth, Ranking Minority Member, S. Comm. on Commerce, Science, and Transp., Consumer Subcomm. (Dec. 17, 1980), *reprinted in* Int'l Harvester Co., 104 F.T.C. 949, 1070-76 (1984) (typically referred to as the FTC's Unfairness Statement).

[81] "It must be substantial; it must not be outweighed by countervailing benefits to consumers or competition that the practice produces; and it must be an injury that the consumers themselves could not reasonably have avoided." *Id*.

[82] Letter from James C. Miller, Chairman, FTC to Bob Packwood, Chairman, Comm. on Commerce, Sci., and Trasnp., and Bob Kasten, Chairman, SubComm. On Consumer Comm. on Commerce, Sci., and Transp. (Mar. 5, 1982), *reprinted in* Antitrust & Trade Reg. Rep. (BNA) No. 1055, at 568-70 (Mar. 11, 1982).

[83] *Id*. at 8.

[84] Federal Trade Commission Act Amendments of 1994, Pub. L. No. 103-312, 108 Stat. 1691 (1994), codified at 15 U.S.C. § 45(n).

[85] Even with the unfairness test, this Commission is seeking to apply the standard in novel ways, ignoring the rigorous analytical framework. *See* Dissenting Statement of Commissioner Noah Joshua Phillips regarding *FTC v. Passport Automotive Group, Inc*. File No. 2023199 (Oct. 14, 2022) (rejecting the inclusion of an unfairness count to expand the FTC Act's coverage to discrimination); Dissenting Statement of Commissioner Noah Joshua Phillips regarding the "Commercial Surveillance and Data Security Advance Notice of Proposed Rulemaking" (Aug. 11, 2022) (discussing FTC overreach), https://www.ftc.gov/system/files/ftc_gov/pdf/Commissioner%20Phillips%20Dissent%20to%20Commercial%20Surveillance%20ANPR%2008112022.pdf.

injury, which Congress endorsed. Third, unfairness is based on quantitative cost-benefit analysis, requiring enforcement decisions to evaluate and balance both harms and benefits. Despite this history and accepted interpretation of the term "unfair" in the same statutory provision, today's Policy Statement repudiates economic content for "unfair methods of competition," rejects the weighing and balancing of anticompetitive effects and procompetitive benefits, and adopts an expansive "I know it when I see it" approach that seeks to protect interests beyond those of consumers. In short, the Policy Statement takes a far different approach to unfairness in the competition context than it does for the antitrust arena.

C. The Policy Statement Fails to Provide a Framework for Credible Enforcement Decisions

The Policy Statement's approach – invoking an adjective to establish liability – will lead to enforcement decisions that are not credible. Enforcement is credible when it yields results consistent with legal, economic, and societal norms. When outcomes conflict with established and accepted norms, or when government policy leads either to systematic underenforcement or overenforcement, public respect for antitrust enforcement is eroded.[86] Under the Policy Statement, the Commission may find liability merely by selecting an adjective and then limiting the defenses of the respondent. Consequently, when the Commission brings a case under Section 5, the cards are stacked so the Commission should always win. The Commission's Part 3 administrative adjudication process is already under attack as unfair to respondents. This Policy Statement will only add to the critique of the Commission's processes. In addition, the Policy Statement instructs that the Commission's determination regarding what practices constitute an unfair method of competition deserve judicial deference and "great weight" on appeal.[87] The framework embodied in the Policy Statement violates expectations of fairness, and consequently will undermine the credibility of antitrust enforcement.

D. The Policy Statement Fails to Consider the Full Legislative History Regarding Section 5 of the FTC Act

There is no dispute that Congress intended Section 5 of the FTC Act to reach beyond then-existing expectations about the scope of the Sherman Act.[88] There is also no dispute that Congress left it to the Commission to determine what conduct fell within the broader scope of "unfair methods of competition" rather than articulating a finite list of practices to be condemned.[89] It is similarly undisputed that Congress envisioned that Section 5 would address

[86] *See* Wilson, Klotz & Sandford, *supra* note 35, at 1452-53.

[87] *See* Policy Statement at 7.

[88] *See, e.g.*, 51 Cong. Rec. 12,454 (1914) (Sen. Cummins) ("That is the only purpose of Section 5 – to make some things punishable, to prevent some things, that can not [sic] be punished or prevented under the antitrust law.").

[89] *See* S. Rep. No. 597, 63d Cong. 2d Sess., at 13 (1914) ("The committee gave careful consideration to the question as to whether it would attempt to define the many and variable unfair practices which prevail in commerce and to forbid [them] . . . or whether it would, by a general declaration condemning unfair practices, leave it to the commission to determine what practices were unfair. It concluded that the latter course would be better, for the reason . . . that there were too many unfair practices to define, and after writing 20 of them into law it would be quite possible to invent others.").

incipient conduct before its perpetrator could become a monopolist.[90] These uncontroversial facts from the legislative history, however, do not translate directly into the expansive enforcement policy the majority announces today. That more than 100 years have elapsed since these legislative statements were made and the FTC Act was enacted makes clear that today's expansive Policy Statement is not the natural outcome of the legislative history. In addition, there is more to the legislative history than the undisputed principles recounted in the Policy Statement; taking into account that fuller history reveals that, for at least three reasons, Congress intended a different path for Section 5 than what is unveiled today.

First, Congressional expectations in 1914 that the reach of the Sherman Act would be limited turned out to be inaccurate. As William Kovacic and Marc Winerman explain, "the Sherman Act proved to be a far more flexible tool for setting antitrust rules than Congress expected in the early 20th century."[91] Today, "courts recognize the Sherman Act's expanded reach, with extensive precedent developed through actions by the antitrust enforcement authorities, including the FTC, and private parties."[92] In fact, the scope of the Sherman Act is still expanding; just two weeks ago, the Antitrust Division obtained a guilty plea arising from criminal prosecution of an invitation to collude under Section 2 of the Sherman Act.[93] Until this guilty plea, invitations to collude had been prosecuted as stand-alone Section 5 violations.[94] Congressional statements from 1914 must be interpreted in light of the *current* application of the Sherman Act.

Second, a closer look reveals that Congress designed Section 5's "unfair methods of competition" prohibition to have economic content. Among Senators debating the legislation, there was substantial discussion about the meaning of "unfair methods of competition,"[95] but no senator propounded the list of adjectives that the Policy Statement now identifies as characteristic of unfair methods of competition. All legislative history analyses must be taken with a grain of salt,[96] but there is evidence that the author of Section 5 believed that "unfair" had economic content, consistent with the consumer welfare standard and the rule of reason.

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[90] *See* Policy Statement at 4-5.

[91] William E. Kovacic & Marc Winerman, *Competition Policy and the Application of Section 5 of the Federal Trade Commission Act*, 76 Antitrust L. J. 929, 934 (2010) ("Several factors explain why Section 5 has played so small a role in the development of U.S. competition policy principles. Probably the most important is that the Sherman Act proved to be a far more flexible tool for setting antitrust rules than Congress expected in the early 20th century.").

[92] Maureen K. Ohlhausen, Commissioner, Fed. Trade Comm'n, *Remarks on Section 5: Principles of Navigation* 4 (July 25, 2013), https://www.ftc.gov/sites/default/files/documents/public_statements/section-5-principles-navigation/130725section5speech.pdf.

[93] United States v. Zito, CR22-113-BLG-SPW (D. Mont. Sept. 19, 2022, https://www.justice.gov/opa/press-release/file/1543701/download.

[94] *See* In Re Quality Trailer Products Corp., 115 F.T.C. 944 (1992) (consent); In re Valassis Communs., Dkt. C-4160, 2006 FTC LEXIS 25 (2006) (consent); In re A.E. Clevite, 116 F.T.C. 389 (1993) (consent); In re YKK (USA), 108 F.T.C. 628 (1993) (consent); In re Precision Moulding Co., 122 F.T.C. 104 (1996) (consent); In re Stone Container Corp., 125 F.T.C. 853 (1998) (consent); In re U-Haul Int'l, Inc., File No. 081-0157, 6 (2010) (consent).

[95] *See* Gilbert Holland Montague, *Unfair Methods of Competition*, 25 Yale L.J. 20 (1915).

[96] *See* INS v. Cardoza-Fonseca, 480 U.S. 421, 452–53 (1987) (Scalia, J., concurring) ("Judges interpret laws rather than reconstruct legislators' intentions. Where the language of those laws is clear, we are not free to replace it with an unenacted legislative intent."); Thompson v. Thompson, 484 U.S. 174, 191–92 (1988) (Scalia, J., concurring)

As Congress was considering legislation that would become the FTC and Clayton Acts, President Woodrow Wilson and Louis Brandeis asked a lawyer and one-time member of the Progressive Party, George Rublee, to serve as liaison between the White House and Congress.[97] Rublee determined that pending legislation that would create a federal trade commission should include a provision that would give the Commission enforcement authority and power to issue orders challenging unfair methods of competition.[98] A commission with enforcement authority diverged from the "sunshine agency" model that was contained in earlier versions of the legislation, and that was preferred by Wilson and Brandeis.[99] But at a White House meeting with President Wilson and Brandeis, Rublee persuaded them to endorse his approach.[100]

In subsequent correspondence to President Wilson describing legislative developments, another contemporary of Brandeis reported that:

> [Representative Ray Stevens of New Hampshire] has introduced the bill which was really drawn up by Mr. Rublee . . . The Stevens Bill declares unfair competition to be unlawful, and empowers the Commission, whenever it has reason to believe that a corporation is using any unfair method of competition, to hold a hearing, and if it is of [the] opinion that the method of competition in question is unfair to restrain the use thereof by injunction.[101]

In a memo prepared for President Wilson, Rublee – the author of the "unfair method of competition" prohibition[102] – explained the difference between fair competition and unfair competition. "Fair competition is competition which is successful through superior efficiency. Competition is unfair when it resorts to methods which shut out competitors who, by reason of their efficiency, might otherwise be able to continue in business and prosper."[103]

A similar description of unfair competition – focused on efficiency among rival companies – was provided by key senators during debate. Senator Henry F. Hollis "who in the

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("Committee reports, floor speeches, and even colloquies between Congressmen, are frail substitutes for bicameral vote upon the text of a law and its presentment to the President.").

[97] *See* THOMAS K. MCCRAW, PROPHETS OF REGULATION: CHARLES FRANCIS ADAMS, LOUIS D. BRANDEIS, JAMES M. LANDIS, ALFRED E. KAHN, location 1625 of 5271 on Kindle (1984); *see also* William Kolasky, *The FTC's Recission of Its 2015 Policy Statement on Section 5: If Not Consumer Welfare and the Rule of Reason, What?*, Washington Legal Foundation Critical Legal Issues Working Paper Series 112 at 28-35 (July 2021), https://www.wlf.org/2021/07/26/publishing/the-ftcs-rescission-of-its-2015-policy-statement-on-section-5-if-not-consumer-welfare-and-the-rule-of-reason-what/.

[98] Kolasky, *supra* note 97, at 11-12.

[99] McCraw, *supra* note 97, at Location 1633 of 5271.

[100] *Id.* at Location 1650 of 5271.

[101] *Id.* at Location 1640 of 5271.

[102] Kolasky, *supra* note 97, at 13.

[103] George Rublee, Memorandum Concerning Section 5 of the Bill to Create a Federal Trade Commission 3 (July 10, 1914) (unpublished memorandum), https://www.wlf.org/wp-content/uploads/2021/07/Rublee-1914-Memo-to-Lobby-for-the-Passage-of-Section-5.pdf.

later stages of the debate upon the floor of the Senate was one of the chief sponsors for the provision regarding 'unfair competition'",[104] repeated the language of the Rublee memo.[105] In short, for the author of Section 5 and one of its chief sponsors, unfair competition has economic content; unfair competition is defined by efficiency, not the list of adjectives provided in the Policy Statement.

Third, the legislative history explains that unfair competition must adversely affect consumers, not merely weaker rivals. That is, the legislative history does not support abandoning the consumer welfare standard. Senator Cummins explained that Section 5 is concerned "not merely with unfairness to the rival or competitor" but instead requires a finding that "the unfairness must be tinctured with unfairness to the public."[106]

Moreover, it is worth noting that Congressional activity regarding Section 5 of the FTC Act did not end in 1914 when the statute originally was enacted. As previously described, in 1938, Congress amended Section 5 to add the prohibition of "unfair and deceptive acts and practices." When the FTC pursued an expansive use of Section 5 through unfairness rulemaking in the 1970s, Congress expressed its disapproval by shutting down the agency for several days, failing to reauthorize the agency for fourteen years, and imposing additional procedural obstacles on trade regulation rulemaking for the FTC.[107] And in 1994, Congress made clear that there is economic content to Section 5's use of the term "unfair" for consumer protection issues, when Congress codified the Commission's Unfairness Statement that is based on a quantitative cost-benefit analysis.

The full history of Section 5 that was omitted from the Policy Statement – the intended meaning of "unfair methods of competition" described by George Rublee and Senator Hollis in 1914 and Congressional action on Section 5 in the 1980s and 1990s – demonstrates that Congress did not envision the approach to "unfair methods of competition" that is described in today's Policy Statement.

IV. Conclusion

For the foregoing reasons, I do not support the approach that the Policy Statement describes for enforcement pursuant to Section 5's "unfair methods of competition" authority. Consequently, I dissent.

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[104] Montague, *supra* note 95, at 28.

[105] 51 Cong. Rec. 12,146 (1914). ("Fair competition is competition which is successful through superior efficiency. Competition is unfair when it resorts to methods which shut out competitors who, by reason of their efficiency, might otherwise be able to continue in business and prosper.").

[106] 51 Cong. Rec. 11,105 (1914) (Sen. Cummins).

[107] *See* Beales, *supra* note 79.