AMERICAN ECONOMIC LIBERTIES PROJECT

Why Merger Policy Matters

Federal antitrust enforcers' work to revise merger guidelines can help level the playing field for businesses, consumers, and working people

August 2022

Music fans hate Ticketmaster. When they want concert tickets, Ticketmaster is always the one selling them, and tickets are expensive, with service charges that can double the price. Tickets are often sold out almost immediately, but are somehow available secondhand for over 50% more than the original price. Ticketmaster provides bad service at outrageous prices.

How is Ticketmaster able to frustrate and annoy consumers without anyone else coming into the market to compete with them? One technique is the corporate merger. In 2010, Ticketmaster, which already controlled 80% of ticketing, merged with Live Nation, the world's largest operator of concert venues. With control over live music, Ticketmaster can get away with ripping off music fans and strong-arming venues, all because there is nowhere else to go. Now, Live Nation-Ticketmaster can retaliate against anyone who wants to use a different ticketing service.

It's not just music. Years of bad merger policy have allowed companies to get bigger, more powerful, and worse for customers and workers. Over the last twenty years, 75% of industries have become more concentrated. Fortunately, policymakers have noticed. Today, there is a big policy fight in Washington about mergers that can change the direction of our economy. This primer explains what this policy fight is all about and why it matters.

FIRST, WHAT'S A MERGER?

A merger is when two companies combine into one company. Acquisitions are a kind of merger where one company buys another outright. There are lots of reasons companies merge. Companies might pursue mergers to grow by expanding their customer base or increasing their financial resources. However, companies might also pursue mergers to

reduce competition, because the two companies would no longer need to compete for customers or employees by lowering prices, making a better product, or paying better wages.

WHY DO MERGERS MATTER?

While many companies grow by hiring more workers and investing to expand to new locations or sell new products, mergers are one of the main ways that companies get bigger—and the main way that they monopolize markets.

A merger often gives the combined company more bargaining power than either company had on its own. A merger can create a company big enough to bully its competitors, workers, or suppliers, and without any real competition, it can increase prices on consumers with no improvements to quality or service. So rules about mergers are really what decides how big and powerful companies can become.

ARE THERE A LOT OF MERGERS TODAY?

Yes. Merger activity reached an all-time high of $5.8 trillion in 2021, with private equity—a specialized type of fund that focuses on mergers—spending more than $1 trillion on deals over the course of the year, up 110% compared to 2020. Banks announced a larger total deal value in mergers and acquisitions in the first half of 2021 than in all of 2020. Mark Sorrell, Goldman Sachs' co-head of global mergers and acquisitions, explained: "Folks across the spectrum, whether that be technology, consumer industries, healthcare, all came out and said, 'I'm going to make moves now.'"

WHAT ARE THE LAWS AND RULES AROUND MERGERS?

The main law on mergers is the Clayton Act, which prohibits any merger that might reduce competition or create a monopoly. The Department of Justice (DOJ) and Federal Trade Commission (FTC) are responsible for deciding whether a merger is legal. If the DOJ or FTC believes that a merger is illegal, they can take the companies to court to block the merger.

How do the DOJ and the FTC know whether a merger is illegal? The Department of Justice and Federal Trade Commission maintain a set of "merger guidelines" that explain which mergers they will block. Despite how important they are for the economy, the merger guidelines are a complicated, technical document that usually gets very little attention.

The first guidelines were written in 1968, but in the early 1980s they were rewritten to encourage mergers rather than to block them. That is why we now have companies like Live Nation, T-Mobile, Disney, and AT&T, among many others, that went through many mergers to become the giants they are now.

WHAT ARE SOME EXAMPLES OF HIGH-PROFILE MERGERS?

Recent years have seen many disastrous mergers:

- **Airlines:** One of the reasons airlines provide bad service is because of a series of mergers between 2008 and 2013. Delta and Northwest merged in 2008, United and Continental merged in 2010, and American Airlines and US Airways merged in 2013. Now there are only four main airlines, and many routes are served by one or two airlines.

- **T-Mobile/Sprint:** In 2019, T-Mobile acquired Sprint, so now there are only three main cellular companies. As a result, consumers have fewer choices, and T-Mobile is *closing up to 1,500 stores, with losses of up to 30,000 jobs.*

- **Disney/Fox:** In 2019, the media conglomerate Disney acquired mass media company 21st Century Fox. Following the merger, *Disney laid off thousands of employees* and is closing production on a number of television and movie projects.

- **Hertz/Dollar Thrifty:** In 2013, Hertz, the second-largest car rental company, acquired Dollar Thrifty, the fourth-largest. Three companies control almost all car rentals, charging high prices and offering bad service. In one famous example, Hertz even has a track record of *having their own customers arrested on false reports of theft.*

- **Google/DoubleClick:** Google controls 90% of search advertising and a third of all online digital advertising, starving newspapers and publishers all over the world. Google's power is a result of hundreds of acquisitions over the course of two decades. The key acquisition was DoubleClick in 2007, which combined the leading search engine with the leading advertising software company. Today, there are five government suits against Google for monopolizing aspects of internet search and key infrastructure.

WHAT ARE THE CONSEQUENCES OF TOO MANY MERGERS?

Successive waves of mergers have led to many problems:

- **Higher prices for consumers:** When companies merge in concentrated markets, there is an average *price increase of 7%.* Mergers and concentration also *contributed to this year's price increases.*

- **Layoffs and lower wages:** *Mergers often result in layoffs,* as the merged company seeks to cut costs or eliminates redundant positions.

- **Fewer startups:** When just a few companies have used mergers to concentrate an industry, they will threaten new entrants, resulting in *fewer startups.*

- **Low investment:** The American economy relies on investment in new technology, new products, and better customer service. Without competition to pressure them, industries that have consolidated through mergers *don't invest much.*

ARE ALL MERGERS BAD? WHAT IF THAT'S AN ENTREPRENEUR'S BEST PATH TO GROWTH?

Not all mergers are bad. Sometimes a business owner wants to retire and sell his or her firm, or a firm is on the verge of bankruptcy and needs to sell out. And some entrepreneurs with new ideas sometimes can't expand other than by merging with another company that has the ability to scale up. But many mergers are done to eliminate competitors, consolidate markets, or provide high fees to the Wall Street bankers who help engineer them. The easy way to tell whether a merger is problematic is through size. If a firm is already large, it probably shouldn't be allowed to merge with or acquire other firms.

SO WHAT IS THE GOVERNMENT TRYING TO DO NOW?

This brings us to the big policy fight this year. The FTC and DOJ requested public feedback and comment to revise the merger guidelines. With new leadership at the FTC and DOJ, and a Biden administration committed to a fair economy, there is a key opportunity to undo a generation of bad merger policy. New guidelines can set clear rules to prohibit giant mergers. The FTC and DOJ could undo bad mergers, like they are attempting now with Facebook, *taking the company to court to undo its illegal acquisitions of Instagram and WhatsApp.*

There is overwhelming public support for this. In 2010, when the DOJ and FTC last revised the guidelines to make minor changes, there were 32 comments in total, and almost all were from representatives of big business. This year, with renewed public support

for reining in corporate power, the agencies received *over 5,800 comments,* mostly from average citizens concerned about, for example, how corporate mergers have ruined their favorite product, made their local hospital worse, or resulted in them being laid off. Our merger comment follows.

AMERICAN ECONOMIC LIBERTIES PROJECT

Before the Department of Justice and the Federal Trade Commission

Response to Request for Information on Merger Enforcement

Docket ID FTC-2022-0003

Written Comments from the American Economic Liberties Project
April 2022

We are submitting this comment in response to your request for information on how to rewrite merger guidelines. By way of background, the American Economic Liberties Project is a nonprofit research and advocacy organization dedicated to understanding and addressing the problem of concentrated economic power in the United States.

Our main request is simple. Enforce the existing law against mergers as it was written by Congress, and not as it has been rewritten by enforcers in the time since.

Indeed, over the last forty years, the failure to enforce anti-merger provisions has led to a monopoly crisis in America. Over the past two decades, 75% of U.S. industries have experienced an increase in concentration levels.[1] Monopolization is happening in big markets,

1 Gustavo Grullon, Yelena Larkin, Roni Michaely, "Are US Industries Becoming More Concentrated?" Review of Finance, Volume 23, Issue 4, July 2019, Pages 697–743, https://doi.org/10.1093/rof/rfz007

like search engines, online commerce, airlines, seeds and chemicals, and social networks. It is happening in small markets as well, in hospitals, in syringes, portable toilets, prison phone services, mixed martial arts, and mail sorting software.[2] It is happening in low-technology markets just as much as in high-tech markets.

Consolidation leads to a host of harms, including more inequality, less innovation, lower productivity, and reduced wages.[3] One of the more pernicious and antidemocratic effects of consolidation, and the resulting domination of industries in the hands of a few, is a pervasive fear of retaliation among citizens engaged in different lines of commerce. As one executive said about a dominant firm to which he was a small supplier, "You get in line and follow orders. If you don't, you're gone. Everything is a threat."[4] Apple suppliers will not even mention the firm by name for fear of retribution, and Google is so feared that one reliant businessman told The Wall Street Journal, "It's less harmful to piss off the government than piss off Google. The government will hit me with a fine. But if Google suspends my listings, I'm out of a job. Google could make me homeless."[5] This power over the lives of others is inconsistent with American democratic values, inside or outside of economic life, and inconsistent with the antitrust laws the agencies are responsible for enforcing.

We encourage you to update the application of antitrust law to meet modern conditions of commerce, while also bringing back traditional principles of American antitrust. To understand why we both need modernization and a return to older ideas, it helps to recognize two separate revolutions in American political economy. The first is the restructuring of antitrust law since the early 1980s, when enforcers and judges accepted many of the assumptions underpinning Robert Bork's arguments about competition law. In Bork's view, the point of antitrust law was purely the promotion of efficiency, as understood through price theory. As part of this new approach, Bork proposed ending most merger challenges and

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2 Office of the Attorney General for the District of Columbia, "AG Racine Files Antitrust Lawsuit Against Amazon to End its Illegal Control of Prices Across Online Retail Market," May 25, 2021, https://oag.dc.gov/release/ag-racine-files-antitrust-lawsuit-against-amazon; US House of Representatives Sub-Committee on Antitrust, Investigation of Competition in Digital Markets, 2020, https://judiciary.house.gov/uploadedfiles/competition_in_digital_markets.pdf; "The Courage to Learn: A Retrospective on Antitrust and Competition Policy During the Obama Administration and Framework for a New Structuralist Approach," American Economic Liberties Project, January 2021 https://www.economicliberties.us/our-work/courage-to-learn/. Matt Stoller, "A Land of Monopolists: From Portable Toilets to Mixed Martial Arts," July 10, 2020, https://mattstoller.substack.com/p/a-land-of-monopolists-from-portable?s=w; "Needles," Sixty Minutes, CBS News, February 22, 2001, https://www.cbsnews.com/news/needles-22-02-2001/.

3 "Confronting America's Concentration Crisis: A Ledger of Harms and Framework for Advancing Economic Liberty for All," American Economic Liberties Project, August 6, 2020, https://www.economicliberties.us/our-work/confronting-americas-concentration-crisis-a-ledger-of-harms-and-framework-for-advancing-economic-liberty-for-all/.

4 Lauren Gurley, "'I Had Nothing to My Name': Amazon Delivery Companies Are Being Crushed by Debt," Vice, March 7, 2022, https://www.vice.com/en/article/wxdbnw/i-had-nothing-to-my-name-amazon-delivery-companies-are-being-crushed-by-debt. See also Matt Stoller, "The Wave of Terror in American Commerce," July 21, 2019, https://mattstoller.substack.com/p/the-wave-of-terror-in-american-commerce?s=w; "U.S. lawmaker says small tech firms fear retaliation if they aid antitrust probe," Reuters, July 20, 2019, https://www.reuters.com/article/us-usa-tech-antitrust/u-s-lawmaker-says-small-tech-firms-fear-retaliation-if-they-aid-antitrust-probe-idUSKCN1TL2S3.

5 Rob Copeland and Katherine Bindley, "Millions of Business Listings on Google Maps Are Fake—and Google Profits," Wall Street Journal, June 20, 2019, https://www.wsj.com/articles/google-maps-littered-with-fake-business-listings-harming-consumers-and-competitors-11561042283?mod=hp_lead_pos5; Yang Jie, "The Big A? The Fruit Company? Why the Maker of iPhones Must Not Be Named," Wall Street Journal, March 4, 2022, https://www.wsj.com/articles/apple-big-a-the-fruit-company-why-the-maker-of-iphones-must-not-be-named-11646407471.

Section 2 monopolization claims.[6] Reversing these changes and reverting to earlier principles and guidelines can help address well-understood problems in areas like meatpacking, oil, sugar, and other 'old economy' industries. We urge the agencies to reverse this legal shift and return to the effective anti-merger policies of the Clayton Act as it was written.

The second is a technological revolution in the rise of information technologies, the internet, social media, and related businesses. The rise of digital technologies in the 1990s and 2000s was organized by firms born native to the monopoly-friendly policy framework Bork promoted. The net effect of these revolutions is the rise of firms more powerful than we have seen in history, so dominant that in many ways they rival or exceed the power of sovereign states and threaten democracy itself.[7] As Mark Zuckerberg once put it, "In a lot of ways Facebook is more like a government than a traditional company." A rewrite of guidelines needs to incorporate how to understand these new data-rich and network heavy markets, along with related nonprice harms such as speech restrictions, cybersecurity threats, and privacy.

The need to update administrative policy around the law, and bring it back to first principles, is not surprising. Enforcers should not imagine that there is anything intrinsic towards centralization or concentration involved in the digital age. Antitrust has always operated on the forefront of technology. In 1911, Standard Oil was a 'high-tech' company, as were Alcoa, AT&T, IBM, and Microsoft when they encountered antitrust authorities.[8] By contrast today, both 'old economy' corporations and 'tech firms' are monopolized for the same reason – policy. But it is useful to note that some markets are well-understood and can be addressed using time-tested tools, whereas other markets are newer and need different approaches.

Finally, given the changes in our economy, it is important to use new research and new digital tools to update the ability of agencies to enforce competition law. As just one significant example discussed below, there is significant new learning into labor market concentration.

This comment is organized into two sections. The first section outlines the failures of recent decades of merger enforcement. Since the 1980s, the agencies have refused to enforce the law as it was written and accepted by courts, a move that has pushed the American economy in an unequal, antidemocratic, and inefficient direction, and which is now allowing for a massive merger wave in the wake of the COVID-19 pandemic. In particular, the 1982 revisions to the merger guidelines were a knowing, intentional, and unapproved rewrite of the law.

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6 "Properly drawn and applied horizontal rules are all that we need." Bork, Robert. 1978. The Antitrust Paradox: A Policy At War with Itself. New York: Basic Books. Page 245.

7 US House of Representatives Sub-Committee on Antitrust, Investigation of Competition in Digital Markets, 2020, https://judiciary.house.gov/uploadedfiles/competition_in_digital_markets.pdf

8 Stoller, Matt. 2019. Goliath: The 100-Year War Between Monopoly Power and Democracy, New York: Simon & Schuster. Chapter 1.

The second section outlines the principles on which effective merger guidelines should rely. These principles include reversing mergers, dispensing with an over-reliance on market definition, considering a broader range of harms than just price (including labor, speech, and security), over-enforcing merger rules to counterbalance the distorting effects of recent policy, and reviving the Clayton Act's incipiency standard for rapidly consolidating but not-yet concentrated industries.

I. THE FAILURES OF CURRENT MERGER POLICY

1. THE AGENCIES ARE OUT OF STEP WITH THE LAW

The main statute governing mergers in the United States is the Clayton Act, which prohibits 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."[9] The Clayton Act is part of a body of antitrust law written over concern that economic concentrations of power posed a threat to democracy itself.[10] Congress last updated this statute in 1950, when lawmakers were concerned over a merger wave and a "rising tide of economic concentration" in America. As the Supreme Court noted, "To arrest this "rising tide" toward concentration into too few hands and to halt the gradual demise of the small businessman, Congress decided to clamp down with vigor on mergers."[11]

The current guidelines, last updated in 2010, include a great deal of consideration and guidance regarding potential efficiencies from mergers, trade-offs between procompetitive and anticompetitive effects, and benefits to the consumer.[12] This is fitting with Bork and the Chicago school's thinking of the antitrust laws as solely motivated by efficiency.

While there are historical claims about the legislative history of the Sherman Antitrust Act in 1890 and whether the intent of legislators was to promote consumer welfare and economic efficiency, *this debate is completely irrelevant to readings of the Clayton Act.* No credible historian contends the Clayton Act was written with anything like consumer welfare in mind.

9 15 U.S.C. § 18.

10 Lande, Robert H., 1982. Wealth Transfers as the Original and Primary Concern of Antitrust: The Efficiency Interpretation Challenged. 34 Hastings L.J. 65, 126-142.

11 United States v. Von's Grocery Co., 384 U.S. 270 (1966).

12 2010 Horizontal Merger Guidelines, Department of Justice and Federal Trade Commission, https://www.justice.gov/atr/horizontal-merger-guidelines-08192010#5c/.

Congress had four broad goals when expanding this statute in 1950. These were to:

1. Limit increases in economic concentration.
2. Preserve small business as an important element of the American economy and protect small business from harmful mergers.
3. Stop monopolization in its incipiency.
4. Expand the law's reach to all mergers, not just 'horizontal' mergers in which direct rivals buy one another.[13]

For three decades, this law reasonably restrained mergers, and protected the United States from dominant economic and political concentrations of power. In 1968, the Department of Justice released the first merger guidelines to help the business community understand the state of the law and enforcement practices. "The 1968 guidelines were basically a codification of existing doctrine as it had developed in the division and the courts," wrote one researcher.[14]

Today a common objection to any substantial revision of the merger guidelines in 2022 is the suggestion that in all of the iterations since 1968, the guidelines have mostly existed to reflect the existing statutory authority and jurisprudence.[15] Should that be the case, then the responsibility of the agencies with respect to the guidelines would merely be to summarize the established statutory guidance and case law regarding what is and is not legal. In such a view, the guidelines would not reflect agency prerogatives or choices to selectively enforce or to prioritize certain issues over others. If this were true, any revisions to the guidelines *now* would be a political intervention into an area of regulation that was previously administered in a technically appropriate and apolitical manner.

However, guidelines are not simply a summary of existing caselaw. First, the courts have always deferred greatly to agency choices regarding enforcement, and frequently defer to the guidelines themselves, even when the guidelines do not perfectly align with prior court decisions or the statutory text itself.[16]

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13 United States v. Bethlehem Steel Corp., 168 F. Supp. 576 (S.D.N.Y. 1958). See the original Senate report on the Clayton Act, S.Rep. No. 698, 63d Cong., 2d Sess. 1 (1914). ("Broadly stated, the bill, in its treatment of unlawful restraints and monopolies, seeks to prohibit and make unlawful certain trade practices which, as a rule, singly and in themselves, are not covered by the Act of July 2, 1890 [the Sherman Act] or other existing antitrust acts and thus, by making these practices illegal, to arrest the creation of trusts, conspiracies, and monopolies in their incipiency and before consummation.")

14 Eisner, Marc Allen. 1991. Antitrust and the Triumph of Economics: Institutions, Expertise, and Policy Change. Chapel Hill, NC: UNC Press. Kindle Edition.

15 See, for example: James Keyte, "New Merger Guidelines: Are the Agencies on a Collision Course with Case Law?" ABA Antitrust Magazine, Fall 2021, Volume 36, Issue 1. https://awards.concurrences.com/IMG/pdf/vol36_no1_fall2021_keyte.pdf?74018/a7211e1b15cf5adc018ebbcd766b3aa4704a6acd

16 Greene, H., 2006. Guideline institutionalization: The role of merger guidelines in antitrust discourse. Wm. & Mary L. Rev., 48, p.771. See more generally Skidmore v. Swift & Co., 323 U.S. 134 (1944) ("Although the rulings, interpretations, and opinions of the Administrator ... do not control judicial decision, they do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance.")

Second, the 1982 revisions to the merger guidelines were implemented as a political project to scale back antitrust enforcement against the clear meaning of the law. The Reagan administration's Assistant Attorney General Bill Baxter of the Antitrust Division superseded Congressional and judicial authority by revamping merger guidelines according to its own policy preferences, ignoring the plain statute of the Clayton Act, as well as judicial precedent.[17] The Reagan administration attempted to get Congressional ratification for these changes in 1986, but Congress refused to modify the Clayton Act.[18]

Baxter was a Bork acolyte, and as such, he was a strong supporter of mergers, and believed that economic theory, not the courts, should govern the antitrust laws. Merger activity, he said, "is a very, very important feature of our capital markets by which assets are continuously moved into the hands of those managers who employ them most efficiently and interfering in a general way with that process would, in my judgment, be an error of substantial magnitude."[19] To put it differently, the Economist noted that "John D. Rockefeller would have liked a trust-buster like Baxter." Baxter, importantly, tended to dismiss statute and precedent in favor of rewriting law through administrative policy. Baxter called Supreme Court decisions "rubbish" and "wacko," and circulated a memo in the department calling one such precedent "idiocy."[20] As part of the primacy of economics, Baxter ensured that economists reviewed every new case to ensure that they aligned with economic theory. Given their effectiveness in halting enforcement, Antitrust Division lawyers took to calling them "case killers."[21]

Moreover, the architects of the 1982 Guidelines knew that they were undertaking a substantial and unapproved revision of the existing law. This can be seen clearly in a 1980 memo titled "Throttling Back on Antitrust," which was sent to Martin Anderson of

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17 Mergers and Acquisitions: Oversight Hearings Before the Subcommittee on Monopolies and Commercial Law of the Committee on the Judiciary, House of Representatives, Ninety-seventh Congress, First Session, on Mergers and Acquisitions, July 8, August 26, September 23, and December 9, 1981, Volume 4. P. 184:

"Mr. Seiberling: I wonder if you realize what your statement of nonconcern regarding vertical mergers, for example, does to the efforts of corporate counsel to advise their clients on compliance with existing court decisions or risks involving vertical mergers. Are you saying, that reciprocity does not have the probability of a substantial adverse effect on competition in these circumstances?

Baxter: Yes.

Mr. Seiberling: Well, I must say that is certainly a new approach and flies in the race of some very significant court decisions. Have those decisions been overruled?

Baxter: Those decisions have not been overruled, no.

Mr. Seiberling: Then in effect you are rewriting the antitrust laws.

Baxter: We are deciding where we will devote enforcement resources."

18 Adams, W., 1987. Should merger policy be changed? An antitrust perspective. In Conference Series;[Proceedings] (Vol. 31, pp. 173-198). Federal Reserve Bank of Boston. https://www.semanticscholar.org/paper/Should-merger-policy-be-changed-An-antitrust-Adams/5cf1be7f343f992eb60f63acb452410d92b4433e

19 Mergers and Acquisitions: Oversight Hearings Before the Subcommittee on Monopolies and Commercial Law of the Committee on the Judiciary, House of Representatives, Ninety-seventh Congress, First Session, on Mergers and Acquisitions, July 8, August 26, September 23, and December 9, 1981, Volume 4.

20 Goliath, pages 376-7. Baxter refused to enforce the Robinson-Patman Act, which he called an attempt "to put lead weights in the saddle bags of the fastest riders."

21 Goliath, page 378.

the Reagan transition team by George Stiglitz and Richard Posner, two Chicago-school scholars and ideological allies of Bork. In it, they argued that "many hallowed principles of antitrust are silly," and called for pruning back on enforcement. They outlined a political strategy to scale back antitrust enforcement under the Reagan presidency *without actually changing the law*.[22] Among the primary proposals they made was to change the merger guidelines in approximately the way that they were altered two years later in 1982:

> "[Reagan] has only to appoint as Assistant Attorney General in charge of the Antitrust Division of the Department of Justice a lawyer committed to enforcing the antitrust laws in accordance with the economic consensus position, i.e., confining enforcement to price fixing and large horizontal mergers. The head of the Antitrust Division could promptly (a) **issue modified Merger Guidelines (the Guidelines issued in 1968, during the Johnson Administration, have never been revised), raising the threshold market share percentages at which the Department will challenge horizontal mergers and abolishing the vertical and conglomerate prohibitions in the Guidelines;** (b) announce his willingness to intervene in FTC and private cases where the position of the plaintiff is contrary to sound antitrust principles; and (c) stop the automatic annual increases in the Antitrust Division's bloated appropriations."[23]

Stigler and Posner themselves were fully aware that this was extreme behavior for the Antitrust Division to pursue. They noted that "**the course of action just proposed would result in the head of the Antitrust Division, and no doubt the Attorney General as well, being hauled before the Judiciary Committee to explain his outrageous conduct**."[24] That did, in fact, occur on multiple occasions as the 1982 guidelines were being formulated and published,[25] but the revised guidelines themselves survived.

Furthermore, this political revision that resulted in the 1982 guidelines was precisely premised on the understanding that the courts would defer to the new merger guidelines, independently of their own prior decisions. As Stigler and Posner explained, "further, many courts would probably defer to the announced positions of the Justice Department, viewed as a responsible enforcer of the antitrust laws, on questions of antitrust policy,"[26] even in private cases to which the government was not a party. Again, this is what happened. For example, consider *United States v. Baker Hughes*, a 1990 case where the D.C. Circuit

22 Richard A. Posner and George J. Stigler, "Throttling Back on Antitrust: A Practical Proposal for Deregulation," Rec'd December 15, 1980, Series I, Box 2: Subject File, Martin Anderson Files, Ronald Reagan Library. Emphasis added. https://www.promarket.org/2022/04/28/a-richard-posner-and-george-stigler-memo-throttling-back-on-antitrust-a-practical-proposal-for-deregulation/.

23 "Throttling Back on Antitrust," page 3.

24 "Throttling Back on Antitrust," page 3.

25 Mergers and Acquisitions: Oversight Hearings Before the Subcommittee on Monopolies and Commercial Law of the Committee on the Judiciary, House of Representatives, Ninety-seventh Congress, First Session, on Mergers and Acquisitions, July 8, August 26, September 23, and December 9, 1981, Volume 4.

26 "Throttling Back on Antitrust," page 4.

Court repeatedly cited the government's revised merger guidelines in their decision, and ironically also cited Richard Posner—by then a Circuit Court Judge himself—as an impartial authority on a § 7 case.

In effect, Baxter and the Reagan administration *de facto* repealed the Clayton Act through prosecutorial and administrative discretion. In 1982, new merger guidelines noted, contra statute, that "although they sometimes harm competition, mergers generally play an important role in a free enterprise economy."[27] The new guidelines allowed mergers to claim an efficiency benefit from the transaction, deemphasized all but horizontal mergers, reduced the importance of access to capital as a barrier to entry in vertical mergers, and provided for much more expansive and looser market definitions.[28]

It should be emphasized here, however, that this is not a matter of interpreting the law differently or of selecting enforcement priorities—as Baxter at the time defended—but rather a complete subversion of the Clayton Act. In its plain language, legislative intent, and even as it is still enforced by the courts, the Clayton Act recognizes no efficiency defense or consumer benefit standard. It broadly condemns most mergers as inherently anticompetitive and does not depend on any reasonableness of the intent of the merging or acquiring parties. Straightforwardly, the Clayton Act prohibits 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."[29] Any question of hypothetical efficiencies or benefits to consumers are beyond the Clayton Act. The Supreme Court has accepted this understanding of the Act and rejected any efficiency defenses and any balancing of costs and benefits.[30]

While it is an appealing idea to believe that the existing guidelines are a faithful attempt to reflect the existing laws and the courts' interpretation of them in order to provide transparent guidance for the public and the business community, the record clearly shows that the 1982 guidelines were a key piece of a broader political movement to scale back antitrust enforcement that was openly out of line with the law as had been written by Congress. Subsequent versions of the guidelines, unfortunately, did not undo this agency revision, but rather advanced it further or made no more than minor adjustments.[31]

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27 U.S. Department of Justice, 1982 Merger Guidelines, § I.

28 "Mergers are never troublesome except insofar as they give rise to horizontal problems" in "Justice Department's New Merger Guidelines May Be Ready by Winter, Baxter Indicates," Antitrust and Trade Regulation Report 1027 (August 13, 1981). Eisner, Marc Allen. 1991. Antitrust and the Triumph of Economics: Institutions, Expertise, and Policy Change. Chapel Hill, NC: UNC Press. Kindle Edition.

29 15 U.S.C. § 18, emphasis added.

30 See FTC v. Procter & Gamble Co., 386 U.S. at 580 ("Possible economics cannot be used as a defense of illegality"). Philadelphia Nat'l Bank, 374 U.S. at 371 ("a merger the effect of which 'may be substantially to lessen competition' is not saved because, on some ultimate reckoning of social or economic debits and credits, it may be deemed beneficial...Congress determined to preserve out traditionally competitive economy. It therefore proscribed anticompetitive mergers, the benign and malignant alike, fully aware, we must assume, that some price might have to be paid.").

31 Courage to Learn, pages 38-40.

Nonetheless, the net effect of this informal repeal of the Clayton Act was transformative. "Why are we in the midst of one of the largest merger waves in United States history?" asked one Federal Reserve economist in 1987.[32] 28% of the largest 500 firms in America were acquired in the 1980s.[33]

Subsequent administrations' acceptance of Baxter's rewrite of antitrust law, enabling multiple waves of consolidation in the 1990s, 2000s, 2010s, and today. The result is that the number of public traded companies has been cut in half since the 1990s, largely due to mergers.[34] Corporate profits rose to become significantly elevated, as aggregate markups rose from 21% above marginal cost in 1980 to 61% in 2020.[35]

Even in hindsight, the executive branch rewrite of the Clayton Act was understood as a signature achievement. In 2002, Assistant Attorney General Charles A. James argued that these guidelines were so significant that it was "difficult to fathom the world of merger policy before them." He likened them to the significance of John Coltrane's jazz masterpiece, *Giant Steps*. "Antitrust seldom resembles art, but Bill Baxter's 1982 Merger Guidelines were every bit as significant in the field of antitrust as the recording of Giant Steps was in the field of modern jazz. The 1982 Guidelines were a revolutionary leap forward when they were first promulgated... No policy document issued by the antitrust agencies has been more enduring or far-reaching."[36]

James was correct about the import of these guidelines, which have been catastrophic for American society. It is time to end this longstanding subversion of the law by Baxter, and subsequent enforcers, who wildly misused agency discretion to enact a radical revolution in American commerce.

Accordingly, we ask the agencies to change the guidelines back to something akin to their form in 1968, when it was a good-faith effort to reflect the congressional intent of Clayton Act and the subsequent court decisions that enforced it. Only after that is done can it be said that the guidelines reflect existing law and judicial precedent.

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32 Ravenscraft, David J. 1987. "The 1980s merger wave: an industrial organization perspective," Conference Series; [Proceedings], Federal Reserve Bank of Boston, vol. 31, pages 17-51. https://www.bostonfed.org/-/media/Documents/conference/31/conf31b.pdf

33 Shleifer, A. and Vishny, R.W., 1990. The takeover wave of the 1980s. Science, 249 (4970), pp.745-749. https://www.jstor.org/stable/2878074

34 "Does America Have a Monopoly Problem? Examining Concentration and Competition in the US Economy" Prepared Statement of John Kwoka before the U.S. Senate Committee on the Judiciary, Subcommittee on Antitrust, Competition Policy, and Consumer Rights, March 5, 2019. https://www.judiciary.senate.gov/imo/media/doc/Kwoka%20Testimony.pdf

35 De Loecker, J., Eeckhout, J. and Unger, G., 2020. The rise of market power and the macroeconomic implications. The Quarterly Journal of Economics, 135(2), pp.561-644. https://doi.org/10.1093/qje/qjz041.

36 "Giant Steps," Remarks of Charles A. James, Assistant Attorney General, Antitrust Division, U.S. Department of Justice, On the Occasion of the Twentieth Anniversary of the 1982 Merger Guidelines. https://www.justice.gov/archives/atr/giant-steps-remarks-charles-james-assistant-attorney-general-antitrust-division

2. BAD MERGER POLICY HAS RE-ORIENTED THE AMERICAN ECONOMY IN AN INEFFICIENT AND UNDEMOCRATIC DIRECTION

A. Economic Evidence

The past generation of continuous mergers has had a grave effect on the character and nature of the American economy. The scale of concentration has increased dramatically over the past 40 years, as over 75% of industries have become more concentrated since the late 1990s.[37] Over the same period, mergers have eliminated almost half of publicly traded companies.[38] A generation of uncontrolled merger activity has created a non-competitive, consolidated, and hierarchical organization of American economic life, and the effects of this can be seen in higher prices, high profits, low investment, slower innovation, declining startup rates for new businesses, and rising income and wealth inequality.[39] Far from being "procompetitive," this long wave of mergers has made the American economy stagnant, lacking in dynamism, and controlled by increasingly small groups of powerful firms.

The most straightforward economic effect of mergers is increased prices, as with fewer firms in an industry, it becomes easier for those firms to collude, tacitly or explicitly, to raise or to not decrease prices. The most comprehensive study on the effects of mergers on prices to date, conducted by economist John Kwoka, found that in recent decades, the agencies have been consistently waiving through mergers that have increased prices, even when ostensibly following the consumer welfare standard. From a sample of 119 product prices, the average change in price post-merger was an increase of 4.3%, and a majority of the post-merger prices reflected price increases.[40] Even aside from specific post-merger prices, the concentrated, non-competitive character of the American economy in the past four decades has resulted in substantial price increases in the aggregate. Economist Thomas Philippon has estimated that the average American household is paying about $5,000 more per year than they would be under more competitive markets.[41]

These price increases are also reflected in a generation of consistently high profits and markups (the difference between the marginal cost of production and sales price). Recent research shows that the rate of profit across the American economy has risen substantially since 1980, driven not by a few high-profit industries, but rather is driven by the extremely

37 Grullon, G., Larkin, Y. and Michaely, R., 2019. Are US Industries Becoming More Concentrated? Review of Finance, 23(4), pp.697-743. https://doi.org/10.1093/rof/rfz007

38 "Does America Have a Monopoly Problem? Examining Concentration and Competition in the US Economy" Prepared Statement of John Kwoka before the U.S. Senate Committee on the Judiciary, Subcommittee on Antitrust, Competition Policy, and Consumer Rights, March 5, 2019. https://www.judiciary.senate.gov/imo/media/doc/Kwoka%20Testimony.pdf

39 For a summary of many of these harms, see "Confronting America's Concentration Crisis: A Ledger of Harms and Framework for Advancing Economic Liberty for All," American Economic Liberties Project, July 2020, https://www.economicliberties.us/wp-content/uploads/2020/08/Ledger-of-Harms-R41.pdf.

40 Kwoka, J., 2014. Mergers, Merger Control, and Remedies: A Retrospective Analysis of US Policy. Cambridge, MA: MIT Press. Chapter 6.

41 Philippon, Thomas. 2019. The Great Reversal: How America Gave Up on Free Markets. Cambridge, MA: Belknap Press.

high profits of the most dominant firms in nearly all industries.[42] Furthermore, average markups have increased from 21% over marginal cost to 61% over marginal cost, showing that efficiency improvements are not being passed on to consumers or workers, but rather held back for profits.[43] Other academic studies largely confirm this rise in profits and markups over the past several decades, and its correspondence with economic concentration.[44]

Concentrated industries also have little incentive to innovate or invest in new technologies, new productive capacity, their workers, or new product lines. Despite the unprecedentedly low cost of capital for most major firms today,[45] the rate of corporate investment in the United States is surprisingly depressed.[46] The American economy has simply under-invested relative to its high profits, low funding costs, and high corporate valuations.[47] Most importantly, however, is that this "investment gap" is driven not by small firms without the money to invest or the resources to scale up a new idea, but rather by low levels of investment among the largest firms in highly concentrated industries. As economists Germán Gutiérrez and Thomas Philippon explain, "Industries with more concentration and more common ownership invest less, even after controlling for current market conditions and intangibles."[48]

Since 1980, corporate America has also turned away from funding direct scientific research and development.[49] Mergers specifically reduce the incentives to invest in basic science and research and development, with decreased rates of patent applications post-merger, particularly in R&D-intensive industries.[50] And sometime mergers are motivated explicitly

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42 De Loecker, J., Eeckhout, J. and Unger, G., 2020. The rise of market power and the macroeconomic implications. The Quarterly Journal of Economics, 135(2), pp. 561-644. https://academic.oup.com/qje/article/135/2/561/5714769

43 De Loecker et al.

44 Autor, D., Dorn, D., Katz, L.F., Patterson, C. and Van Reenen, J., 2020. The fall of the labor share and the rise of superstar firms. The Quarterly Journal of Economics, 135(2), pp.645-709, https://academic.oup.com/qje/article/135/2/645/5721266?login=true. Kurz, M., 2017. On the formation of capital and wealth: IT, Monopoly Power and Rising Inequality. Monopoly Power and Rising Inequality (June 25, 2017), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3014361.

45 Joe Rennison, "US corporate borrowing costs sink to record low," Financial Times, June 19, 2020, https://www.ft.com/content/29a4d5fc-64c9-4ad5-b91f-37c821af33fe.

46 Robin Harding, "Corporate Investment: A Mysterious Divergence," Financial Times, July 24, 2013. https://www.ft.com/content/8177af34-eb21-11e2-bfdb-00144feabdc0; Chris Matthews, "America's Investment Crisis is Getting Worse," Fortune, December 2, 2015, https://fortune.com/2015/12/02/corporate-investment-crisis/ ; https://www.wsj.com/articles/companies-shy-away-from-spending-1448931106.

47 See Gutiérrez, G. and Philippon, T., 2018, May. Ownership, concentration, and investment. In AEA Papers and Proceedings (Vol. 108, pp. 432-37), https://doi.org/10.1257/pandp.20181010; Gutiérrez, G. and Philippon, T., 2017. Declining Competition and Investment in the US (No. w23583). National Bureau of Economic Research. https://www.nber.org/papers/w23583.

48 Philippon, T. and Gutierrez, G. 2017. "Investmentless Growth: An Empirical Investigation," Brookings Papers on Economic Activity, 95-97, https://www.brookings.edu/bpea-articles/investment-less-growthan-empirical-investigation/.

49 Arora, A., Belenzon, S. and Patacconi, A., 2015. Killing the golden goose? The decline of science in corporate R&D (No. w20902). National Bureau of Economic Research, https://www.nber.org/papers/w20902.

50 Haucap, J., Rasch, A. and Stiebale, J., 2019. How mergers affect innovation: Theory and evidence. International Journal of Industrial Organization, 63, pp.283-325. https://doi.org/10.1016/j.ijindorg.2018.10.003.

by the desire to shut down to research and development of an innovative rival product, in so-called “killer acquisitions.”[51]

The perverse incentives created by a generation of mergers and rising corporate consolidation have also resulted in a historically low rate of new business creation,[52] with the recovery from the 2008 financial crisis being particularly characterized by a dearth of new startups, dominated instead by established companies.[53] This low startup rate is specifically the result of industrial concentration, as dominant firms are able to control and police the boundaries of existing markets and deter new entrants.[54]

High profits, concentration, and high markups are consistently linked to the declining share of national income going to workers as opposed to owners of capital.[55] Concentrated industries pay less in wages relative to the share of income going to capital and profits,[56] even when controlling for other factors that otherwise affect the labor share of income.[57] On top of paying less wages overall, the concentration of industry has likewise contributed to the rise in *inequality among workers* over the past generation. Employees of the most powerful and profitable firms are paid far more than employees of smaller firms who are at their mercy. Correspondingly, the past generation of rising income inequality is largely attributable to inter-firm income inequality following this pattern, rather than within-firm inequality based on employee skill or productivity.[58]

Finally, concentration gives employers more bargaining power over workers, allowing them to pay lower wages and partake in anticompetitive tactics to suppress them further.

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51 Cunningham, C., Ederer, F. and Ma, S., 2021. Killer acquisitions. Journal of Political Economy, 129(3), pp.649-702, https://doi.org/10.1086/712506.

52 Hathaway, I. and Litan, R.E. 2014. Declining business dynamism in the United States: A look at states and metros. Economic Studies at Brookings: https://www.brookings.edu/wp-content/uploads/2016/06/declining_business_dynamism_hathaway_litan.pdf; Shambaugh, J., Nunn, R., Breitwieser, A. and Liu, P., 2018. "The state of competition and dynamism: Facts about concentration, start-ups, and related policies." Hamilton Project, Brookings Institution: https://www.brookings.edu/wp-content/uploads/2018/06/ES_THP_20180611_CompetitionFacts_20180611.pdf; Lettieri, John and Fikri, Kenan. 2017. “The Case of Economic Dynamism and Why it Matters for the American Worker,” Economic Innovation Group: https://eig.org/dynamism/assets/case-for-dynamism.pdf

53 “The New Map of Economic Growth and Recovery,” Economic Innovation Group, May 2016: https://eig.org/wp-content/uploads/2016/05/recoverygrowthreport.pdf.

54 Ian Hathaway and Robert E. Litan, “What’s Driving the Decline in the Firm Formation Rate? A Partial Explanation,” Economic Studies at Brookings, November 2014, https://perma.cc/D4RS-8CC5; “Dynamism in Retreat: Consequences for Regions, Markets, and Workers,” Economic Innovation Group, February 2017, https://eig.org/wp-content/uploads/2017/07/Dynamism-in-Retreat-A.pdf.

55 Matthias Kehrig and Nicolas Vincent, “Growing Productivity Without Growing Wages: The Micro-Level Anatomy of the Aggregate Labor Share Decline,” Economic Research Initiatives at Duke (ERID) Working Paper No. 244, April 25, 2017. Available at http://dx.doi.org/10.2139/ssrn.2943059.

56 Barkai, S., 2020. Declining labor and capital shares. The Journal of Finance, 75(5), pp.2421-2463: https://onlinelibrary.wiley.com/doi/full/10.1111/jofi.12909.

57 De Loecker, J., Eeckhout, J. and Unger, G., 2020. The rise of market power and the macroeconomic implications. The Quarterly Journal of Economics, 135(2), pp. 561-644: https://academic.oup.com/qje/article/135/2/561/5714769.

58 Barth, E., Bryson, A., Davis, J.C. and Freeman, R., 2016. It’s where you work: Increases in the dispersion of earnings across establishments and individuals in the United States. Journal of Labor Economics, 34(S2), pp.S67-S97. https://www.journals.uchicago.edu/doi/full/10.1086/684045?casa_token=xjZOq81vS3wAAAAA%3Ay668MHZiWkvnIcLJA06W0ojueDf22pRaFeqK4ap43CuemQEho7A3Dok-A_u63EDNImCKXmzV8IsI; Song, J., Price, D.J., Guvenen, F., Bloom, N. and Von Wachter, T., 2019. Firming up inequality. The Quarterly journal of economics, 134(1), pp.1-50. https://doi.org/10.1093/qje/qjy025; Furman, J. and Orszag, P., 2018. A Firm-Level Perspective on the Role of Rents in the Rise in Inequality. In Toward a Just Society (pp. 19-47). New York, NY: Columbia University Press. https://www.degruyter.com/document/doi/10.7312/guzm18672-003/html.

Living in a region where there are very few employers, employees have little negotiating position to leave for better pay or to threaten to do so. As such, markets with more concentrated labor markets are associated with substantial decreases wages,[59] and in the United States today, the average labor market has 2.3 employers, with 60% of labor markets being highly concentrated.[60] A recent report from the Treasury on competition in labor markets estimated that the average worker is paid approximately 20% less than they would have been relative to more competitive markets, based on a combination of labor market concentration and anticompetitive practices like non-compete agreements, non-disclosure agreements, and other restrictive employment agreements.[61]

In addition to these broader categories of harms, the concentration of economic power in fewer and fewer hands leads to a range of abuses, harms, and costs that do not fit easily into the categories normally considered in merger review. These include extreme cases of cruelty to customers or workers and negligence of core responsibilities by merged firms. Hospital consolidation has been linked to understaffing, and by extension led to deaths.[62] For example, Delta Airlines assaulted and forcibly dragged a passenger off a flight that they had overbooked.[63] Hertz has for years by reporting rental vehicles as stolen, leading to the arrest of hundreds of its own customers.[64] Varsity Spirit, the dominant monopoly firm in competitive cheerleading, covered up a sex-abuse scandal in the sport and allowed hundreds of convicted sex offenders to remain.[65] The two crashes of Boeing 737 Max planes can be linked to Boeing's adoption of the poor quality control systems of McDonnell Douglass when it acquired the firm in 1997.[66] Consolidated technology companies play an outsized role in deciding what sort of speech is platformed or amplified through opaque algorithms.

All these harms are made possible or exacerbated by competition. Powerful companies can treat their employees, their customers, their suppliers, or the distributors horribly if

59 Azar, J., Marinescu, I. and Steinbaum, M., 2022. Labor market concentration. Journal of Human Resources, 57(S), pp. S167-S199: http://jhr.uwpress.org/content/early/2020/05/04/jhr.monopsony.1218-9914R1.short?ssource=mfr&rss=1;

60 Azar, J., Marinescu, I., Steinbaum, M. and Taska, B., 2020. Concentration in US labor markets: Evidence from online vacancy data. Labour Economics, 66, p. 101886: https://www.nber.org/papers/w24395.

61 "The State of Labor Market Competition," U.S. Department of the Treasury, March 7, 2022, available at: https://home.treasury.gov/system/files/136/State-of-Labor-Market-Competition-2022.pdf.

62 Gaynor, M., Moreno-Serra, R. and Propper, C., 2013. Death by market power: reform, competition, and patient outcomes in the National Health Service. American Economic Journal: Economic Policy, 5(4), pp. 134-66. https://www.aeaweb.org/articles?id=10.1257/pol.5.4.134

63 "United Airlines faces backlash after dragging man from plane," CBS News, April 11, 2017: https://www.cbsnews.com/news/united-airlines-faces-backlash-after-dragging-man-from-plane/.

64 Katie Wedell, "Senators call for investigation of Hertz after hundreds of rental car customers claim false arrest," USA Today, March 31, 2022: https://www.usatoday.com/story/money/2022/03/31/hertz-arrests-senate-warren-blumenthal-investigation-rental-car/7233969001/.

65 Daniel Connolly, "Cheer Empire: A for-profit company built competitive cheer, pays people who make its rules," USA Today News, September 18, 2020: https://www.usatoday.com/in-depth/news/2020/09/18/cheer-empire-profit-company-created-cheerleading-regulators-pays-salaries/3468551001/.

66 Maureen Tkacik, "Rescue Mission: Bailing Out Boeing and Rebuilding It to Thrive," American Economic Liberties Project, March 23, 2020: https://www.economicliberties.us/wp-content/uploads/2020/04/Boeing-Bailout-2020.pdf.

there are no other options. Powerful companies can provide a poorer quality—or even dangerous—product if there are no other companies to buy from.

The past generation of non-enforcement of the Clayton Act has led the United States in a catastrophic direction. The rapid growth and shared prosperity of the mid-20th century was anchored by a legal and policy commitment to a dispersed, competitive, and fair economy. The revisions to antitrust law in the late 1970s and 1980s—with the 1982 merger guideline revisions central among them—encouraged American industry to consolidate in an unequal and inefficient direction, resulting in higher prices, more inequality, lower wages, suppressed investment, and lower growth. A faithful application of the Clayton Act would help address many of these maladies.

B. Mergers are Unproductive and Inefficient

Beyond these general effects, because of this generation of misguided and misapplied merger policy, the personal and professional incentives for mergers have become increasingly divorced for any sort of commercial, technical, or social logic for them to be consummated. Merger deals now primarily make large incomes and fortunes for the dealmakers who push them through, at the expense of workers, consumers, and the public. "Golden parachutes" – payoffs for executives of merging firms who might otherwise fear losing their job in a merger – have become increasingly common in corporate America.[67] Likewise, large sums of consulting and service fees go to the investment bankers, corporate lawyers, and economic consultants who push mergers through despite their costs. This was not the case under the merger policies as they had been applied prior to the 1980s. Notably, the costs of such "merger frictions" are rarely if ever incorporated in analyses of the supposed procompetitive benefits of mergers.[68]

The prevalence of such misaligned incentives is demonstrated well by the current merger wave in the wake of COVID. The optimal efficient scale of business did not change because of the pandemic, and yet we are into a two-year merger frenzy. What did change was the availability of the financial resources for mergers and acquisitions – in part because of the CARES Act. As finance professor Nuno Fernandes wrote breathlessly in the Harvard Business Review in early 2021, "Well-capitalized companies will soon face a once-in-a-generation opportunity to make acquisitions and consolidate power," even as he also acknowledged that "most mergers and acquisitions fail."[69] The personal and commercial

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67 Matt Stoller and Sarah Miller, "No More Payoffs for Layoffs," Buzzfeed News, May 3, 2019: https://www.buzzfeednews.com/article/mattstoller1/no-more-payoffs-for-layoffs.

68 Jesse Eisinger and Justin Elliott, "These Professors Make More Than a Thousand Bucks an Hour Peddling Mega-Mergers," ProPublica, November 16, 2016: https://www.propublica.org/article/these-professors-make-more-than-thousand-bucks-hour-peddling-mega-mergers.

69 Nuno Fernandes, "How to Capitalize On the Coming M&A Wave," Harvard Business Review, February 12, 2021: https://hbr.org/2021/02/how-to-capitalize-on-the-coming-ma-wave.

incentives created by weak merger policy now mean that firms will use additional financial resources on wasteful, inefficient, and counterproductive merger deals, rather than make investments in further growth, production, innovation, or other forms of internal expansion.

A brief illustration of the commercial incentives facing firms during the post-war period will highlight the differences. Because of the 1950 Amendment to the Clayton Act, as well as court decisions rigorously enforcing it,[70] American firms ceased to try to expand and consolidate industries through mergers and acquisitions.[71] Strict but straightforward merger rules ensured an administrable deterrent to anticompetitive mergers, such that there was little hope to get around the Clayton Act's prohibitions. As the courts were very clear about the preferences that firms expand through investment in new plants, hiring, research, or new locations (i.e., internal expansion), firms faced strong incentives to pursue those business strategies. Consider, for example, Bethlehem Steel, a company that had never actually built a steel plant itself and had only acquired them. After a court told them they were not permitted to acquire, they began investing in building new plants and productive capacity themselves, building their largest steel plant just a few years later from 1962 to 1964.[72] Lastly, individual corporate managers – who often spent much of their careers at a single firm – had their own reasons for opposing mergers: they had served and protected one organization's interests for much of their lives, in a merged firm they would lose their managerial autonomy, or they might even find themselves out of a job.

By comparison, today mergers and acquisitions are rife with conflicts of interest, self-dealing, kickbacks, and perverse incentives, most of which further push decisionmakers to pursue mergers, despite there being little to no commercial logic for the deal. One prominent example is the widespread practice of a "golden parachute," where executives of merging firms are paid large sums, often by the acquiring firm, should a merger transaction go through. Originally developed during the late 1970s as a business strategy for firms to *avoid* being acquired – as a poison pill to make the deal unattractive to corporate raiders – now golden parachutes have become ubiquitous kickbacks to executives to ensure that transactions can go through seamlessly.[73] These sorts of arrangements define the merger and acquisition space, exemplified well by a few examples:

70 See Brown Shoe Co., Inc. v. United States, 370 U.S. 294 (1962); United States v. Philadelphia Nat'l Bank, 374 U.S. 321 (1963); United States v. Von's Grocery Co., 384 U.S. 270 (1966).

71 Fligstein, N., 1990. The Transformation of Corporate Control. Cambridge, MA: Harvard University Press.

72 United States v. Bethlehem Steel Corporation, 168 F. Supp. 576 (S.D.N.Y. 1958); Alex Brown, "Burns Harbor Steel Plant Dedicates Historical Marker," Inside Indiana Business, October 19, 2018: https://www.insideindianabusiness.com/articles/burns-harbor-steel-plant-dedicates-historical-marker. Another example of internal expansion was the widespread use of corporate research labs, which disappeared when firms were able to purchase smaller innovative firms instead of doing their own R&D. See Barry C. Lynn, "Estates of Mind," Washington Monthly, July 4, 2013: https://washingtonmonthly.com/2013/07/04/estates-of-mind/. See also Arora, A., Belenzon, S., Patacconi, A. and Suh, J., 2020. The changing structure of American innovation: Some cautionary remarks for economic growth. Innovation Policy and the Economy, 20(1), pp. 39-93: https://www.journals.uchicago.edu/doi/pdfplus/10.1086/705638.

73 Andrew Ross Sorkin, "Executive Pay: A Special Report; Those Sweet Trips to the Merger Mall," New York Times, April 7, 2002: https://www.nytimes.com/2002/04/07/business/executive-pay-a-special-report-those-sweet-trips-to-the-merger-mall.html?pagewanted=all&src=pm.

- AT&T-Time Warner Acquisition: $434 million to Time Warner CEO Jeff Bewkes;[74]
- CVS-Aetna Acquisition: $500 million to Aetna CEO Mark Bertolini
- Charter-Time Warner Cable Acquisition: $91 million to Time Warner Cable CEO Robert Marcus
- Bayer-Monsanto Merger: $77 million to Monsanto CEO Hugh Grant
- Merck-Cubist Acquisition: $113 million to Cubist CEO Michael Bonney
- Roche-Spark Acquisition: $22 million to Spark CEO Jeffrey Marrazzo
- Google-Motorola Acquisition: $66 million to Motorola CEO Jha[75]
- Proctor & Gamble-Gillette Acquisition: $185 million for Gillette CEO James Kilts[76]
- Johnson & Johnson-Synthes Acquisitions: $52 million to Synthes CEO Michael Orsinger[77]
- Energy Transfer Equity-Southern Union Acquisition: $54 million to Southern Union CEO George Lindemann[78]
- United Technologies-Goodrich Acquisition: $35 million to Goodrich CEO Marshall Larsen[79]

Research has found that golden parachutes are associated with a higher likelihood of a firm being acquired, and with poorer stock and business performance after their adoption, primarily because of increased managerial slack.[80]

Yet executives are not the only actors in this space with a deep conflict of interest. While much of the potential costs of mergers fall to workers, consumers, and other competitors, the investment bankers, lawyers, and consultants who push these deals through personally benefit a great deal from them. An industry of academic economists consulting on behalf of serial mergers and acquirers has sprung up since the 1980s when merger rules became less stringent, precisely to offer professional and academic authority to the corporate arguments that the mergers in question are "procompetitive" and will reduce prices for consumers.[81] This consulting work is, unsurprisingly, extremely lucrative.

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74 Howard Gold, "Here's the biggest winner in the AT&T-Time Warner merger," MarketWatch, June 14, 2018: https://www.marketwatch.com/story/heres-the-biggest-winner-in-the-att-time-warner-merger-2018-06-13.

75 "Motorola CEO Jha to get $66 mn 'golden parachute' in Google Deal," Firstpost, September 15, 2011: https://www.firstpost.com/business/motorola-ceo-jha-to-get-66mn-golden-parachute-in-google-deal-84578.html.

76 Scott Thurm, "Mergers Open 'Golden Paracutes': Top Executives of Acquired Companies Stand to Get Huge Payouts When They Exit Quickly," The Wall Street Journal, November 1, 2011: https://www.wsj.com/articles/SB10001424052970204394804577010000947986974.

77 "Mergers Open 'Golden Paracutes'"

78 "Mergers Open 'Golden Paracutes'"

79 "Mergers Open 'Golden Paracutes'"

80 Bebchuk, L., Cohen, A. and Wang, C.C., 2014. Golden parachutes and the wealth of shareholders. Journal of Corporate Finance, 25, pp.140-154. https://www.sciencedirect.com/science/article/abs/pii/S0929119913001156?via%3Dihub

81 Jesse Eisinger and Justin Elliott, "These Professors Make More Than a Thousand Bucks an Hour Peddling Mega-Mergers," ProPublica, November 16, 2016: https://www.propublica.org/article/these-professors-make-more-than-thousand-bucks-hour-peddling-mega-mergers.

Research into the success rate of recent mergers and acquisitions, even solely as a business endeavor, does not show a particularly flattering picture. As one researcher put it, “In fact, a substantial body of research on whether mergers create value for the firm’s shareholders concludes that most mergers do not create value for anyone, except perhaps the investment bankers that have negotiated the deal.”[82] New York University Finance Professor Aswath Damodoran has noted that “More value is destroyed by acquisitions than any other single action taken by companies.”[83]

The incentives for mergers and acquisitions are significantly out of line with any logical commercial justification for such transactions. This problem is particularly pronounced in the United States, with financial analysts Taiki Morita and Nick Schmitz noting based on COMPUSTAT data that “corporate acquirers in the US generally tended to underperform the market. And the bigger the deal, the worse the returns. The firms in the 10th decile [of the value of acquisitions] generated a -23% premium relative to the market in the subsequent year.”[84] This internal game of payoffs, kickbacks, perverse incentives, and kickbacks is not itself the focus of the merger guidelines, but the lax guidelines that have been in place since 1982 have certainly contributed to it.

C. The Antidemocratic Character of a Consolidated Economy

This generation of mergers and concentration has undermined the formal system of American democracy. Dominant corporations use their power to shape public discourse, influence government policy, undermine democratic institutions, and avoid accountability. Corporations in concentrated industries are spending unprecedented amounts to influence the political system and warp policy outcomes to their own preferences. Lobbying expenditures reached an all-time high of $3.73 billion in 2021,[85] not including the hundreds of millions of dollars businesses spend on unregulated influence campaigns every year.[86] Some of today’s most powerful firms undermine our free media, a cornerstone of democracy. Google and Facebook have monopolized digital advertising, harvesting nearly 60 percent of U.S. advertising revenue, decimating newspapers, magazines, and

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82 Schilling, M.A., 2018. Potential sources of value from mergers and their indicators. The Antitrust Bulletin, 63(2), pp. 183-197. https://journals.sagepub.com/doi/full/10.1177/0003603X18770068?casa_token=uFyZNmKCJVAAAAAA%3ACmvNsiLcKLZczJFNv5eHQ6Ay4HTfB9OCH4w1wNZ6UyZYNJcuQ7IrI_zar0kbVp_MzzTeCutS5eROmw

83 Max Nisen, “This Is the #1 Thing That Companies Do to Destroy Shareholder Value,” Business Insider, June 5, 2012: https://www.businessinsider.com.au/damodaran-the-acquisition-process-destroys-more-value-than-anything-else-corporations-do-2012-6.

84 Taiki Morita and Nick Schmitz, “Japan’s Empire Builders,” Verdad, January 18, 2022: https://us13.campaign-archive.com/?u=6dc62f307511d466ff78a94fe&id=717ea79d10.

85 Total lobbying spending in the United States from 1998 to 2021, Statista: https://www.statista.com/statistics/257337/total-lobbying-spending-in-the-us/.

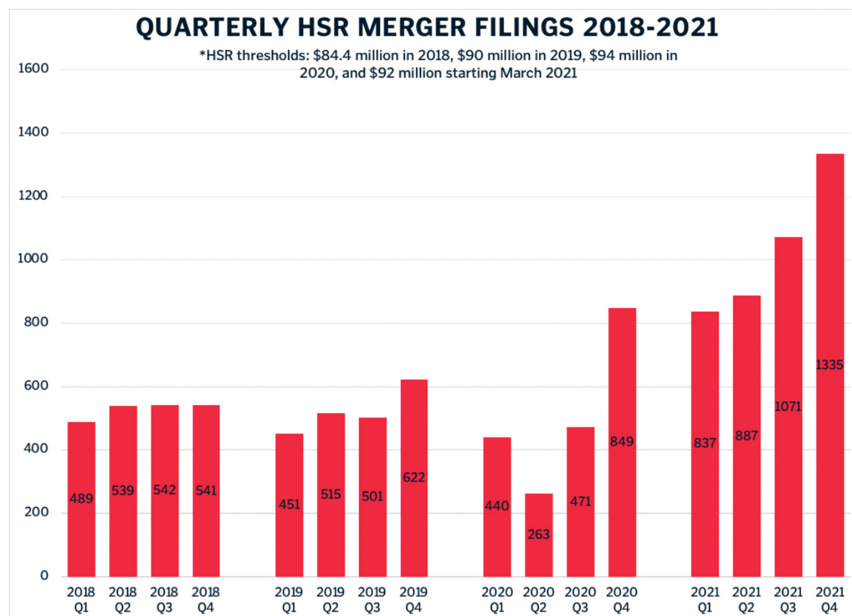
86 Andrew Perez, Abigail Lack, and Tim Zelina, “Business Group Spending in Lobbying in Washington is at Least Double What’s Publicly Reported,” The Intercept, August 6, 2019: https://theintercept.com/2019/08/06/business-group-spending-on-lobbying-in-washington-is-at-least-double-whats-publicly-reported/.

other outlets even before the coronavirus pandemic.[87] As a result of both this control over advertising revenue and two decades of acquisitions, roughly 1,800 local newspapers disappeared in America between 2004 and 2018.[88]

Fifth, at a more principled level, the past generation of mergers has reorganized economic life in this country in a deeply undemocratic direction. The economy is now predominantly organized hierarchically, with each industry dominated by one or a few firms who can dictate the terms of every interaction, internally to their own workers, but also externally to their customers, suppliers, and competitors. Many workers and independent businesses are denied the voice to be able to change these circumstances, instead bullied or threatened by larger and more powerful firms. While in the private sphere, such relationships are deeply antidemocratic and against the spirit of American civic life.

3. THE AMERICAN ECONOMY IS CURRENTLY EXPERIENCING A MASSIVE MERGER BOOM

While the past generation has experienced a sustained pattern of mergers and economic consolidation since the early 1980s, these trends have been boosted in the wake of the COVID-19 pandemic. We are currently in the middle of an enormous and acute merger wave. This is clear when looking at the trend in recent years of pre-merger filings under the Hart-Scott-Rodino (HSR) Act, with the pace of mergers over doubling pre-pandemic levels by the end of 2021:



87 Sheila Dang, "Google, Facebook have tight grip on growing U.S. online ad market," Reuters, June 5, 2019: https://www.reuters.com/article/us-alphabet-facebook-advertising/google-facebook-have-tight-grip-on-growing-u-s-online-ad-market-report-idUSKCN1T61IV;

88 Penelopy Muse Abernathy, "The Expanding News Desert," UNC Hussman School of Journalism and Media, 2018: https://www.usnewsdeserts.com/reports/expanding-news-desert/

Furthermore, these are only the merger actions that are above the required thresholds set by the HSR act, whereas research already establishes clearly that substantial merger activity also occurs well below these thresholds,[89] and likely follows a similar trend.

The economic stimulus efforts undertaken in response to the COVID-19 pandemic, particularly the CARES Act, helped unleash today's unprecedented merger wave. Sarah Bloom Raskin, former Deputy Secretary of the Treasury and member of the Federal Reserve Board of Governors, summed up the long-term consequences of the Trump administration's approach to administering relief, in which the bulk of the aid supported Wall Street and large corporations: "We are in the midst of a massive restructuring of the economy. It might be hard to see because of the pandemic, but the actions taken by the Federal Reserve and by Congress in the CARES Act will have profound consequences for the economic landscape—both in terms of economic concentration and inequality."[90]

Ballooning stock prices have driven up company valuations. More companies are willing to sell at high prices, and buyers are armed with their own high valuations. Incentivized by cheap capital and huge cash reserves, dealmakers have created an unprecedented merger wave, pushing already overtaxed antitrust enforcement capacity to its limit.

U.S. corporations and their financiers have reaped the benefits. Merger activity reached an all-time high of $5.8 trillion in 2021, with private equity spending more than $1 trillion on deals over the course of the year—up 110 percent compared to 2020.[91] Banks announced a larger total deal value in mergers and acquisitions in the first half of 2021 than in all of 2020.[92]

Composed of a record number of $5 billion-plus "megadeals," the current merger wave is raging through nearly every sector. Mark Sorrell, Goldman Sachs' co-head of global mergers and acquisitions, explained: "Folks across the spectrum, whether that be technology, consumer industries, healthcare, all came out and said, 'I'm going to make

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89 Wollmann, T.G., 2019. Stealth consolidation: Evidence from an amendment to the Hart-Scott-Rodino Act. American Economic Review: Insights, 1(1), pp.77-94. https://www.aeaweb.org/articles?id=10.1257/aeri.20180137.

90 Robert Kuttner, "The Bailout, the Fed, and the Aftermath," The American Prospect, Apr. 21, 2020, https://prospect.org/economy/the-bailout-the-fed-and-the-aftermath/.

91 Nicket Nishant, "Global M&A Volumes Hit Record High in 2021, Breach $5 Trillion for First Time," Reuters, Dec. 31, 2021, https://www.reuters.com/markets/us/global-ma-volumes-hit-record-high-2021-breach-5-trillion-first-time-2021-12-31/; Lina Saigol, "Global Deal Making Hits Record High at $5.8 trillion," Barrons, Dec. 31, 2021, https://www.barrons.com/articles/global-deal-making-record-high-2021-51640960224

92 Benjamin Robertson and Beata Wijeratne, "Private Equity Is Smashing Records with Multi-Billion M&A Deals," Bloomberg, Sept. 17, 2021, https://www.bloomberg.com/news/articles/2021-09-17/private-equity-is-smashing-records-with-multi-billion-m-a-deals?sref=q0qR8k34; Jennifer Surane and Max Reyes, "Banking Merger Frenzy May Meet Early End After Biden Order," Bloomberg, Jul. 9, 2021, https://www.bloomberg.com/news/articles/2021-07-09/banking-merger-frenzy-may-meet-an-early-end-after-biden-order

moves now.'"[93] The evidence concurs, showing more major cross-sector mergers and more acquisition activity in markets that don't typically see significant M&A activity.[94]

The potential costs of the current merger wave, as well as the accumulated negative effects from 40 years of bad merger policy, demands that the agencies act now to revise the guidelines and actually enforce the Clayton Act.

II. PRINCIPLES FOR CONSIDERING MERGERS

Having established that current merger policy is based on a subversion of the clear meaning and intent of the Clayton Act and that there are large economic and political costs of the current approach to merger enforcement, we now outline several principles that the agencies should incorporate into revised guidelines.

1. EFFICIENCIES AND THE DETERRENCE OF ANTI-COMPETITIVE MERGERS

A. The Failure to Deter

The United States has a system of merger control that systematically under-deters anticompetitive mergers. In terms of the results for the American economic overall, the past generation has seen the most sustained wave of corporate mergers and consolidation in American history,[95] the American economy is currently experiencing a significant merger wave, and the overall concentration of most American industries is already substantially more concentrated than in the past.[96]

The failure of deterrence in part stems from an enforcement system that provides merging parties with a plethora of exceptions, justifications, and technicalities through which their merger can be approved by courts or the agencies. These include defending a merger on the basis that it will be efficient and thus "procompetitive," the availability of merger

93 "Big, Bold, Strategic Moves: The 2021 M&A Outlook." Exchanges at Goldman Sachs, Feb. 16, 2021. https://www.goldmansachs.com/insights/podcasts/episodes/02-16-2021-stephan-feldgoise-mark-sorrell.html

94 Billion-dollar deals are leading the M&A wave (see Kevin Dowd, "A Perfect Storm": Record-Breaking M&A, A SPAC Slowdown, Antitrust Action, Media Mega-Mergers And More From A Frantic First Half Of Deals In 2021," Forbes, Jul. 14, 2021, https://www.forbes.com/sites/kevindowd/2021/07/04/aperfect-storm-record-breaking-ma-a-spac-slowdown-antitrust-action-media-mega-mergers-and-more-from-a-frantic-first-half-of-deals-in2021/?sh=4d250cb61dc5)

95 Brennan, J., 2016. Rising corporate concentration, declining trade union power, and the growing income gap: American prosperity in historical perspective. Levy Economics Institute: http://gesd.free.fr/brennan316.pdf.

96 Autor, D., Dorn, D., Katz, L.F., Patterson, C. and Van Reenen, J., 2020. The fall of the labor share and the rise of superstar firms. The Quarterly Journal of Economics, 135(2), pp. 645-709: https://doi.org/10.1093/qje/qjaa004. De Loecker, Jan & Eeckhout, Jan & Unger, Gabriel. (2020). "The Rise of Market Power and the Macroeconomic De Loecker, J., Eeckhout, J. and Unger, G., 2020. The rise of market power and the macroeconomic implications. The Quarterly Journal of Economics, 135(2), pp.561-644. https://doi.org/10.1093/qje/qjz041. Philippon, Thomas. 2019. The Great Reversal How America Gave Up on Free Markets. Cambridge, MA: Harvard University Press.

remedies whereby the agencies approve a merger based on minor tweaks to the proposed transaction, the possibility that one of the merging parties can claim to be a "weakened competitor," the presumptions that a "vertical" merger is more likely to be procompetitive and efficiency-enhancing, the requirement that a merger challenge define an exact relevant market for the merger even in the presence of direct evidence of anticompetitive intent, and a review process that views price increases as the primary, if not only, potential anticompetitive harm from a merger.

For firms wishing to merge, the result is that rather than facing a set of clear rules and effective penalties for their violation, there is instead an array of different legal and economic defenses that they can make. Having many different options, firms can choose to characterize the merger as efficient, one of the firms as "weakened," or emphasize that the merger is a vertical merger, contorting the reality of their substantial economic power into a category accepted by existing enforcement procedures.

This is because even the practicalities of day-to-day antitrust and merger enforcement are embedded within an ideological frame that, contra the expressed intent of the Clayton Act, fundamentally favors concentration, the acquisitions of market power, and minimizing enforcement.[97] Today's extreme levels of industry and market consolidation calls for a proportionate policy response to balance and amend decades of policy favoring anticompetitive mergers and corporate concentration. Here we emphasize the failures of this ideological framework and call on the agencies to instead turn to a policy of overdeterrence against anticompetitive mergers, based around simple, bright-line rules like those outlined in the original 1968 Merger Guidelines. The remainder of the comment addresses a number of the other specific exceptions, problem areas, or neglected issues in merger enforcement that the agencies should incorporate into revised guidelines.

B. The Error-Costs Framework

Since the 1980s, merger enforcement, as well as antitrust policy generally, has been implicitly guided by an "error-cost" framework, a mode of analysis in which the cost of a mistaken antitrust enforcement action far outweighs under-enforcement. A central feature of our merger-friendly policy and ideological framework, the general supposition is that antitrust should be subjected to form of cost-benefit analysis, with the procompetitive benefits of a policy or judicial intervention balanced against the anticompetitive costs of that intervention. Even analysts critical of current policy, and supportive of significant changes to antitrust and merger policy, will view the primary guiding question as balancing of the procompetitive and anticompetitive effects of each outcome.[98]

97 See in particular, Khan, Lina M. 2018. The Ideological Roots of America's Market Power Problem, 127 Yale L.J.F. 960: http://www.yalelawjournal.org/forum/the-ideological-roots-of-americas-market-power-problem.

98 Kwoka, J., 2014. Mergers, Merger Control, and Remedies: A Retrospective Analysis of US Policy. MIT Press.

The error-costs framework was most prominently advanced by Frank Easterbrook, who asserted three main assumptions: (1) that most forms of cooperation or consolidation are beneficial, (2) that "the economic system corrects monopoly more readily than it corrects judicial errors," and (3) that the costs of accidentally permitting monopoly are smaller than the costs of prohibiting efficient business practices through antitrust.[99] Because "monopoly prices eventually attract entry,"[100] as Easterbrook argued, "judicial errors that tolerate baleful practices are self-correcting, while erroneous condemnations are not."[101] This error-cost approach has been adopted by the courts in Sherman Act cases,[102] and it has served as general guidance for antitrust rulemaking more generally.

C. No Balancing of Efficiencies Under the Clayton Act

This approach, and any conceptual framework derivative of it, is wholly inapplicable to merger enforcement, above all because the Clayton Act respects no balancing of the anticompetitive costs against procompetitive benefits of any mergers, and courts have consistently ruled as such. The Supreme Court has been clear that "potential economics cannot be used as a defense to illegality, as Congress struck the balance in favor of protecting competition."[103] In *Philadelphia National Bank*, the Supreme Court held that "a merger the effective of which 'may be substantially to lessen competition' is not saved because, on some ultimate reckoning of social or economic debits and credits, it may be deemed beneficial."[104] The Court continued, "Congress determined to preserve our traditionally competitive economy. It therefore proscribed anticompetitive mergers, the benign and the malignant alike."[105] Even the strongest proponents of applying efficiency standards to the Clayton Act acknowledge that this is simply not the law[106] and that in practice the agencies and federal courts have consistently applied the standards from *Philadelphia National Bank* in pursuing merger cases.[107]

99 Easterbrook, Frank H. 1984. The Limits of Antitrust. Texas Law Review 63, no. 1, page 15.

100 Easterbrook, "The Limits of Antitrust", page 2.

101 Easterbrook, "The Limits of Antitrust", page 3.

102 Credit Suisse Sec. (USA) LLC v. Billing, 551 U.S. 264, 281 (2007) ("In light of the nuanced nature of the evidentiary evaluations necessary to separate the permissible from the impermissible, it will prove difficult for those many different courts to reach consistent results [in this context]."); Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398, 414 (2004) ("The cost of false positives counsels against an undue expansion of [section] 2 liability."); Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 594 (1986) ("Mistaken inferences in cases such as this one are especially costly, because they chill the very conduct the antitrust laws are designed to protect.").

103 FTC v. Proctor & Gamble Co., 386 U.S. 568, 580 (1967).

104 United States v. Philadelphia Nat'l Bank, 374 U.S. at 371.

105 United States v. Philadelphia Nat'l Bank, 374 U.S. at 371.

106 Ginsberg, Douglas and Wright, Joshua. 2015. Philadelphia National Bank: Bad Economics, Bad Law, Good Riddance. Antitrust Law Journal, Vol. 80, No. 2: 201-219.

107 See, e.g., United States v. Oracle Corp., 331 F. Supp. 2d 1098, 1110 (N.D. Cal. 2004) ("Under Philadelphia [National] Bank, a post-merger market share of 30 percent or higher unquestionably gives rise to the presumption of illegality."); FTC v. Swedish Match, 131 F. Supp. 2d 151, 166 (D.D.C. 2000) ("In Philadelphia National Bank, the Court specifically held that a post-merger market share of thirty percent triggers the presumption."); FTC v. OSF Healthcare Sys., 852 F. Supp. 2d 1069, 1077–78 (N.D. Ill. 2012); FTC v. ProMedica Health Sys., Inc., No. 3:11-cv-47, 2011 WL 1219281, at *56 (N.D. Ohio

Furthermore, regardless of the Clayton Act's clear standards on this, this assumption that markets are self-correcting has radically ratcheted back enforcement by creating an impression that faithfully enforcing the law will cause harm. As then-scholar Lina Khan wrote in 2020, "Because [the Chicago school's] application of price theory blurred the line between pro-competitive and anticompetitive conduct," she wrote, "almost every enforcement opportunity now raised the risk not just of erroneously condemning conduct that did not rise to an antitrust violation but also of erroneously condemning beneficial behavior."[108]

To the degree they are considered, we likewise implore the agencies to be incredibly careful about what sort of changes are considered efficiencies. Under a consumer welfare standard, where the final price paid by consumers is the ultimate of whether a merger is efficient or now, large-scale layoffs as a result of mergers would be considered an "efficiency," even if no technical process was altered in any meaningful way. Fewer resources (workers) are being used in the process, and presumably the merged firm should be able to pass those cost savings on to the consumer. A merger that becomes more "efficient" by laying off a large number of workers – as they are now deemed "redundant" to the merged firm – and accordingly lowers prices for consumers, is not productivity-enhancing. Such layoffs serve merely as redistribution from workers to the owners of the company profits, and often reduce resiliency and firm capacity, elevating the risk of shortages or poor quality.

Reduced firm employment can also represent an anti-competitive activity vis-à-vis suppliers or workers, if their options to function as suppliers of remaining industry firms are reduced. Yet merger-induced layoffs are deemed an efficiency rather than the result of an unfair method of competition, based only on the hypothetical and unrealistic assumption that those workers would be able to find comparable productive employment elsewhere with little job switching friction.

D. Low Costs to Over-Enforcing

Yet even aside from the inapplicability of the error-cost framework to mergers and the Clayton Act, its assumption – that the costs of overly-aggressive enforcement are large

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2011); FTC v. Cardinal Health, Inc., 12 F. Supp. 2d 34, 51–53 (D.D.C. 1998); Community Publishers, Inc. v. Donrey Corp., 892 F. Supp. 1146, 1167–69 (W.D. Ark. 1995); United States v. Country Lake Foods, Inc., 754 F. Supp. 669, 678–79 (D. Minn. 1990); United States v. Ivaco, Inc., 704 F. Supp. 1409, 1418–19 (W.D. Mich. 1989); FTC v. Coca-Cola Co., 641 F. Supp. 1128, 1138–39, vacated, 829 F.2d 191 (D.C. Cir. 1987); United States v. Waste Mgmt., Inc., 743 F.2d 976, 981–82 (2d Cir. 1984); Mid-Nebraska Bancshares, Inc. v. Bd. of Governors of Fed. Reserve Sys., 627 F.2d 266, 270–71 (D.C. Cir. 1980); RSR Corp. v. FTC, 602 F.2d 1317, 1324–25 (9th Cir. 1979); United States v. Mrs. Smith's Pie Co., 440 F. Supp. 220, 230–31 (E.D. Pa. 1976); United States v. M.P.M., Inc., 397 F. Supp. 78, 91–92 (D. Colo. 1975); Elco Corp. v. Microdot Inc., 360 F. Supp. 741 (D. Del. 1973); Luria Brothers & Co. v. FTC, 389 F.2d 847, 864–65 (3d Cir. 1968); United States v. Times Mirror Co., 274 F. Supp. 606, 622 (C.D. Cal. 1967); United States v. Gen. Dynamics

Corp., 258 F. Supp. 36, 64–65 (S.D.N.Y. 1966).

108 Khan, Lina. 2020. The End of Antitrust History Revisited, 133 Harv. L. Rev. 1655, 1669. Emphasis in original. https://scholarship.law.columbia.edu/cgi/viewcontent.cgi?article=3793&context=faculty_scholarship.

and the costs of under-enforcement are temporary – have little empirical or theoretical basis beyond the assertion originally made by Easterbrook himself. The current state of the concentrated American economy suggests that it is the costs of under-enforcement that endure, whereas the effects of aggressive judicial enforcement are likely to wane. To redress the high costs of a generation of underenforcement, the agencies should err on the side of over-enforcement of the Clayton Act's prohibitions against anticompetitive mergers.

While it is a common argument that prohibiting mergers and acquisitions is a naïve ideological opposition to size that unnecessarily limits advantages to scale, over-enforcement would not block advantages to scale on any enduring basis. Mergers are entirely unnecessary to acquire efficiency advantages that may accrue to economies of scale, networks advantages, or core competencies. Blocking mergers simply forecloses gaining that scale through the acquisition of other firms, including existing competitors. In such an environment, firms must expand internally through further investments and prove, through profitable expansion, that scale is more efficient. Even in the instance where larger-scale operations are more efficient, firms would instead invest heavily in their own capital and workers to capture those efficiency gains through growth over time.

Congress did not intend to categorically bar corporations, even large corporations, from achieving economies of scale and other efficiencies. Congress sought to promote growth through internal expansion—investment in new plants and facilities that expand the nation's productive capacity—instead of mergers and acquisitions, which represent the purchase, sale, and combination of existing business assets.[109] Accordingly, a large firm seeking to enter an adjacent market can do this by hiring the personnel and investing in the facilities necessary to participate in this market, or by licensing relevant technologies or capacity, in lieu of buying out an existing firm in this market. The DOJ and FTC must follow the Supreme Court's rejection of an efficiencies defense, not ignore it based on some theoretical arguments supporting corporate consolidation.

On the other side of the established error-costs framework, markets do not automatically correct for judicial under-enforcement. There are enduring effects of under-enforcement against anticompetitive mergers. First, inefficient, illegal, and unnecessary mergers destroy organizational resources through layoffs, reorganizations, and sales of capital that are now deemed "redundant" by the merged entity. Should the merger turn out to be a mistake, either by creating large diseconomies of scale, a monopoly, or injurious market power, breaking up the merged firm requires that those resources be rebuilt, an expensive cost that would not have been incurred had the merger simply never been approved. Second,

109 See Philadelphia National Bank, 374 U.S. at 370 ("[S]urely one premise of an antimerger statute such as § 7 is that corporate growth by internal expansion is socially preferable to growth by acquisition."); Sandeep Vaheesan, "American Prosperity Depends on Stopping Mega-Mergers," FT Alphaville, April 25, 2019: https://ftalphaville.ft.com/2019/04/25/1556192949000/American-prosperity-depends-on-stopping-mega-mergers/ ("Encouraging businesses to grow through product improvement and innovation and new investment instead of mergers would make customers, workers, and society much better off. Instead of the fewer choices and higher prices that often follow a merger, customers would have more options, lower prices, and better service. Instead of losing their jobs or receiving lower wages, workers would have more job opportunities and higher wages.")

market power, once acquired, begets market power, and dominant firms as are to use a variety of tools to exclude potential or actual competitors from the market or from their most profitable lines of business. Third, in the aggregate, consistent under-enforcement over time is not remedied by market forces over time, but rather paves the way for an economy and society that is owned and controlled by a small group of major corporations. The recent and current pace of corporate consolidation shows that these trends can easily outpace sluggish enforcement.

E. Simple Rules for Administrable Enforcement and Effective Deterrence

Based on the need to far more strongly deter anticompetitive mergers today, the overly-complicated system of carve-outs, exceptions, and efficiencies that has characterized current merger policy, and the need for an administrable enforcement system, we urge the agencies to adopt a simple system of bright-line rules regarding what mergers will be challenged or not, akin to the original 1968 guidelines.

An effective set of merger policies likewise should be administrable in an efficient and timely manner. This is particularly the case considering the unprecedented merger wave currently playing out in the wake of the Covid pandemic. To effectively deter and enforce the merger rules, the agencies need to be able to apply the rules, *en masse*, against hundreds or thousands of proposed mergers. This is only possible if the rules are simple, based on easy-to-verify decision criteria, rather than based on complex economic models with specific data requires and legal criteria, and multiple different defenses or exceptions through which a merger might be approved.

While outdated in some ways and based on the industrial organization of the mid-20th century, the 1968 guidelines offer an effective model of simple rules and effective, administrable enforcement. The 1968 guidelines were several pages, and the section on horizontal mergers outlined in simple terms how the DOJ would challenge mergers in highly concentrated industries, less highly concentrated industries, and industries with a trend towards concentration, based on easy-to-determine market shares.[110]

Accordingly, to update such simple rules to the 21st century, an effective set of simple rules for new guidelines would include, for example:

- Prohibiting all mergers over a certain market share or over a certain annual revenue, with no exceptions.

110 1968 Merger Guidelines, Department of Justice, https://www.justice.gov/archives/atr/1968-merger-guidelines.

- In concentrated industries, prohibiting all mergers, with the only exception being unless one of the firms is a failing firm unable to meet its financial obligations, and imminently entering bankruptcy proceedings.
- Permitting no merger that results in six or less firms controlling 75% or more of an industry.[111]
- Prohibiting rapid, "serial acquisitions" or roll-ups of industries, regardless of the firm size. For example, prohibiting any more than six acquisitions—even if small—by a single firm within an industry per year.

The revised guidelines should provide for minimal exceptions to these rules. The Clayton Act that the guidelines that meant to embody prohibits any merger that may substantially decrease competition in any market. As such, over-enforcing the Clayton Act by prohibiting some mergers that do not decrease competition is legal and in line with the law. However, under-enforcing by allowing mergers that may or do eventually decrease competition is not in line with the law. Likewise, over-enforcement will not limit any potential returns to scale in the long run, as companies can always capture those efficiencies through internal growth, whereas the last generation of under-enforcement, through complicated exceptions and unclear rules, demonstrates the high costs to such an approach.

3. MERGER DECISIONS ARE A GUESS IN ADVANCE, AND MERGERS SHOULD BE REVERSED IF THE MERGED ENTITY GAINS SIGNIFICANT MARKET POWER AS A RESULT OF THE MERGER

A. Merger Review Over-Relies on Speculative and Unwieldy Guesses

Following the current guidelines, current merger review and policy heavily relies on complex quantitative estimates and predictions based on economic theory to assess whether the effects of a merger will be anticompetitive. Expensive teams of consulting economists are retained on both sides of a merger case, each coming with different assumptions about the industry's structure and trajectory, all to make a highly uncertain predictions about two possible futures: one in which the merger is permitted versus one in which it is blocked.

There is an acknowledged uncertainty inherent to the predictions required by the Clayton Act in its enforcement:

111 Kwoka, J., 2016. The structural presumption and the safe harbor in merger review: False positives or unwarranted concerns. Antitrust LJ, 81. Available at SSRN: https://ssrn.com/abstract=2782152 or http://dx.doi.org/10.2139/ssrn.2782152.

> “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.”[112]

As a solution to this problem, current policy and the current guidelines tend to use sophisticated econometric and theoretical models to reach precise conclusions about the effects of a merger on competition. More sophisticated and accurate tools, the thinking goes, leads to better policy.

However, the result has been more rather than less uncertainty. This problem is perhaps most succinctly stated by Judge Marrero in his decision regarding the T-Mobile/Spring merger. For all the expert testimony and technical predictions of economic theory regarding the eventual costs or benefits of the merger, Marrero found that:

> “quite often what the litigants propound sheds little light on a clear path to resolving the dispute. In the final analysis, at the point of sharpest focus and highest clarity and reliability, the adversaries’ toil and trouble reduces to imprecise and somewhat suspect aids: competing crystal balls.”[113]

Rather than clarify and create precise predictions to guide policy and court decisions, the system of economic models, experts, and predictions of the future simply presents the court with two entirely different versions of the future and how the relevant market works, each based on different and often untestable assumptions.

This ambiguity of the economic evidence on which merger review and merger decisions are made exemplifies two core problems. The first is simply that regardless of the amount of evidence, theory, statistics, or predictive modeling brought to bear in trying to determine the eventual effects of a merger, the decision as to whether it is anticompetitive or not—and thus illegal under the Clayton Act—is ultimately a guess.

The second issue is that this form of economic evidence is based around issues of price effects, market definition, the “balancing” of procompetitive and anticompetitive effects of the merger, and predictions of efficiencies. All of these have their origins in the legal revolutions of the 1970s and 1980s, none of them have any basis in the statutory language of the Clayton Act, and some of them are outright prohibited by it. It has resulted in an overly complicated and non-administrable misapplication of the Act.

112 Brown Shoe Co., Inc. v. United States, 370 U.S. at 323.

113 New York v. Deutsche Telekom AG, 1:19-cv-05434-VM-RWL, 4 (S.D.N.Y. 2020).

This section focuses on the first problem, emphasizing that instead of trying to eliminate this uncertainty ahead of time, the agencies should monitor post-merger outcomes and unwind the transaction later when it is appropriate. The following sections will focus on the second problem.

B. Merger Remedies are a Demonstrable Failure

One reason for the lack of effective deterrence is that deterrence has not even the intent. In recent years, the agencies have relied on a "settlement" approach to merger review. Rather than challenging mergers through litigation and seeking to block them, the agencies favored negotiating with the merging parties in exchange for concessions to divest assets or change their behavior, resulting in the merger being waved through with consent agreements that amount to little more than promises.[114] First, on its face, this approach does little to nothing to halt the trend of corporate consolidation, instead actively aiming to allow the mergers to go forward. Second, to the degree that behavioral remedies are aimed at limiting the anticompetitive costs of these mergers, they fail. Firms either do not abide by their own promises, or the divested assets failed to survive as a viable firm, only to be re-acquired by the merged firm.[115] Not only do the overall economic results speak to this, but specific examples show the recent approach to enforcement to be ineffective against anticompetitive mergers. In many cases the agencies either did not challenge or waived through anticompetitive mergers, resulting in clear harms to competition.

In a self-evaluation, the FTC found that roughly 20 to 25 percent of divestitures it ordered failed to achieve an independently viable competitive business.[116] Independent research is much less charitable. When Northeastern University economist John Kwoka studied mergers that resulted in divestitures specifically, he found that prices went up by an average of 6.7 percent, "little different" than the 7.4 percent price increase when enforcers simply let the merger through with no conditions. Kwoka concluded that the "remedies imposed—divestiture and conduct or conditions remedies—are not generally adequate to the task of preserving competition."[117]

Notable examples make this clear. In 2012, the FTC approved rental car company Hertz's acquisition of Thrifty, requiring that Hertz sell Advantage Rent-a-Car to a company outside of the four main car rental firms. A mere four months after the divestiture, the spinoff

114 Courage to Learn, pages 48-55. See also John E. Kwoka, "Mergers, Merger Control, and Remedies: A Response to the FTC Critique," March 31, 2017, https://ssrn.com/abstract=2947814 or http://dx.doi.org/10.2139/ssrn.2947814.

115 Courage to Learn, pages 50-55.

116 "The FTC's Merger Remedies 2006-2012: A Report of the Bureaus of Competition and Economics," Federal Trade Commission, January 2017, pages 22, 31: https://www.ftc.gov/system/files/documents/reports/ftcs-merger-remedies-2006-2012-report-bureaus-competition-economics/p143100_ftc_merger_remedies_2006-2012.pdf.

117 Kwoka Jr, J.E., 2012. Does Merger Control Work: A Retrospective on US Enforcement Actions and Merger Outcomes. Antitrust LJ, 78, p. 619: 640. https://heinonline.org/HOL/LandingPage?handle=hein.journals/antil78&div=30&id=&page=

company filed for bankruptcy,[118] Hertz bought back a number of the locations that it had sold in the consent agreement,[119] and the remaining rental car companies had all raised their prices.[120] In 2014, the FTC waved through grocery chain Albertson's acquisition of competitor Safeway, requiring the sale of 168 locations to a small, regional grocer who then went bankrupt within a few years. As with Hertz-Thrifty, Albertsons bought back a number of those locations for a fraction of the price they were sold at.[121]

The merging firms violate their settlement agreements with impunity, facing no threat of meaningful fines or punishment to deter this sort of illegality.[122] This process – negotiating a merger with minor concessions that are then reneged – turns merger enforcement into less of a law enforcement action to ensure competitive and fair markets, and more of a box-checking exercise to ensure the merger can go through so long as it jumps through certain hoops.

C. The Agencies should Significantly Increase their Monitoring of Post-Merger Outcomes, and Reverse Mergers That Turn Out to Be Anticompetitive

Our proposed solution to the uncertain anticompetitive effects of mergers is far simpler than finding more sophisticated or accurate predictive models, or seeking to remedy the particularly unsavory components of a transaction. Predictions at the moment of merger review will always be uncertain. Rather, we propose that the agencies should monitor mergers for years after they are finalized, and unwind the mergers that turn out to have led to a decrease in competition, or where the merged firm violated their settlement agreement with the government. The revised guidelines should include several standard procedures for post-merger monitoring.

First, the agencies should formally monitor the merged firm for several years post-merger, to ensure that the merger did not decrease competition or increase prices, and to ensure that the merged firm is abiding by the promises that were made during the merger review

118 David McLaughlin and Joe Schneider, "Simply Wheelz to File for Bankruptcy on Failed Hertz Deal," Bloomberg, November 5, 2013, https://www.bloomberg.com/news/articles/2013-11-05/simply-wheelz-to-file-for-bankruptcy-on-failed-hertz-deal?sref=ZvMMMOkz.

119 Courage to Learn, pp. 50-51. "FTC Approves Franchise Services of North America's Application to Sell Certain Advantage Rent a Car Locations to Hertz and Avis Budget Group," Press Release, Federal Trade Commission, May 30, 2014: https://www.ftc.gov/news-events/press-releases/2014/05/ftc-approves-franchise-services-north-americasapplication-sell; Petition of Franchise Services of North America, Inc. for Prior Approval of the Sale of the Non-Transferred Locations, In re Hertz Global Holdings, C-4376, April 10, 2014, pages 2-3, 8: https://www.ftc.gov/system/files/documents/cases/140414hertzpetition.pdf.

120 David McLaughlin, Mark Clothier, and Sara Forden, "Hertz Fix in Dollar Thrifty Deal Fails as Insider Warned," Bloomberg, November 29, 2012, https://www.bloomberg.com/news/articles/2013-11-29/hertz-fix-in-dollar-thrifty-deal-fails-as-insider-warned?sref=ZvMMMOkz.

121 Courage to Learn, pp. 51-2. Brent Kendall and Peg Brickley, "Albertsons to Buy Back 33 Stores It Sold as Part of Merger With Safeway," The Wall Street Journal, November 24, 2015: https://www.wsj.com/articles/albertsons-to-buy-back-33-stores-it-sold-as-part-of-merger-with-safeway-1448411193.

122 For example, T-Mobile's agreement to merge with Sprint required that it spin off Dish as a viable competitor. However, once the merger was finalized, T-Mobile cut Dish off from essential networks. The agencies took no action against this flagrant violation of their settlement agreement. Hal Singer, "The Terrible T-Mobile/Sprint Merger Must Be Undone," Wired, February 25, 2021: https://www.wired.com/story/opinion-the-terrible-t-mobilesprint-merger-must-be-undone/.

process. The revised guidelines could provide time periods for this monitoring based on the type of transaction, industry, and the potential to reduce competition.

Second, the agencies should punish firms who lie, misrepresent, or go back on their word relative to the promises made in any settlements with agencies. If a company agrees to deal fairly with another firm in order for the merger to be approved, and they do not do that, the merger should be undone. If a company agrees to not combine certain datasets as a condition of the merger's approval, and then the merged firm combines the dataset, the merger should be undone. If a company agrees to not raise prices as a condition of the merger approval, and then does not do that, the merger should be undone. The Agencies have the authority to do this, as there is precedent for divestitures and firm breakups based on the company having violated a settlement or consent decree.[123]

Third, the agencies should hold in escrow benefits to the individual parties who profit from mergers until it is clear that the merger did not substantially reduce competition. This includes golden parachutes for any executives of an acquired firm, investment banking fees, or legal fees for outside corporate counsel. The merger guidelines can provide and state which sorts of fees ought to be withheld, and for what period of time, until the Agencies can more confidently conclude that the merger did not violate the Clayton Act.

Fourth, the agencies should reverse mergers that turn out to have reduced competition, even if that was not clear at the moment when the merger was approved. Put simply, the firm should be broken up, even if the agencies approved or did not object to the merger before it was finalized. There is a long precedence for breaking up firms and forcing divestitures of assets, whether specifically under the revised Clayton Act.[124]

Undoing mergers in this way would provide significant benefits. Principally, it would provide a very strong deterrent to anticompetitive mergers in the future. First, firms and other dealmakers would be less likely to pursue an anticompetitive merger, if they feared that it would likely or possibly be undone at a later date. Similarly, even if an anticompetitive mergers is approved and consummated, and the merged firm correspondingly gains market power, it would be less likely to exploit that market power (e.g. by raising price), for fear that the agencies would unwind the merger in response.

Prior to the passage of the Hart-Scott-Rodino Act (HSR), enforcers regularly used authority under the Clayton Act to undo consummated mergers. HSR notifications, though intended as a mechanism to help agencies track combinations, ironically created a framework where agencies were perceived to have 'cleared' mergers they did not challenge under the short time period allowed by the statute. Such a shift was problematic, because the illegal nature

123 Hughes v. United States, 342 U.S. 353 (1952); United States v. Armour & Co., 402 U.S. 673 (1971).

124 United States v. E. I. du Pont de Nemours & Co., 353 U.S. 586 (1957).

of mergers often only becomes clear in retrospect. We would encourage the agencies to stop seeing HSR as anything but a tool for notifying the government of mergers, and not a clearance mechanism and to enforce the Clayton Act more aggressively on consummated mergers. Furthermore, we would encourage the FTC and DOJ to claw back personal compensation based on consummated illegal mergers, such as golden parachutes, as well as banker and legal fees.

As Judge Janice Rogers Brown noted in *FTC v. Whole Foods Market, Inc.* in 2008, undoing consummated mergers is well within the legal purview of the agencies.

> Only in a rare case would we agree a transaction is truly irreversible, for the courts are "clothed with large discretion" to create remedies "effective to redress [antitrust] violations and to restore competition." Ford Motor Co. v. United States, 405 U.S. 562, 573 (1972). Indeed, "divestiture is a common form of relief" from unlawful mergers. United States v. Microsoft Corp., 253 F.3d 34, 105 (D.C. Cir. 2001) (en banc). Further, an antitrust violator "may . . . be required to do more than return the market to the status quo ante." Ford Motor, 405 U.S. at 573 n.8. Courts may not only order divestiture but may also order relief "designed to give the divested [firm] an opportunity to establish its competitive position." Id. at 575. Even remedies which "entail harsh consequences" would be appropriate to ameliorate the harm to competition from an antitrust violation. United States v. E.I. du Pont de Nemours & Co., 366 U.S. 316, 327 (1961).

We offer three recent mergers worth considering.

i. T-Mobile/Sprint

The 2020 merger of Sprint and T-Mobile was facially illegal and should never have gotten out of the board room. There is ample economic evidence that three firm telecom markets exhibit higher consumer prices and less investment than four firm telecom markets,[125] a point conceded by the Division when it cleared the merger with a condition attempting to foster DISH as a fourth competitor.

T-Mobile said prices would drop as a result of the merger. And they should have. In the mobile sector, as economist Luigi Zingales noted, Americans pay $50 billion more per year than Europeans for similar cell phone service, which is about $14/month in pure profit for every single American.[126] And since the DOJ blocked AT&T's attempt to buy T-Mobile in

125 "Why the proposed Vodafone – Three merger will harm Britain," Balanced Economy Project, April 2022: https://www.balancedeconomy.net/wp-content/uploads/2022/04/Vodafone-3-merger-FINAL.pdf.

126 Luigi Zingales, "How E.U.'s Google Fine Explains High Cellphone Costs in the U.S.," New York Times, July 24, 2018: https://www.nytimes.com/2018/07/24/opinion/european-union-google-fine-monopoly.html.

2011, prices actually had been dropping. After the T-Mobile Sprint merger, however, prices for mobile service plateaued, or even began going up.[127]

Similarly, the firm pledged the deal would create "new jobs from Day One." Naturally, T-Mobile employment dropped by 9,000 in the first year of the deal.[128] T-Mobile began strong-arming dealers almost immediately, and is now being sued for doing so, even as the number of authorized dealer stores fell by 11%.[129] Perhaps the most embarrassing part for Judge Marrero is that T-Mobile pledged to help set up a competitor in wireless - DISH - and then after the merger went through, cut off DISH's access to its network instead.[130]

ii. Northrop/Orbital-ATK

A similarly illegal merger occurred in the defense industrial base. In 2018, Northrop Grumman bought one of two major rocket engine makers, Orbital ATK. The Federal Trade Commission approved the merger.[131] The Pentagon Undersecretary of Acquisitions and Sustainment, Ellen Lord, wrote the FTC that the Pentagon expected "substantial benefits from the merger, including increased competition for future programs and lower costs." The FTC allowed the merger, but imposed a settlement on Northrop, saying that the corporation must "make its solid rocket motors and related services available on a non-discriminatory basis to all competitors for missile contracts."[132] In other words, Northrop had to sell rocket motors to its competitors.

This merger ended up lessening competition. Today, as a result of this merger, "the production of America's nuclear triad is dangerously monopolized."[133] The U.S. Air Force is considering upgrading our fleet of ICBMs. Such an upgrade is expensive, and will likely cost a hundred plus billion dollars over many years. And it turns out, now there's only one bidder for the upgrade, and that's Northrop Grumman. Boeing, the other bidder, dropped out, because Northrop now won't sell rocket motors to Boeing on equal terms, an antitrust

127 Hal Singer, "The Terrible T-Mobile/Sprint Merger Must Be Undone," Wired, February 25, 2021: https://www.wired.com/story/opinion-the-terrible-t-mobilesprint-merger-must-be-undone/.

128 Press Release, "One Year After T-Mobile/Sprint Merger, Fewer Stores, Fewer Jobs and Higher Prices," Communications Workers of America, May 3, 2021: https://cwa-union.org/news/releases/one-year-after-t-mobilesprint-merger-fewer-stores-fewer-jobs-and-higher-prices

129 Monica Alleven, "Report: Metro by T-Mobile puts non-exclusive dealers on notice," Fierce Wireless, April 6, 2020: https://www.fiercewireless.com/wireless/report-metro-by-t-mobile-puts-non-exclusive-dealers-notice; Nadia Dreid, "Sprint Dealer Says T-Mobile Is Preying On Smaller Sellers," Law 360, January 28, 2022: https://www.law360.com/competition/articles/1459596/sprint-dealer-says-t-mobile-is-preying-on-smaller-sellers.

130 Hal Singer, "The Terrible T-Mobile/Sprint Merger Must Be Undone," Wired, February 25, 2021: https://www.wired.com/story/opinion-the-terrible-t-mobilesprint-merger-must-be-undone/.

131 "Statement of Bureau of Competition Deputy Director Ian Conner on the Commission's Consent Order in the Acquisition of Orbital ATK, Inc. by Northrop Grumman Corp.," Federal Trade Commission, File No. 181-0005, June 5, 2018: https://www.ftc.gov/system/files/documents/cases/1810005_northrop_bureau_statement_6-5-18.pdf

132 Press Release, "FTC Imposes Conditions on Northrop Grumman's Acquisition of Solid Rocket Motor Supplier Orbital ATK, Inc.," Federal Trade Commission, June 5, 2018: https://www.ftc.gov/news-events/press-releases/2018/06/ftc-imposes-conditions-northrop-grummans-acquisition-solid-rocket.

133 Elle Ekman, "The Stakes Of A Nuclear Missile Monopoly," The American Conservative, October 12, 2021: https://www.theamericanconservative.com/articles/the-stakes-of-nuclear-missile-monopoly/.

violation known as 'vertical foreclosure.'[134] Vertical foreclosure over rocket motors is a direct violation of the FTC consent decree, and the reason this merger should have been blocked in the first place.

The net effect of this merger is that now there is just one seller of the nuclear triad, meaning that the U.S. military is a price taker when it comes to buying what we need for upgrading our nuclear facilities. The price will likely be far higher than it should be, but in addition, as in any monopolized market, the quality of the end product will go down, and that means that safety standards are likely to be worse than they would be if there were multiple bidders.

The solution to this particular merger is simple. As Congressman Mark Pocan noted, just reverse it, considering that Northrop is violating the FTC consent decree.[135]

iii. Live Nation-Ticketmaster

Perhaps the single most embarrassing merger enabled by lax antitrust enforcement is that of Live Nation and Ticketmaster in 2010, which was facilitated by current Department of Justice official Gene Kimmelman. “There will be enough air and sunlight in this space for strong competitors to take root, grow, and thrive,” said DOJ Antitrust Division chief Christine Varney at the time of the merger.[136] As Congressman Bill Pascrell noted both before and after the merger, the combination of these two firms has been a disaster.[137] And the Antitrust Division has agreed with this assessment, noting in 2020 that “Defendants have repeatedly and over the course of several years violated this Court’s July 30, 2010, Final Judgment.”[138]

For 15 years prior to the merger, Ticketmaster was the dominant provider of ticketing services, controlling 80 percent of the market.[139] Live Nation was the largest concert promoter, controlling more than 75 concert venues in the United States, including many

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134 Aaron Gregg, “Boeing drops out of massive Pentagon nuclear missile program, citing unfair competition,” Washington Post, July 25, 2019: https://www.washingtonpost.com/business/2019/07/25/boeing-drops-out-massive-pentagon-nuclear-missile-program-citing-unfair-competition/.

135 Representative Mark Pocan, Letter to FTC Commissioners, August 23, 2021: https://pocan.house.gov/sites/pocan.house.gov/files/documents/Defense%20Industrial%20Base%20Monopoly%20Letter%20from%20Rep.%20Pocan%208-23-21.pdf.

136 Christine A. Varney Remarks as Prepared for the South by Southwest, “The Ticketmaster/Live Nation Merger Review and Consent Decree in Perspective,” March 18, 2020: https://www.justice.gov/atr/speech/ticketmasterlive-nation-merger-review-and-consent-decree-perspective.

137 Press Release, “Pascrell Calls on FTC and DOJ to Break up Live Nation-Ticketmaster Monopoly,” Off of Rep. Bill Pascrell, March 22, 2022: https://pascrell.house.gov/news/documentsingle.aspx?DocumentID=5064

138 Motion to modify Final Judgment and Enter Amended Final Judgment, U.S. v. Ticketmaster Entertainment, Inc., (1:10-cv-00139-RMC) (D.D.C., Jan. 8, 2020): https://www.justice.gov/atr/case-document/file/1233396/download.

139 Varney, “The Ticketmaster/Live Nation Merger Review and Consent Decree in Perspective”: https://www.justice.gov/atr/speech/ticketmasterlive-nation-merger-review-and-consent-decree-perspective.

major amphitheaters, and had an artist management business with 200 of the top marquee artists, from Miley Cyrus to Willie Nelson.[140]

Live Nation had also been Ticketmaster's largest customer until 2007, when it announced it would build its own competitive ticketing service.[141] Just two years later, Live Nation and Ticketmaster announced a merger; Ticketmaster CEO Michael Rapino explained to The New York Times that his goal was to turn Ticketmaster's website into live music's answer to Amazon.[142] Varney approved the merger but forced some divestments of assets and behavioral remedies on the combined entity through a consent decree. She described the settlement as "vigorous antitrust enforcement—only with a scalpel rather than a sledgehammer."[143]

The settlement had two parts. Ticketmaster was forced to both sell its ticketing subsidiary, Paciolan, to Comcast—a company with just 2 percent of the primary ticketing market—and license its ticketing software to Live Nation's rival, AEG.[144] The licensing agreement would last for five years in exchange for a royalty fee to the newly formed Live Nation Entertainment.[145]

There were also behavioral remedies. The new company was not allowed to bundle services or retaliate against any venue that considers or works with another primary ticketing service. Nor could the combined entity use data it received in the course of processing tickets for the purposes of concert promotion or management—a prohibition on data-sharing that is extremely difficult to oversee or enforce.[146]

The predictions of merger opponents came true. Neither the divestment nor the licensing arrangement created any substantial competition. AEG never paid royalty fees for the ticketing software,[147] and Paciolan, which covered 7 percent of the market prior to the

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140 Complaint, United States v. Ticketmaster Entertainment, (1:10-cv-00139) (D.D.C. January 25, 2010), 5: https://www.justice.gov/atr/case-document/complaint-224; David Segal, "Calling Almost Everyone's Tune," The New York Times, April 24, 2010: https://www.nytimes.com/2010/04/25/business/25ticket.htm.

141 Complaint, Ticketmaster Entertainment, 5.

142 Segal, "Calling Almost Everyone's Tune": https://www.nytimes.com/2010/04/25/business/25ticket.htm.

143 Varney, "The Ticketmaster/Live Nation Merger Review and Consent Decree in Perspective": https://www.justice.gov/atr/speech/ticketmasterlive-nation-merger-review-and-consent-decree-perspective.

144 Sean Burns, "Sens Blumenthal, Klobuchar Urge DOJ Inquiry into Live Nation," TicketNews, August 28, 2019, https://www.ticketnews.com/2019/08/sensblumenthol-klobuchar-doj-live-nation/.

145 Segal, "Calling Almost Everyone's Tune": https://www.nytimes.com/2010/04/25/business/25ticket.htm.

146 Final Judgment, United States v. Ticketmaster Entertainment, (1:10-cv-00139) (D.D.C. July 30, 2010), 19-21: https://www.justice.gov/atr/case-document/file/513321/download.

147 Ben Sisario and Graham Bowley, "Live Nation Rules Music Ticketing, Some Say With Threats," The New York Times, April 1, 2018: https://www.nytimes.com/2018/04/01/arts/music/live-nation-ticketmaster.html.

divestment,[148] remained a niche ticketing service.[149] By 2018, Ticketmaster was still the dominant ticketing service, ticket prices were at record highs, and there were reported complaints by its chief competitor in concert venues that Live Nation "used its control over concert tours to pressure venues into contracting with its subsidiary, Ticketmaster."[150] Fear in the industry of Live Nation was rampant.[151] In 2019, the Trump administration found that Live Nation repeatedly violated the consent decree. The DOJ had to go back to court to modify its settlement decree, allowing the companies free rein for nearly a decade.[152]

Investment news commentators reported on the business model of Live Nation as if the consent decree did not exist. "Ticketmaster typically has an upper hand in negotiating with venues, as it also controls access to the talent," noted one writer at Barron's. "If the firm declines to use Ticketmaster, then LYV (Live Nation Entertainment) can elect to take its talent to an alternative venue. This contractual moat is compounded by Live Nation's frequent practice of installing its own hardware at the venue, using proprietary software to process tickets."[153] By April 2020, in the midst of a pandemic devastating the live music industry, investors still recommended investing in Live Nation's stock. Why? "The company," said one fund manager, "operates an impenetrable moat that has a monopoly-like structure."[154]

Clearly, this consummated merger should be reversed.

3. MERGER ENFORCEMENT SHOULD IGNORE DISTINCTIONS BETWEEN HORIZONTAL AND VERTICAL TRANSACTIONS

One of the highest priorities for any revised merger guidelines must be to eliminate the analytical distinction between vertical and horizontal transactions. The logic of this distinction is that an acquisition is generally only anticompetitive if it either horizontally absorbs a company selling the same widget or vertically absorbs a company that sells the parts to make that widget or distributes the widget post-production. In practice the agencies have acknowledged that these distinctions have their limits and are unable to

148 Sisario and Bowley, "Live Nation Rules": https://www.nytimes.com/2018/04/01/arts/music/live-nation-ticketmaster.html.

149 Sisario and Bowley, "Live Nation Rules": https://www.nytimes.com/2018/04/01/arts/music/live-nation-ticketmaster.html.

150 Sisario and Bowley, "Live Nation Rules": https://www.nytimes.com/2018/04/01/arts/music/live-nation-ticketmaster.html.

151 Sisario and Bowley, "Live Nation Rules": https://www.nytimes.com/2018/04/01/arts/music/live-nation-ticketmaster.html; Ben Sisario and Cecilia Kang, "Citing Violations, U.S. to Toughen Live Nation Accord on Ticketing," The New York Times, December 19, 2019: https://www.nytimes.com/2019/12/19/arts/music/live-nation-ticketmaster-settlement-justice-department.html.

152 Sisario and Kang, "Citing Violations": https://www.nytimes.com/2019/12/19/arts/music/live-nation-ticketmaster-settlement-justice-department.html.

153 Christine Jurzenski, "Live Nation Stock Can More Than Double in 3 Years, Analyst Says," Barron's, April 8, 2020: https://www.barrons.com/articles/livenation-stock-can-more-than-double-in-three-years-analyst-51586380765.

154 Jurzenski, "Live Nation Stock Can More Than Double in 3 Years": https://www.barrons.com/articles/livenation-stock-can-more-than-double-in-three-years-analyst-51586380765.

describe a range of possible anticompetitive threats and problems, but they have strained to expand past this simple distinction in prior draft guidelines.[155]

First, the framing of the distinction between horizontal and vertical transactions has seeded the ground for treating non-horizontal mergers differently, and usually more leniently than horizontal mergers.[156] Indeed, the plan for the original 1982 revisions to the guidelines was to entirely undo any prohibitions on vertical acquisitions, treating them as inherently efficient and procompetitive.[157] Considering the anticompetitive behavior born from non-horizontal mergers such as Ticketmaster/Live Nation—which has effectively monopolized the ticket market following its approved vertical merger—this leniency is hard to defend.[158]

Second, the horizontal/vertical distinction is broadly immaterial to the priorities and intent of the Clayton Act, which makes no mention itself of horizontal or vertical acquisitions, never mind any distinction in the standards or scrutiny that either should face. Whether a merger is horizontal or vertical is an entirely secondary question to the primary aim of prohibiting mergers where "the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly."[159] Since the law requires that both types of mergers are permitted or prohibited according to the same standard, the guidelines should do so as well.

Third, because of changes to industrial organization since the mid-20th century, in many markets and acquisitions now the vertical-horizontal distinction is not even particularly discernable.[160] For example, Google operates a platform with overlapping search, publishing, and advertising users.

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155 See e.g., United States Department of Justice and Federal Trade Commission, Vertical Merger Guidelines (June 30, 2020) ("These Guidelines describe how the agencies analyze a range of non-horizontal transactions. Where they use the term "vertical," that term should not be read to narrow the applicability of these Guidelines.") https://www.ftc.gov/system/files/documents/reports/us-department-justice-federal-trade-commission-vertical-merger-guidelines/vertical_merger_guidelines_6-30-20.pdf

156 For example, in 2017, in a rare challenge to the vertical merger of AT&T and Time Warner AT&T's general counsel, David McAtee, said, "Today's DOJ lawsuit is a radical and inexplicable departure from decades of antitrust precedent. Vertical mergers like this one are routinely approved because they benefit consumers without removing any competitor from the market. We see no legitimate reason for our merger to be treated differently." This was an accurate description of the past decades of practice. For many years, enforcers operated from the assumption that a vertical merger relationship was categorically different from a horizontal merger and thus merited more lenient treatment, including a greater proclivity to accept "efficiencies" justifications. Liz Moyer, "Justice Department Calls AT&T Deal for Time Warner 'Illegal' and 'Harmful' to Consumers," CNBC, November 20, 2017: https://www.cnbc.com/2017/11/20/justice-department-calls-att-deal-for-time-warner-illegal-and-harmful-to-consumers.html.

157 Richard A. Posner and George J. Stigler, "Throttling Back on Antitrust: A Practical Proposal for Deregulation," Rec'd December 15, 1980, Series I, Box 2: Subject File, Martin Anderson Files, Ronald Reagan Library, https://www.promarket.org/2022/04/28/a-richard-posner-and-george-stigler-memo-throttling-back-on-antitrust-a-practical-proposal-for-deregulation/.

158 See e.g., Bill Pascrell, Frank Pallone, Jerry Nadler, Jan Schakowsky, David N. Cicilline, Letter to Attorney General Garland and Acting Chairwoman Slaughter, April 19, 2021: https://pascrell.house.gov/uploadedfiles/letter_to_attorney_general_garland_and_acting_chairwoman_slaughter_on_lne_investigation_-_final.pdf.

159 15 U.S.C. § 18.

160 See e.g. Marty, F. and Warin, T., 2021. Visa's Abandoned Plan to Acquire Plaid: What Could Have Been a Textbook Case of a Killer Acquisition (No. 2021s-39). CIRANO. https://ssrn.com/abstract=4026596 ("many mergers, initially appearing as vertical, if not conglomerate, may turn out to be horizontal ex-post as a result of market convergence").

Its offering is deployed within email, mapping, shopping, reviews, and other online services. It collects data from its smart watches and smart speakers to feed into that ecosystem. And it is plugged in as a default in various web browsers and mobile operating systems that it owns or controls. When Google acquires a company, it is a tangled web to determine how any of these might fit as vertical or horizontal, and against current or nascent, competitors. It is difficult to know who is the "consumer" that might be harmed and who is the "competitor" that might be squashed.

Fourth, the horizontal/vertical distinction is ultimately unhelpful because harm to competition can come from anything that allows a business to unfairly dominate businesses or consumers that it interacts with. The more effective method to identify the competitive impact of a merger is by examining the various channels for dominance. The agencies should use a checklist of power for whether a merger will create or exacerbate any of these areas. An assessment of whether a company has or will gain harmful economic power does not require categorizing the power as horizontal, vertical, diagonal, or some other direction. Instead, it should function as a diagnostic test for the health of the market, testing the various ways that a post-acquisition company would destabilize that competitive health.

We suggest that the agencies look to a list of categories of economic dominance that can be deployed by dominant firms. These factors should be generally applicable descriptions of power, foreclosure, and dominance. They can be rendered specific for different industry context to provide guidance to market participants and courts.

The factors should, at minimum, include an assessment of how the merger might exacerbate:

- Control over critical inputs (e.g. physical components, software, expertise)[161]
- Control over access rights (e.g. infrastructure, IP, interoperability)[162]
- Control over sales or revenue channels (e.g. store ownership, payment processing, contractual access to markets)[163]

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161 See e.g., FTC challenge to Lockheed Martin and Aerojet Rocketdyne merger because Aerojet is the sole source supplier of critical missile inputs for multiple weapons systems on which that the defense industry relies. Complaint, In re: Lockheed Martin and Aerojet, No. 9405. https://www.ftc.gov/system/files/documents/cases/d09405lockheedaerojetp3complaintpublic.pdf

162 See e.g., FTC challenge to NVIDIA and ARM merger over concerns about access to computer chip IP licensing. Complaint, In re: Nvidia, No. 9404. https://www.ftc.gov/system/files/documents/cases/d09404_part_3_complaint_public_version.pdf; or see CSX challenge to Canadian Pacific-Kansas City Southern merger over exclusive access rights to a critical line of rail traffic. Before the Surface Transportation Board, No. 36500. https://dcms-external.s3.amazonaws.com/DCMS_External_PROD/1646175205491/304040.pdf

163 See e.g. the Google App Store Suit, alleging exclusionary conduct related to the Google Play Store, the primary distribution method for apps on Android phones. Complaint, Utah v. Google, (3: 21-cv-05227) (July 7, 2021). https://attorneygeneral.utah.gov/wp-content/uploads/2021/07/Utah-v-Google.1.Complaint-Redacted.pdf; or see in the meatpacking context, that mergers like Smithfield Foods and Shuanghui International created a trend where "the use of "production contracts" has increased. Farmers dealing with meatpackers through production contracts often receive lower prices for their livestock, accept large amounts of contract risk, and forego asserting valid contract rights out of fear of retaliation." Zimmerli, D., 2014. Something old, something new: relying on the traditional agricultural cooperative to help farmers solve the power imbalance in modern meatpacker production contracts. San Joaquin Agric. L. Rev., 24, p. 59. https://www.sjcl.edu/images/stories/sjalr/volumes/V24N1A2.pdf

- Shared leadership or control (e.g. interlocking directorates, minority shareholders, contractual partnerships)[164]
- Access to funding or financing (e.g. LBOs, PE relationships, capital reservoirs)[165]
- Access or control over data or data sources (e.g. sales, strategy, user surveillance)[166]
- Increased situational bargaining power (e.g. timing or geography)[167]
- Legal or regulatory barriers to competition (e.g. patents, tariffs)[168]
- Market tipping/concentration acceleration effects (e.g. network effects, stickiness, entrenchment)[169]
- Ability to cluster/combine markets[170]
- Existing concentration or collusion between market players[171]

Analyzing a market with a framework like this prioritizes evidence of chokepoints and leverage over other market participants. This allows direct evidence of market harm to take precedence over economic theory that may be divorced from the way markets work in real life. It also allows other disciplines to the table, like labor, agricultural, medical, or technological. In this way, it can allow antitrust enforcers to gain a broader and deeper

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164 See e.g. allegations that Facebook's board included Netflix's CEO and the shared leadership facilitated a collusive agreements between the companies. Amended Complaint, Doc 244 in Klein v. Meta Platforms, Inc., (3:20-cv-08570) (N.D. Cal. 2022) https://www.courtlistener.com/docket/18714274/klein-v-facebook-inc/?page=2

165 See e.g. Bolton, P., Brodley, J.F. and Riordan, M.H., 1999. Predatory pricing: Strategic theory and legal policy. Geo. LJ, 88, p.2239. (discussing the increased viability of predatory pricing schemes when firms have differential terms of access to financial markets), https://www0.gsb.columbia.edu/faculty/pbolton/PDFS/BBRPrincetonDP.pdf; See also Xia, T. and Sexton, R.J., 2004. The competitive implications of top-of-the-market and related contract-pricing clauses. American Journal of Agricultural Economics, pp.124-138 (discussing how large agricultural buyers that trade in cash and contract markets can manipulate benchmark prices through strategic trading in a reference cash market).

166 See e.g., "Justice Department Sues to Block UnitedHealth Group's Acquisition of Change Healthcare," Press Release, Department of Justice, February 24, 2022: https://www.justice.gov/opa/pr/justice-department-sues-block-unitedhealth-group-s-acquisition-change-healthcare ("The proposed transaction threatens an inflection point in the health care industry by giving United control of a critical data highway through which about half of all Americans' health insurance claims pass each year").

167 See e.g. in the agricultural context, Michael K. Adjemian, B. Wade Brorsen, William Hahn, Tina Saitone, and Richard Sexton, "Thinning Markets in U.S. Agriculture," U.S. Department of Agriculture Economic Research Service, March 2016 ("The timing and duration of contracts, as well as scale economies in processing, can augment the power of these tools. Consider a packer who ties up a substantial portion of the local hog supply with production contracts; to attain enough output to operate a processing plant at the minimum efficient scale, a potential competitor packer would need to either (1) pay exorbitant contract liquidation fees to secure a large enough supply of hog inputs, or (2) wait out existing contracts until they lapse. Likewise, a poultry processor could use the short-term nature of broiler contracts to lure a grower into committing substantial capital investments to housing, and then impose extra costs and lower prices in followup contracts once the grower is in a vulnerable position"): www.ers.usda.gov/publications/eib-economic-information-bulletin/eib148.

168 See Madl, A.C., 2020. Killing innovation?: Antitrust implications of killer acquisitions. JREG Bulletin, 38, p. 28. ("Like reverse settlements, killer acquisitions in the pharmaceutical industry rely on patent protection and high regulatory entry barriers to forestall competition.") https://www.yalejreg.com/bulletin/killing-innovation-antitrust-implications-of-killer-acquisitions/.

169 See Majority Staff of H. Subcomm. On Antitrust, Comm. & Admin. L. of the H. Comm. on the Judiciary, 116th Cong., Investigation of Competition in Digital Markets 385 (2020) ("digital markets have certain characteristics—such as network effects, switching costs, and other entry barriers—that make them prone to tipping in favor of a single dominant firm."); see also older considerations of entrenchment theory which scrutinized acquisitions that enabled one leading firm to reinforce another's "entrenched" market position with its own financial or promotional backing, usually in the form of advertising or brand dominance. E.g. FTC v. Procter & Gamble Co., 386 U.S. 568 (1967).")

170 See Hovenkamp, Herbert. Forthcoming. Digital Cluster Markets, Col. Bus. L. Rev., page 5: https://scholarship.law.upenn.edu/faculty_scholarship/2299 ([The] process of aggregating noncompeting products or services leads to the creation of "cluster markets," which are markets that consist of noncompeting goods. It then becomes important to ask when it is sensible to locate power in the cluster itself rather than in the simple presence of any particular item.")

171 This is already the primary focus of the merger guidelines and deserves continued, if less predominant, focus. A broad definition of collusive agreements like, for example, reciprocal buying that used to receive scrutiny should be included in these examinations. See e.g., FTC v. Consolidated Foods Corp., 380 U.S. 592 (1965)

understanding of market realities. Most importantly it allows enforcers to enter a market with a more appropriate analytical frame.

Whereas the horizontal or vertical nature of a commercial relationship between the merging parties can be unstable, mixed, or incoherent. By contrast, the questions of control, dominance, and foreclosure outlined here are consistent and better aligned with both contemporary changes to the modern digital economy and the broader range of anticompetitive harms that merger enforcement ought to consider. With this, enforcers can instead focus immediately on the potential sources competitive harm, rather than unnecessary subcategories of merger transactions.

4. RECIPROCITY AND RECIPROCAL BUYING

As one example of where the horizontal and vertical distinctions break down, the agencies should incorporate the concept of 'reciprocity' into the new merger guidelines to address the rise of data-rich large dominant multi-product firms in the tech sector. Reciprocity, or reciprocal buying, referred to a context where a conglomerate, or other firm producing multiple lines of related but separate products, would advantage their own products in the "internal market" within their own firm, denying outside firms access to those internal markets. Considered during the 1960s and 1970s as a key theory of competitive harm for conglomerate mergers, it was in fact a key motivator behind the Celler-Kefauver Amendments.

There is legal precedent to support the use of reciprocity under the Clayton Act. In FTC v. Consolidated Foods Corp., 380 U.S. 592 (1965), the Supreme Court allowed that reciprocal buying was a violation of the Clayton Act. In this case, the FTC held that Consolidated Foods, which owned a network of food processing plants and retail and wholesale outlets, was not allowed to buy Gentry, a producer of dehydrated garlic and onions, because doing so would mean that Gentry's products would have an advantage in selling into Consolidated existing ecosystem. Such 'reciprocity' would necessarily exclude competitors, regardless of market share increases.

> "If reciprocal buying creates for Gentry a protected market, which others cannot penetrate despite superiority of price, quality, or service, competition is lessened whether or not Gentry can expand its market share. It is for this reason that we reject respondent's argument that the decline in its share of the garlic market proves the ineffectiveness of reciprocity. We do not know that its share would not have fallen still farther had it not been for the influence of reciprocal buying. This loss of sales fails to refute the likelihood that Consolidated's reciprocity power, which it has shown a

> willingness to exploit to the full, will not immunize a substantial segment of the garlic market from normal quality, price, and service competition."[172]

The court held that the practice did not require explicit bad acts, but from 'subtle arrangements' within an oligopolistic industry:

> "Reciprocal trading may ensue not from bludgeoning or coercion, but from more subtle arrangements. A threatened withdrawal of orders if products of an affiliate cease being bought, as well as a conditioning of future purchases on the receipt of orders for products of that affiliate, is an anticompetitive practice."[173]

As the FTC and DOJ consider how to understand the problem of technology "ecosystems" or platforms, the doctrine of reciprocity provides guidance for merger policy. This background, as well as Corwin Edwards's follow-up work in the 1950s, provide a conceptual framework to address some of today's problems regarding technology platforms.[174] As highlighted in the previous section, major technology platforms operate in many lines of business—search, publishing, advertising, business logistics, web services, all deployed throughout an interdependent network of consumer products through which they collect and merge aggregated data, sell targeted advertising based on that data and in-house algorithms, and integrate those capabilities into other products.

Following this intended application of the Clayton Act and Consolidated Foods, the new guidelines should ensure that no merger should give the merged firm power over related products or services such that other firms can have their sales or purchasing arrangements essentially tied to a range of products and services from a more expansive firm. Likewise, the guidelines should prevent mergers that create "internal" markets for the merged firm, into which outside competitors would not be able to enter, whether these internal markets would be for mundane goods like food or metals, or for data and other information technology resources.

5. THE "FLAILING FIRM" OR "WEAKENED COMPETITOR" EXCEPTION SHOULD BE CURTAILED

We also wish to highlight the "flailing firm" or "weakened competitor" defense, and the agencies should provide guidance to narrow the scope of this exception. Meant to be a narrow and exceptional circumstance for struggling companies, this defense for anticompetitive mergers has grown to become a broad and overly permissive where

172 FTC v. Consolidated Foods Corp., 380 U.S. at 599.

173 FTC v. Consolidated Foods Corp., 380 U.S. at 594.

174 Edwards, Corwin D. 1955. Conglomerate Bigness as a Source of Power. In Business Concentration and Price Policy. Princeton, NJ: Princeton University Press. Available at: https://www.nber.org/system/files/chapters/c0967/c0967.pdf.

dominant firms are treated as "weakened competitors." Where two firms seek to merge and their relative market shares indicate that the merger is likely to reduce competition under the Clayton Act, one of the merging parties can show that it does not have a competitive future as an independent firm. Arguing this under the weakened competitor defense, the merger can be permitted as it arguably does not reduce future competition. This is distinct from the failing company defense, which is – appropriately – a restrictive, narrow exception for imminently-bankrupt companies that is rarely approved by the courts.

The weakened competitor defense has its origins in *General Dynamics* in 1974, where two coal firms intended to merge.[175] The government filed to block the merger, relying on evidence that the existing and combined market shares of the two firms created a presumption that the merger would violate the Clayton Act. One of the firm's coal reserves were very low, and those reserves were almost entirely committed in long-term contracts to utility companies. Arguably unable to compete for any new business as a result, that firm effectively wasn't going to be a future competitor in the market. The Supreme Court found, based on this very specific set of facts, that the merger thus did not decrease competition and did not violate the Clayton Act. A series of subsequent decisions over the years relied on this weakened competitor standard,[176] accepting or rejecting it to varying degrees.

Despite the weakened competitor defense's not-uncommon use and citation in the caselaw, it is meant to be a rare exception to the Clayton Act's otherwise broad and straightforward prohibitions on anticompetitive mergers. Presumably for that reason, it is not recognized in the existing guidelines, though past versions – for example, the 1984 Guidelines – have considered the "financial condition of firms in the relevant market."[177] This was presumably to indicate that poor financial condition meant less competitive risk, with similar reasoning as the weakened competitor defense as set out by *General Dynamics*.

Regardless of the wisdom of the original *General Dynamics* decision, its reasoning has been extended and used as a pretense to approve mergers on the following reasoning, by courts and the agencies alike: merging the two firms does not diminish competition because neither firm, on its own, would be able to successfully compete in some broader market or against some larger competitor. Arguably unable to successfully compete, the merger would not reduce competition because it allowed those firms to compete where they otherwise would not have been able to.

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

176 United States v. International Harvester Co., 564 F.2d 769 (7th Cir. 1977); Kaiser Aluminum and Chemical Corp. v. FTC, 652 F.2d 1324 (7th Cir. 1981); FTC v. Arch Coal, Inc., 329 F. Supp. 2d 109 (D.D.C. 2004).

177 1984 Merger Guidelines, § 3.22 ("If the financial difficulties of a firm cannot be explained as phenomena of, for example, the business cycle, but clearly reflect an underlying structural weakness of the firm, the firm's current market share may overstate its likely future competitive significance. For example, a firm's current market share may overstate its future competitive significance if that firm has chronic financial difficulties resulting from obsolete productive facilities in a market experiencing a long-term decline in demand.") https://www.justice.gov/archives/atr/1984-merger-guidelines#N_18_

With this extension, the weakened competitor exception has become broad enough to approve some of the most notorious megamergers of recent decades. In the telecommunications industry, where there were only four major players in the industry, the merger of the 3rd and 4th largest firms, Sprint and T-Mobile, was approved on the basis of the weakened competitor defense, citing Sprint's position as a struggling competitor and its inability to compete in the next generation of broadband technologies.[178] The result was, predictably, an increase in prices for consumers, predatory behavior by the merged firm, and the failure of the proposed DOJ remedy.[179]

Further back in time, the 1997 merger of Boeing and McDonnel Douglas was approved by the FTC on the basis that McDonnell Douglas was a weakened competitor – despite still running profitably with a backlog of orders – resulting in one of the largest aerospace companies in the world.[180] This merger left Boeing as a monopoly, with common quality-control issues imported from McDonnell Douglas, contributing to notable recent airline disasters.[181] Meant initially as an exception for marginal firms, we are now calling some of the most powerful companies in the country "flailing" or "weakened" to waive through their mergers.

Two main points mitigate against this sort of extension of *General Dynamics* and the weakened competitor exception. First, this argument is fundamentally balancing the anticompetitive effects in one market against the supposedly procompetitive effects in another, an exercise prohibited by the Clayton Act. By allowing, for example, T-Mobile and Sprint to merge in order to increase the merged firm's effective competition with other telecommunications firms, *the merger is still eliminating the competition between the two merging parties*. Only if Sprint were failing—unable to meet its financial obligations and imminently entering bankruptcy proceedings—would there be no loss of competition.

The only context where a weakened competitor defense is not an illegal balancing of pro- and anti-competitive effects is in the context of a genuinely failing firm which is unable to meet its financial obligations and under immediate threat of bankruptcy. Thus, the weakened competitor defense either represents an illegal balancing of pro- and anti-competitive effects across different markets, or it collapses into the failing firm defense, which has strict limits.

178 New York v. Deutsche Telekom AG, 1:19-cv-05434-VM-RWL (S.D.N.Y. 2020).

179 https://www.wired.com/story/opinion-the-terrible-t-mobilesprint-merger-must-be-undone/

180 Statement of Chairman Robert Pitofsky and Commissioners Janet D. Steiger, Roscoe B. Starek III and Christine A. Varney in the Matter of The Boeing Company/McDonnell Douglas Corporation, Jul 1, 1997. Available at: https://www.ftc.gov/legal-library/browse/cases-proceedings/public-statements/statement-chairman-robert-pitofsky-commissioners-janet-d-steiger-roscoe-b-starek-iii-christine

181 Maureen Tkacik, "Rescue Mission: Bailing Out Boeing and Rebuilding It to Thrive," American Economic Liberties Project, March 23, 2020: https://www.economicliberties.us/wp-content/uploads/2020/04/Boeing-Bailout-2020.pdf.

To the degree that weakened competitors and failing firms are meaningfully different categories, the agencies' revised guidelines should outline clear limits on the scope of the weakened competitor defense, particularly ensuring that a overly-broad reading of it is not available as a justification for large-scale mergers of profitable companies.

6. MARKET DEFINITION AND DIRECT EVIDENCE

"Throughout the history of U.S. antitrust litigation, the outcome of more cases has surely turned on market definition than on any other substantive issue."[182]

The above by antitrust scholar Jonathan Baker is true, but it should not be. Market definition has come to be overly important in antitrust disputes. Cases hinge on market definition. In merger cases, a firm's market share within an industry can determine if the merger is presumptively illegal or not. If the market is defined very narrowly, a firm will comprise a larger portion of it and appear to dominate it. If, on the other hand, the market is defined very broadly to include all sorts of similar product and services, then the firm will appear to be but a minor player in that broader market. This requirement of *indirect* evidence of competitive harm, in the form of market definition, places an unnecessary and undue burden on enforcement of the Clayton Act by primarily emphasizing *indirect* evidence of threats to competition, most especially by requiring a precise market definition. As a result, antitrust cases, and merger cases especially, unnecessarily rely on complex models for market definition that constrain enforcement of the Clayton Act.

While indirect evidence should still be used to guide enforcement, judicial precedence is clear that such extensive inquiries – asking courts to parse which sub-markets or product lines exactly characterize the relevant market definition – is prohibited by congressional intent. To maintain a practicable enforcement toolkit to remain true to the Clayton Acts incipiency standard, the guidelines and enforcement should acknowledge that *direct* evidence, such as testimony, company or industry documents, or any other statement of intent to monopolize or control markets, should suffice to establish that there is a market where competition could be reduced.

Disputes over market definition have come to be defined by very specific economic models that did not exist when the laws were passed, and to which the laws were not meant to be constrained. Current merger cases often use the "hypothetical monopolist test" to define a market. It identifies a market by assuming that if there were a hypothetical monopolist in that market, it would impose a "small but significant and non-transitory increase in price" (SSNIP), because there would not be sufficient substitute products outside the market.[183] In this way, the current guidelines suggest that market definition should primarily be a

182 Baker, J.B., 2007. Market definition: An analytical overview. Antitrust LJ, 74, p.129.

183 See 2010 Horizontal Merger Guidelines, § 4.1. https://www.justice.gov/atr/horizontal-merger-guidelines-08192010.

function of the quantitatively defined demand elasticities of products relative to adjacent markets.

However, economics as a discipline is not a special form of evidence in merger cases, or in antitrust more generally. By contrast to the current guidelines, existing precedent establishes that the government and other challengers do *not* have to meet any “definite quantitative or qualitative tests.”[184] As the Supreme Court has ruled, “we must be alert to the danger of subverting congressional intent by permitting a too-broad economic investigation.”[185]

The Clayton Act was passed precisely to lower the requirements for blocking mergers than those relevant for the Sherman Act.[186] This aligns with the wording of the Celler-Kefauver Act prohibiting mergers “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.”[187] In other words, if a merger or acquisition results in markets that are too concentrated or where it *could potentially* reduce competition in *any* market, that merger is illegal, with no further inquiry needed.

To establish the likelihood that a merger may substantially lessen competition, it should suffice to present either indirect evidence, such as market definition and a measure of concentration, or direct evidence. The incipiency standard of the Clayton Act is not deterministic, requiring the government to establish through a specific method or specific analysis that a merger will threaten competition in a specific way. Rather, as the illegality is determined by whether a merger may threaten competition, now or in the future, *any* form of direct or indirect evidence that indicates a threat to competition should be sufficient, including testimony or documentation regarding the intent to reduce competition, monopolize, or control a market, or any anticipation of the ability to do so.

Existing cases, most notably *Brown Shoe*, have outlined other indicators, outside of formal economic models, that can be used to establish the existence of a market:

1. Industry or public recognition of the market as a separate economic entity
2. The product's peculiar characteristics and uses
3. Unique production facilities
4. Distinct customers
5. Distinct prices

184 Brown Shoe Co. v. United States, 370 U.S. at 321 (1962).

185 Philadelphia Nat’l Bank, 374 U.S. at 362 (1963).

186 Mergers under the Sherman Act are reviewed following the rule of reason, establishing whether the acquisition represented a reasonable business decision or an attempt to monopolize. No such standard exists with respect to the Clayton Act.

187 15 U.S.C. § 18 (emphasis added).

6. Sensitivity to price changes
7. Specialized vendors[188]

This range of direct and indirect evidence has and is used in by courts to adjudicate merger cases. Courts have relied on “Testimony in the record from numerous independent retailers, based on their actual experience in the market” to establish that the dominant firm could insulate itself from competition in certain locations and inhibit other firms’ ability to compete,[189] or testimony from a manufacturing executive that it could leverage their size to force their own products into the inventory of newly-acquired retail firm,[190] and foreclosing the retail market to smaller competitors. Company documents can be used to establish a common market, as in *FTC vs. Proctor & Gamble Co.*, where a company executive established that they were “thoroughly at home in the field” of the industry into which the firm was making an acquisition.[191] This was enough to effectively show that there was a market where competition might be diminished.

Therefore, even absent a quantitative specification or exact market definition, direct evidence about the intent or expectation of a merger to reduce competition should suffice as evidence to both (a) establish that there is a relevant market and (b) establish that the merger could reduce competition, and the merger is therefore illegal. With any substantive evidence that the merger could lead to a reduction in competition in *any market*, well-defined or not, the Clayton Act deems the merger illegal and places no requirement than any inquiry be made to define the relevant market for the purposes of evaluating the merger.

This direct evidence includes company documents, testimony from the merging parties or independent competitors, or other statements of intent to monopolize, restrain trade, exclude competitors, engage in surveillance, or to control a key resource, network, data set, sales channel, pool of labor, production capacity, regulatory barrier, or intellectual property. This would likewise include any statement of expectation that the merger, or a market position gained as a result, will give the merged firm unilateral power to set prices, terms, conditions, or standards in business dealings, the unilateral power to dictate or control non-price terms, or other evidence that the merged firm will not be constrained by competitive pressures, such as the ability to degrade quality without suffering reduction in profitability.

Lastly, in acknowledging the harms to labor market competition that merger review should increasingly take into consideration, direct evidence about reductions of competition in

188 Brown Shoe, 370 U.S. at 325.

189 Brown Shoe, 370 U.S. at 344.

190 Brown Shoe, 370 U.S. at 332.

191 Proctor & Gamble Co., 386 U.S. at 578.

labor markets should likewise suffice without any defined market. This would include plans to use non-compete clauses or no-poach agreements after a merger, an expectation of unilateral power to set wages or other working conditions, or plans to reduce wages or other compensation post-merger.

7. PRICE AND QUANTITATIVE MEASURES ARE NOT ADEQUATE TO MEASURE HARMS FROM MERGERS

Merger policy and guidelines in the United States has over-emphasized short-term, quantitative measures of harm, predominantly in terms of the final price for the consumer. There are several problems with this approach. First, economics and price theory are not special forms of evidence in the context of the Clayton Act's anti-merger provisions nor in antitrust policy generally. Second, there are qualitatively and conceptually broader forms of harm that antitrust and merger policy has historically ignored:

A. Labor Harms

Any revised merger guidelines should emphasize several different potential harms to labor as a result of mergers. President Biden's Executive Order on Competition recognized the harms that concentration economic power have on workers, "Consolidation has increased the power of corporate employers, making it harder for workers to bargain for higher wages and better work conditions."[192]

The "monopsony" power of concentrated employers in regional labor markets means that many workers have either only a few potential employers for whom they could work, or even just one. Just as companies collude in product markets to raise prices, employers in such a setting can collude to hold wages down, by refusing to pay more than the others or agreeing to not poach employees. As a result, employees are not able to seek outside offers and bargain for better pay. The Treasury Department's recent report on labor market competition emphasizes and highlights many of these harms. Summarizing the conclusions of a broad range of labor market research, the report concluded that American workers experience an average of a 20% decrease in their wages relative to more competitive labor markets.[193] Employers in concentrated labor markets will likewise find it easier to require employees to sign non-compete or other restrictive employment agreements.

Mergers also harm workers in more direct ways: layoffs. When merging parties highlight potential cost savings from a merger, often those efficiencies are a code for laying off

192 President Biden statement regarding Executive Order on Promoting Competition in the American Economy, July 9, 2021. Available at: https://www.whitehouse.gov/briefing-room/presidential-actions/2021/07/09/executive-order-on-promoting-competition-in-the-american-economy/.

193 "The State of Labor Market Competition," Department of the Treasury, March 7, 2022. https://home.treasury.gov/system/files/136/State-of-Labor-Market-Competition-2022.pdf

workers that the merged firm deems redundant. Under a consumer benefit standard, such layoffs are considered efficiencies. Where certain administrative functions are combined or where the merged firm decides to focus more narrowly on certain competencies, and any resultant cost savings should ostensibly be passed on to consumers.

We urge the agencies to make two main changes to the merger guidelines with respect to labor. First, merger review should incorporate the anticompetitive effects of the merger in labor markets, ensuring that it does not limit the degree to which the merged firm will need to compete for workers. Furthermore, since the monopsony power of employers is more prevalent than market power in product markets, we urge the agencies to use stricter standards for labor markets than those used in product markets. For example, if a merger in a product market is presumed to be anticompetitive if the merged firm would control over 30% of the market, a merger should be deemed anticompetitive if it resulted in the employer controlling, for example, 20% of the labor market. Second, the revised merger guidelines should unambiguously state that cost savings through reduced labor or layoffs are not an efficiency of a merger, but are in fact a substantial lessening of competition for the labor of affected workers.

B. Cybersecurity Harms

Mergers also present unquantifiable yet serious threats to cybersecurity, by concentrating a number of essential infrastructure, facilities, and networks in a few firms with outsized power. While large technology firms frequently insist that regulation or government oversight is a threat to cybersecurity, such companies have vast swaths of personal data that is aggregated into a single company, making the potential risks from individual data breaches enormous.

- In 2017, a data breach as Equifax, one of the three credit reporting agencies, released the personal information of $147 million people.[194]
- In 2017, as Yahoo was trying to be acquired by Verizon, a data breach as Yahoo released personal data on all 3 billion user accounts.[195]
- In 2014, just a few years earlier 500 million Yahoo accounts were breached. Yahoo only revealed or investigated the breach two years later after the stolen data went up for sale on the black market.[196]

194 Equifax Data Breach Settlement, Federal Trade Commission, February 2022. https://www.ftc.gov/enforcement/refunds/equifax-data-breach-settlement

195 Selena Larson, "Every single Yahoo account was hacked – 3 billion in all," CNN Business, October 4, 2017, https://money.cnn.com/2017/10/03/technology/business/yahoo-breach-3-billion-accounts/index.html.

196 Nicole Perlroth, "Yahoo Say Hackers Stole Data on 500 Million Users in 2014," New York Times, September 22, 2106, https://www.nytimes.com/2016/09/23/technology/yahoo-hackers.html.

- In 2019, First American Financial Corporation leaked personal mortgage information of 885 million users, going back 16 years.[197]
- In 2021, the personal data of 92% of LinkedIn's user base, 700 million accounts, was breached and posted for sale on the dark web.[198]
- Notwithstanding Facebook's questionable and intentional uses of personal data, in 2019 a data breach released data for 533 million accounts, which was then further leaked for sale onto the dark web in 2021.[199]
- In 2018, a glitch by Twitter resulted in 330 million users' passwords being publicly accessible. The company did not reveal the extent of users directly affected.[200]

Likewise, monopolies over specific software applications lead to other cybersecurity vulnerabilities. For example, monopolies over web browsers—a position held at various points in recent decades by Netscape, Microsoft, and now Google—means that any exploits in that browser can be exploited almost universally.[201]

This is just a small sample, but with such large companies controlling or having access to such large databases regarding sensitive information, the costs of any breach are far larger.

More generally, like in any other research-intensive sector, in cybersecurity mergers and concentration will only likely reduce the incentives to innovate.[202] Acquisitions like Google's current bid to take over Mandiant will likely lead to reduced innovation by not just Google, but other cybersecurity firms as well.

C. Speech Harms

Powerful firms also have an inordinate amount of power over public speech. In digital technologies, YouTube is the dominant video streaming platforms, and its algorithm

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197 AJ Dellinger, "Understanding The First American Financial Data Leak: How Did It Happen And What Does It Mean?" Forbes, May 26, 2019, https://www.forbes.com/sites/ajdellinger/2019/05/26/understanding-the-first-american-financial-data-leak-how-did-it-happen-and-what-does-it-mean/?sh=6013f5b6567f.

198 Clare Duffy, "500 million LinkedIn users' data is for sale on a hacker site," CNN Business, April 8, 2021, https://www.cnn.com/2021/04/08/tech/linkedin-data-scraped-hacker-site/index.html; Gary Guthrie, "LinkedIn data breach puts 700 million user records at risk," Consumer Affairs, June 29, 2021, https://www.consumeraffairs.com/news/linkedin-data-breach-puts-700-million-user-records-at-risk-062921.html.

199 Paul Haskell-Dowland, "Facebook data breach: what happened and why it's hard to know if your data was leaked," The Conversation, April 6, 2021, https://theconversation.com/facebook-data-breach-what-happened-and-why-its-hard-to-know-if-your-data-was-leaked-158417.

200 Chaim Gartenberg, "Twitter advising all 330 million users to change passwords after bug exposed them in plain text," The Verge, May 3, 2018, https://www.theverge.com/2018/5/3/17316684/twitter-password-bug-security-flaw-exposed-change-now.

201 Blane Erwin, "The Secret Web Browser Monopoly," Fractional CIS, August 25, 2021, https://fractionalciso.com/the-secret-web-browser-monopoly/.

202 Haucap, J., Rasch, A. and Stiebale, J., 2019. How mergers affect innovation: Theory and evidence. International Journal of Industrial Organization, 63, pp. 283-325. https://www.sciencedirect.com/science/article/pii/S0167718717303685?casa_token=f6T6gaIRGaMAAAAA:JWxsetiPPCic8ao6QfV4rEKhJVjPsYXrpSMSb4ZJS9OGGFIHPgnmiL1QlrdIYnE_vFSkzjIA_jU

decides what sorts of content and information users have access to, and likewise what sorts of speech and content is amplified. There are many cases of harms created by the content of the speech amplified by such companies. However, the harms to speech and public life that we wish to emphasize are not primarily the content, but rather the fact that such a small group of companies has such an outsized amount of power, control, and influence over American public life.

8. REVITALIZE INCIPIENCY STANDARD IN RAPIDLY CONSOLIDATING INDUSTRIES

The merger guidelines should further return to a key element included in the 1968 guidelines: a specific attention to the incipient tendency towards concentration in industries, well before they are consolidated into a small number of firms.[203] Section 7 of the Clayton Act incorporates an "incipiency standard," meaning that it provides the authority to challenge mergers that might not themselves directly reduce competition, but either in their tendency or accumulation, result in a concentrated, less competitive industry. As the Supreme Court had interpreted it, "it requires not merely an appraisal of the immediate impact of the merger upon competition, but a prediction of its impact upon competitive conditions in the future; this is what is meant when it is said that the amended § 7 was intended to arrest anticompetitive tendencies in their 'incipiency.'"[204]

The legislative background of the 1950 Celler-Kefauver Act, and subsequent interpretations of it, explicitly considered the possibility of incipient monopolization through a trend of ongoing smaller mergers and acquisitions. The 1950 House Report stated that acquisitions "have a cumulative effect" and that the Act was "intended to permit intervention in such a cumulative process when the effect of an acquisition may be a significant reduction in the vigor of competition, even though this effect may not be so far-reaching as to amount to a combination in restraint of trade, create a monopoly, or constitute an attempt to monopolize."[205] A 1948 FTC report that motivated the passage of the 1950 Celler-Kefauver Act noted that "imminent monopoly may appear when one large concern acquires another, but it is unlikely to be perceived in a small acquisition by a large enterprise. As a large concern grows through a series of such small acquisitions, its accretions of power are individually so minute as to make it difficult to use the Sherman Act tests against them."[206] The report continued to note the threat of a few firms "extending their power by successive small acquisitions, the cumulative effect of their purchases may be to convert an industry

203 Section (I)(7) of 1968 Merger Guidelines, Department of Justice, https://www.justice.gov/archives/atr/1968-merger-guidelines.

204 United States v. Philadelphia National Bank, 374 U.S. at 362.

205 House Report. REP. NO. 1191, 81st Cong., 2d Sess. 12-13 (1950). See also: S. REP. No. 1775, 81st Cong., 2d Sess. 4-5 (1950): "The committee wish to make it clear that the bill is not intended to revert to the Sherman Act test. The intent here ... is to cope with monopolistic tendencies in their incipiency and well before they have attained such effects as would justify a Sherman Act proceeding."

206 S. Rep. No. 1775, 81st Cong., 2d Sess. 5, U.S. Code Cong. and Adm. News 1950, p. 4297, citing 1948 Federal Trade Commission study on corporate mergers. Cited in Brown Shoe, 370 U.S. at 333-334.

from one of intense competition among many enterprises to one in which three or four large concerns produce the entire supply."[207]

Specific enforcement actions reinforced this interpretation of the purpose of the Clayton Act, from which recent iterations of the merger guidelines deviate. *Brown Shoe* held that "remaining [competitive] vigor cannot immunize a merger if the trend in that industry is towards a monopoly."[208] In *Philadelphia National Bank*, the Supreme Court stated, "A fundamental purpose of amending § 7 was to arrest the trend toward concentration, the tendency of monopoly, before the consumer's alternatives disappeared through merger, and that purpose would be ill-served if the law stayed its hand until 10, or 20, or 30" more firms were absorbed.[209] In *Von's Grocery,* noting that the industry in question was not already concentrated, the Court found nonetheless that a merger in a market "characterized by a steady decline, before and after the merger, in the number of small grocery companies, combine with significant absorption of small firms by larger ones, is a violation of § 7 of the Clayton Act."[210] Furthermore, this incipiency standard did not require that the merger actually lead to clear harm. In *FTC v. Procter & Gamble*, the Court was clear that "there is certainly no requirement that the anticompetitive power manifest itself in anticompetitive action before § 7 can be called into play."[211]

The 1968 merger guidelines further reinforced this by including specific criteria regarding mergers that the DOJ would challenged based on the industry's tendency towards concentration, even if that industry were not yet particularly concentrated: "The Department applies an additional, stricter standard in determining whether to challenge mergers occurring in any market, not wholly unconcentrated, in which there is a significant trend toward increased concentration."[212] Specifically, the 1968 guidelines stated that it was challenge any merger in such an industry *by any firm with a market share of 2% or more.*

The 1982 revisions to the merger guidelines not only were far more permissive towards mergers among large firms, but they also to included a "safe harbor" – a threshold of concentration below which "the Department is unlikely to challenge mergers falling in this region.[213] More recently, this implicit safe harbor was expanded in the 2010 amendment to the Horizontal Merger Guidelines by increasing the level of concentration where the DOJ would determine that mergers "are unlikely to have adverse competitive effects

207 Brown Shoe, 370 U.S. at 334.

208 Brown Shoe, 370 U.S. at 333.

209 United States v. Philadelphia National Bank, 374 U.S. at 367.

210 Von's Grocery, 384 U.S. at 277.

211 FTC v. Proctor & Gamble Co., 386 U.S. at 577.

212 Section (I)(7) of 1968 Merger Guidelines, Department of Justice, https://www.justice.gov/archives/atr/1968-merger-guidelines.

213 The 1982 "safe harbor" was a Herfindahl-Hirschman Index (HHI) of 1,000. 1982 Merger Guidelines, Department of Justice, https://www.justice.gov/archives/atr/1982-merger-guidelines.

and ordinarily require no further analysis."[214] With this safe harbor, antitrust policy has implicitly written a blank check for smaller mergers and acquisitions, regardless of how anticompetitive they are, or how anticompetitive the intent of the business strategy is in the long run.

There are two main reasons why a reinvigoration of the incipiency standard is important. First, in order to maintain a competitive, decentralized economy, concentration needs to be held in check well before it becomes a serious threat. Without any sort of incipiency enforcement, merger activity would consolidate most industries right up to the limit of whatever levels of concentration the guidelines or existing precedent allows. Concentration would thus not be meaningfully limited, but rather held just barely at bay relative to the level of concentration that the guidelines otherwise strictly prohibit.

Second, there is a more recent business strategy, often developed among private equity firms, of rapidly rolling up many smaller firms in an industry. Taking advantage of the lax regulatory environment in recent decades to engage in "serial mergers" allows a corporation or fund to acquire and consolidate many small firms in previously fragmented industries, without triggering public scrutiny. Despite clearly tending to reduce competition as a business strategy, these serial mergers fall in a gap in existing regulation, because they neither immediately raise prices as they are acquiring small firms nor are they large enough to raise concern under the existing merger guidelines or merger notification requirements. The anticompetitive intent of these new business strategies should be considered as attempts at incipient monopolization, regardless of whether the serial acquirer already has the market power to create anticompetitive harms at the time of acquisition.

We therefore request that the agencies incorporate criteria for enforcement of the incipiency standard into the merger guidelines, as the original 1968 guidelines had done. In particular, following the 1968 guidelines, revised guidelines should indicate that the agencies will challenge mergers in rapidly consolidating industries, even when those industries are less concentrated than where they would otherwise challenge mergers. In addition, the agencies should likewise remove any implicit guarantee created by a "safe harbor" from the guidelines. The United States government and Congress has long aimed to block or halt attempts to monopolize markets and has a long history of attempting to do so before potential monopolists gained the power to injure their competitors, workers, or consumers. A revised version of the guidelines, incorporating incipiency as a key standard to assess mergers, would help to do so again.

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214 The HHI for the safe harbor was increased to 1,500 from the 1,000 outlined in 1982. 2010 Horizontal Merger Guidelines, Department of Justice and Federal Trade Commission, https://www.justice.gov/atr/horizontal-merger-guidelines-08192010#5c/.

CONCLUSION

A revised set of merger guidelines is an opportunity for the agencies to amend key mistakes made in antitrust policy over the past generation. Not only have the past 40 years of merger policy been based on an intentional subversion of the Clayton Act as written by Congress, but its economic and political effects have been grave, harming workers, independent businesses, consumers, economic growth, innovation, and democracy. By faithfully applying the law, recentering the focus of merger policy around the priorities from the Clayton Act, and updating them to reflect today's market realities, the agencies can ensure that antitrust and merger policies are used for the benefit of all Americans.