UNITED STATES OF AMERICA
BEFORE THE
FEDERAL TRADE COMMISSION

Hearing #2 On Competition and Consumer Protection in the 21st Century.

COMMENTS OF THE AMERICAN ANTITRUST INSTITUTE

The American Antitrust Institute (AAI)[1] appreciates the opportunity to respond to the Commission's invitation for public comment on the topics identified for Hearing #2 On Competition and Consumer Protection in the 21st Century. Below are responses to select questions posed on the Commission's website. Certain questions associated with Hearing #2 relate to other questions associated with previous or subsequent hearings. To avoid duplication AAI may omit responses to certain questions for Hearing #2 that will be addressed in future comments for other hearings.

whether the consumer welfare standard is the appropriate standard for antitrust law and, if not, whether other standards, including a total welfare standard, should be preferred;

We ask the Commission to consider AAI's views as reflected in *The Consumer Welfare Standard in Antitrust: Outdated or a Harbor in a Sea of Doubt?, Hearing Before the Subcomm. on Antitrust, Competition and Consumer Rights of the H. Comm. on the Judiciary*, 115th Cong. (2017) (testimony of Diana Moss, President, American Antitrust Institute). We call particular attention to the following excerpt of this testimony:

I. Preserving the Consumer Welfare Standard

A. Total Welfare Vs. Consumer Welfare

The economic standards by which antitrust concerns are evaluated have been the subject of much debate. It is well-known that Robert Bork's work, *The Antitrust Paradox*, misapplied the term "consumer welfare" when actually referring to "total welfare." This has stimulated years of controversy.[2] Because the issue of

[1] AAI is an independent, nonprofit organization devoted to promoting competition that protects consumers, businesses, and society. It serves the public through research, education, and advocacy on the benefits of competition and the use of antitrust enforcement as a vital component of national and international competition policy. For more information about AAI, see http://www.antitrustinstitute.org.

[2] *See, e.g.*, Steven C. Salop, *Question: What is the Real and Proper Antitrust Welfare Standard; Answer: The True Consumer Welfare Standard*, 22 LOY. CONSUMER L. REV. 336 (2010). ("Robert Bork's usage of the term 'consumer welfare' . . . would condemn conduct only if it decreases the welfare of the sum of the total of consumers (i.e. buyers) *plus producers* (i.e. sellers plus competitors), and *without regard to any wealth transfers*. Thus, efficiencies such as cost savings can trump demonstrable consumer injury. In contrast, the true consumer welfare standard would condemn conduct if it reduces the welfare of buyers, irrespective of its impact on sellers. Efficiency benefits count under the true consumer welfare standard, but only if there is evidence that enough of the efficiency

consumer welfare has been the subject of much confusion, it is helpful to illustrate what it can and cannot do.

Take merger enforcement as an example, since it is a central focus in the debate over growing concentration. In several previous large airline mergers, enforcers likely knew that potentially significant airfare increases were likely on some nonstop routes where a merger would eliminate an important head-to-head rival. But in allowing the mergers, enforcers gave excessive deference to the cost savings and consumer benefits promised by the merging parties.[3] These enforcement decisions were arguably based more on the application of a total welfare standard, driven by the influence of conservative enforcement ideology at the time.

In the airline merger context, the difference in standards is simple to understand. Say an airline merger would lead to higher airfares post merger, thus reducing consumer surplus. Assume also that enforcers accepted claims that costs would decline and consumer benefits would increase (e.g., through improved post-merger service and connectivity) after the merger. Application of the consumer welfare standard would lead to a finding of consumer harm. But under a total welfare standard, a pre- to post-merger increase in total surplus (i.e., consumer + producer surplus) resulting from any realized efficiencies would justify allowing the merger. In this example, the increase in total surplus is attributable primarily to an increase in producer surplus, which includes wealth transfers *from consumers* to the merged airline.

This is not to say that efficiencies do not "count" under the consumer welfare standard. They do only if they are *passed on* so that they benefit consumers directly (e.g., through lower airfares). Of course, one of the major problems that enforcers are addressing now is that many claimed merger efficiencies never materialize. The fact that enforcers have no way to ensure that claimed efficiencies will be realized and not dwarfed by long-term, post-merger integration costs makes the total welfare standard even more problematic.[4]

B. Enforcement Actions That Highlight the Broad Scope of Consumer Welfare

The actual record of enforcement actions serves as the best evidence of the adequacy of the consumer welfare standard. This record demonstrates that the existing standard captures a fulsome range of the effects of consolidation and

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benefits pass through to consumers so that consumers (i.e. buyers) would directly benefit on balance from the conduct.").

[3] *See, e.g.*, Press Release, U.S. Dep't of Justice, Statement of the Department of Justice Antitrust Division on Its Decision to Close Its Investigation of Southwest's Acquisition of Airtran, (Apr. 26, 2011), https://www.justice.gov/opa/pr/statement-department-justice-antitrust-division-its-decision-close-its-investigation.

[4] *See, e.g.*, Diana L. Moss, *Delivering the Benefits? Efficiencies and Airline Mergers*, AMERICAN ANTITRUST INSTITUTE (Nov. 21, 2013), http://antitrustinstitute.org/sites/default/files/AAI_USAir-AA_Efficiencies.pdf.

anticompetitive conduct. For example, the consumer welfare standard can capture non-price effects, such as quality, by employing direct measures or using quality-adjusted prices. Enforcement has addressed such effects in hospital mergers.[5] In mergers involving the vertical integration of video content and video distribution, the government raised concerns about diminished quality, in addition to other factors.[6] Other actions raised concerns over eliminating innovation (or "R&D") competition in mergers involving semiconductor equipment,[7] crop planting technology,[8] and oilfield services and equipment.[9]

On the important issue of workers, enforcers have taken on monopsony issues. Enforcement against mergers of beef and pork packers[10] and health insurance companies sought to address effects that would adversely affect cattlemen and medical professionals.[11] In a merger of physician practices, enforcers required the suspension of pre-existing non-compete clauses in order to restore competition.[12] Enforcers have policed anticompetitive bid rigging, wage fixing, no-poaching, and information-sharing agreements that have injured nurses, tech professionals, and others.[13] And the agencies have made it clear through their guidance that such agreements will not be tolerated.[14] They have also challenged occupational licensing abuses that harmed competition and inhibited innovative market entrants.[15]

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[5] Complaint, *In the Matter of Inova Health System Foundation, and Prince William Health System Inc.*, Federal Trade Comm'n, Docket No. 9326 at 2, 4 (May 8, 2008), https://www.ftc.gov/sites/default/files/documents/cases/2008/05/080509admincomplaint.pdf.

[6] Complaint, *United States v. Comcast Corp.*, No. 1:11-cv-00106, at 23 (D.D.C. Jan. 18, 2011), https://www.justice.gov/atr/case-document/file/492256/download.

[7] Press Release, U.S. Dep't of Justice, Applied Materials Inc. and Tokyo Electron Ltd. Abandon Merger Plans After Justice Department Rejected Their Proposed Remedy (Apr. 27, 2015), https://www.justice.gov/opa/pr/applied-materials-inc-and-tokyo-electron-ltd-abandon-merger-plans-after-justice-department.

[8] Complaint, *United States v. Deere & Co.*, No. 1:16-cv-08515, at 16 and 18 (N.D. Ill. Aug. 31, 2016), https://www.justice.gov/opa/file/889071/download.

[9] Complaint, *United States v. Halliburton Co.*, No. 1:16-cv-00233-UNA, at 2, 30, 32, 36 (D. Del. Apr. 6, 2016), https://www.justice.gov/opa/file/838651/download.

[10] *See, e.g.*, Complaint, *United States et al. v. JBS S.A.*, No. 08CV5992, at 3, 10, 12, and 14 (N.D. Ill., Oct. 20, 2008) https://www.justice.gov/atr/case-document/file/500016/download. *See also* Complaint, *United States et al. v. Tyson Foods, Inc.*, No. 1:14-cv-01474, at 7-9 (D.D.C. Aug. 27, 2014), https://www.justice.gov/atr/case-document/file/513846/download.

[11] Complaint, *United States v. Anthem, Inc.*, No. 1:16-cv-01493, at 25 (D.D.C., Jul. 21, 2016), https://www.justice.gov/atr/file/903111/download; *see also*, United States v. Anthem, Inc., No. 17-5024, at 12-13 (D.C. Cir. Apr. 28, 2017). https://www.justice.gov/atr/case-document/file/971316/download.

[12] Complaint, *In the Matter of Renown Health*, Federal Trade Comm'n, Docket No. C-4366 at 3 (Aug. 3, 2012), https://www.ftc.gov/sites/default/files/documents/cases/2012/08/120806renownhealthcmpt.pdf; Agreement Containing Consent Orders, *In the Matter of Renown Health*, Federal Trade Comm'n File No. 111-0101, at 1, 3 (July 2012), https://www.ftc.gov/sites/default/files/documents/cases/2012/08/120806renownhealthagree.pdf.

[13] Complaint, *United States v. Adobe Sys., Inc.*, No. 10-cv-01629, 2010 WL 11417874 (D.D.C. Sept. 24, 2010); Complaint, *United States v. Lucasfilm Ltd.*, No. 10-cv-02220, 2010 WL 5344347 (D.D.C. Dec. 21, 2010); Complaint, *United States v. eBay, Inc.*, No. 12-cv-5869, 2012 WL 5727488 (N.D. Cal. Nov. 16, 2012).

[14] *See* U.S. Dep't of Justice & Federal Trade Comm'n, Antitrust Guidance for Human Resources Professionals (2016), https://www.justice.gov/ atr/file/903511/download.

[15] *North Carolina Board of Dental Examiners v. Federal Trade Commission*, 135 S.Ct. 1101 (2015); s*ee also* Randy M. Stutz, *State Occupational Licensing Reform and the Federal Antitrust Laws: Making Sense of the Post-Dental*

The foregoing examples of enforcement actions only scratch the surface of what can be accomplished using a consumer welfare standard that is vigorously employed by U.S. antitrust enforcers. They support the notion that the standard capable of taking on the challenges we face moving forward.

II. Where Do We Go From Here?

As the leader in independent, progressive competition advocacy, AAI has consistently advocated for more vigorous enforcement. This spans the public-private enforcement partnership and across *all* areas of antitrust, including merger control, anticompetitive agreements, and exclusionary practices by powerful sellers and buyers. AAI's National Competition Policy Statement lays out an action plan to spur more vigorous enforcement.[16] Among other things, it recommends revitalizing enforcement against abusive practices with the many tools available to do so, including Section 2 of the Sherman Act, Section 5 of the FTC Act, and the Robinson Patman Act.

AAI also encourages enforcers to focus on more novel sources of market power, including intellectual property, the use of distribution to leverage dominance, buyer power, and colluding on market "rules." We should not forget that Section 1 represents a very active area of antitrust enforcement. Ramping up penalties and remedies for illegal agreements is critical for deterring future behavior. And it is vital to ensure that antitrust remedies, when they are used, focus on effective approaches to restoring competition through structural approaches, rather than behavioral fixes.

Moving forward will require a number of important efforts. First, we need *more* enforcement that explicitly recognizes the full scope of cognizable competitive harms under a consumer welfare standard, including price and non-price competition. Second, the laws would benefit from some clarification in light of developments in technology, market dynamics, and competitive practices, along the lines suggested in Senator Amy Klobuchar's recently introduced legislation.

Third, enforcement would benefit from a more skeptical attitude toward efficiencies defenses, which have been a driving force behind lax enforcement for many years. Evidence on failed merger efficiencies could valuably inform enforcement moving forward. And enforcers should be given the ability to hold merging parties' feet to the fire on their claims that a merger will deliver cost savings and benefits to consumers.

Fourth, it is vital that enforcers and the courts get up to speed on the dynamics of more modern and complex technologies and markets. The consumer welfare

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Examiners Landscape, AMERICAN ANTITRUST INSTITUTE (Nov. 6, 2017), http://www.antitrustinstitute.org/sites/default/files/Occupational%20Licensing%20White%20Paper.11.6.17.pdf.

[16] *Supra* note 2.

standard is able to tackle the manifestation and exercise of market power in these settings. For example, "data" can, in appropriate circumstances, be defined not only as a market for antitrust purposes, but also as a strategic competitive asset. Digital online markets are more complex "ecosystems" of exchange and collaboration. But they might be viewed in some instances as competing on services and value, such as advertising and information/attention-based experiences, through differentiated complementary offerings. Antitrust can and should address concerns over that competitive process, just as it does in more traditional markets.

Fifth, antitrust needs support from other policy instruments. Trade, labor, education, tax, and small business policies all bear importantly on promoting competition. More focused efforts should be made to understand how such policies can be made to complement each other. And last, but not least, the agencies need adequate resources to do their jobs. The problem with antitrust enforcement has not been the consumer welfare standard. The key to ensuring a competitive economy is vigorous and aggressive enforcement, and support for that effort by lawmakers, policymakers, and the public.

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whether and, if so, how antitrust law should take into account additional public policy concerns such as income or wealth distribution, the bargaining power of large entities, or labor and employment considerations;

We ask the Commission to consider AAI's views as reflected in American Antitrust Institute, Antitrust and Inequality: What Antitrust Can and Should Do to Protect Workers, AM. ANTITRUST INST. (Apr. 25, 2017) and Randy M. Stutz, The Evolving Antitrust Treatment of Labor-Market Restraints: From Theory to Practice, AM. ANTITRUST INST. (July 31, 2018).

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the accuracy and relevance of recent research identifying increases in concentration across broadly defined economic sectors, as well as some recent studies suggesting changes in price-cost margins over time, and what influence, if any, this existing research should have on antitrust law and policy;

We ask the Commission to consider AAI's views as reflected in Diana L. Moss, *Merger Policy and Rising Concentration: An Active Agenda for Antitrust Enforcement*, ANTITRUST (forthcoming Fall 2018) and American Antitrust Institute, A National Competition Policy: Unpacking the Problem of Declining Competition and Setting Priorities Moving Forward, AM. ANTITRUST INST. (Jan. 4, 2017). The following excerpt from AAI's National Competition Policy statement discusses some recent studies in context:

I. The Symptoms of Declining Competition

A. The First Problem: Rising Concentration

Concentration is important because it is a generally recognized gauge of market competitiveness. In more concentrated markets, only a few sellers account for a large proportion of output, and they are more likely to exercise market power, either alone or together with their competitors. Nowhere does concentration take center stage more than in merger cases. Horizontal mergers eliminate a competitor, change the structure of a market, and increase concentration. Because of the recognized risks of higher concentration, the anti-merger statute is designed to prevent mergers that *may* enhance market power and lead to anticompetitive effects.[17] The importance of this "incipiency" doctrine cannot be overstated. Once a merger is consummated and a market thus restructured, both the merger and the market are difficult, if not impossible, to unscramble.

There are many ways to measure concentration.[18] Aggregate levels of concentration reflect control of resources across the economy as a whole. Concentration can also be calculated for major sectors and industries, and for even more precisely defined markets for the purpose of evaluating an antitrust concern. To be sure, the implications of various measures of concentration have been the subject of disagreement. And, there are important distinctions between concentration, as applied in an antitrust enforcement context, versus in other contexts. But this broader debate is now becoming somewhat irrelevant, because a variety of available measures of concentration in key industries and sectors over time all now point in the same direction – up.[19] For example:

- **Council of Economic Advisors.** The CEA estimates that the revenue share earned by the top 50 firms between 1997 and 2012 increased, on average, by 4% across 13 major industries.[20] Leading in the highest changes in revenue share are transportation and warehousing (11%), retail trade (11%), and financial and insurance (10%). But these 10,000-foot level data tend to hide the severity of increases in concentration that more specific measures reveal.

- **The Economist.** The Economist magazine evaluated changes in the top four firms' share of industry revenue for almost 900 industries in the U.S.,

[17] *See* Clayton Act, § 7; Fed. Trade Comm'n & U.S. Dep't of Justice, Antitrust Div., Horizontal Merger Guidelines (Augst 19, 2010) [hereinafter Guidelines).

[18] *See, e.g.*, James W. Brock, *Economic Concentration and Market Power: John Flynn and a Quarter-Century of Mergers*, 56 ANTITRUST BULLETIN681-730 (2011).

[19] *See, e.g.,* ACTING ASSISTANT ATTORNEY GENERAL RENATA HESSE OF THE ANTITRUST DIVISION DELIVERS OPENING REMARKS AT 2016 GLOBAL ANTITRUST ENFORCEMENT SYMPOSIUM (Sept. 20, 2016), https://www.justice.gov/opa/speech/acting-assistant-attorney-general-renata-hesse-antitrust-division-delivers-opening. The antitrust agencies evaluate market concentration using the Herfindahl-Hirschman Index (HHI), which is the sum of the squares of the market shares for all sellers in the market.

[20]Council of Economic Advisers, *supra* note 5 at 4.

grouped into 15 sectors, from 1997 to 2012.[21] The share of the top four in third party administration of insurance and pension funds increased from about 10% in 1997 to over 75% in 2012.[22] The top four share for scheduled passenger air transportation increased from about 25% to 65%.[23] In wireless telecommunications, it increased from about 50% to almost 90%.[24] For credit card issuers, the top four firm share rose from about 55% to almost 80%; and in petrochemical manufacturing, it increased from over 70% to over 90%.[25]

- **Wall Street Journal.** The Wall Street Journal highlighted academic research that estimates concentration in food and staples retailing in 2013 at about 3,000 HHI, up almost 2,000 HHI points from 1996.[26] In Internet software, concentration was about 2,500 HHI, up from about 750 HHI in 1996; and in airlines, it was 2,000 HHI, almost double the level in 1996.[27]

One of the reasons for the upward creep in concentration seems clear. Before the 1980s, merger enforcement put significant stock in the "structural presumption," or the idea that mergers that significantly increase concentration in already concentrated markets are presumed to create or enhance market power. Moreover, courts and enforcers recognized the importance of stopping anticompetitive mergers in their incipiency.

But in the 1980s – and particularly under the Reagan administration – a sea change in ideology captured enforcement. The structural presumption was given less or no weight by enforcers, the balance of merger analysis shifted strongly toward complex economics, and evidence of higher prices from previous mergers played little to no role. The agencies fortified their more permissive approach by too often accepting unsubstantiated or amorphous claims that mergers would produce cost savings and consumer benefits.

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[21] *Too Much of a Good Thing*, ECONOMIST, (Mar. 26, 2016), http://www.economist.com/news/briefing/21695385-profits-are-too-high-america-needs-giant-dose-competition-too-much-good-thing. The concentration measure is essentially the 4-firm ratio, which measures the percentage of output controlled by the four largest firms.

[22] *Corporate Concentration*, ECONOMIST (Mar. 24, 2106), http://www.economist.com/blogs/graphicdetail/2016/03/daily-chart-13.

[23] *Id.*

[24] *Id.*

[25] *Id.*

[26] Theo Francis & Ryan Knutson, *Wave of Megadeals Tests Antitrust Limits in U.S.*, WALL STREET J. (Oct. 18, 2015), http://www.wsj.com/articles/wave-of-megadeals-tests-antitrust-limits-in-u-s-1445213306. The article cites work by Hoberg and Phillips. *See, e.g.*, Gerard Hoberg and Gordon Phillips, *Product Market Synergies and Competition in Mergers and Acquisitions: A Text-Based Analysis*, 23 Rev. Fin. Stud. 3773 (2010), *available at* https://www.researchgate.net/profile/Gordon_Phillips/publication/227349422_Product_Market_Synergies_and_Competition_in_Mergers_and_Acquisitions_A_Text-Based_Analysis/links/0912f50ac446540a04000000.pdf.

[27] Francis & Knutson, *supra* note 26.

While the pre-Reagan era is generally believed to have been overly hostile to mergers, it is also accepted that the superseding ideology advanced by conservative scholars during the 1980s "overshot the mark."[28] The outcome was a swath of questionable merger approvals – many with no or weak remedial conditions attached – and a steady ratcheting up of concentration in many markets.

Some economists who once highlighted the folly of the overly aggressive merger policy of the 1960s have changed their tune. One economist concluded in the late 1970s, for example, that the prevalence of cost efficiencies cast doubt on any general legal rule hostile to industrial concentration. Thirty-three years later, however, this same economist identified a nexus between increases in concentration in the manufacturing sector and adoption of the more lenient merger enforcement policies adopted in the early 1980s.[29]

B. The Second Problem: Higher Profits to the Few and Slowing Rates of Start-Up Activity

The standalone indicators of declining competition examined by the CEA are revealing. But the relationships among those indicators are particularly important for framing policy responses. The CEA's work highlights the connections among market concentration, higher prices, and higher profits. Leading economist and Nobel laureate Joseph Stiglitz explains: "Monopolies and imperfectly competitive markets are a major source of rents," and "the higher prices that [monopolies] charge not only distort the economy but also act like a tax, the revenue from which doesn't, however, go to public purposes, but rather enriches the coffers of the monopolists."[30]

The CEA cites recent research indicating that returns on investments in capital for the most profitable 10% of firms are five times the median.[31] Of course, high

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[28] *See* HOW THE CHICAGO SCHOOL OVERSHOT THE MARK: THE EFFECT OF CONSERVATIVE ECONOMIC ANALYSIS ON U.S. ANTITRUST (Robert Pitofsky ed., 2008).

[29] *Compare* Sam Peltzman, *The Gains and Losses from Industrial Concentration*, 20 J. L. ECON. 229 (October 1977) (finding that "while price effects [of the usual profit-concentration ratio] are not absent, the cost effects so dominate them as to cast doubt on the efficacy of any general legal rule hostile to industrial concentration.") *with* Sam Peltzman, *Industrial Concentration Under the Rule of Reason*, 57 J. L. ECON., S101 (August 2014) (finding that "concentration, which had been unchanged on average for all of the 20th century, began rising at the same time that merger policy changed. Concentration has increased steadily over the entire post-Bork period.) Increases in market concentration were particularly pronounced in the consumer goods industries.

[30] JOSEPH E. STIGLITZ, THE PRICE OF INEQUALITY: HOW TODAY'S DIVIDED SOCIETY ENDANGERS OUR FUTURE 338-9 (2012).

[31] Council of Economic Advisers, *supra* note 5, at 5. *See also* Jason Furman and Peter Orszag, *A Firm-Level Perspective on the Role of Rents in the Rise in Inequality: Presentation at "A Just Society" Centennial Event in Honor of Joseph Stiglitz, Columbia University* (Oct. 16, 2015), https://www.whitehouse.gov/sites/default/files/page/files/20151016_firm_level_perspective_on_role_of_rents_in_inequality.pdf.

profits can result from legitimate factors such as charging higher prices for innovative products for which there is high demand, having low costs due to investment in new technology, or being the first mover in a "winner take all" market. In markets where competition is on the merits, profits are a green light to market entrants to capitalize on an opportunity to get a share of the pie. This entry typically lowers profits to normal levels. But high profits can result from the exercise of market power gained through merger or collusion, or by abusing a dominant market position to exclude rivals. Such market power can be "durable," and the resulting monopoly profits may persist because entry barriers block new firms.

In fact, market entry by smaller, entrepreneurial start-ups is on the decline. Entrepreneurs commercialize a disproportionate number of disruptive innovations that drive market entry and productivity growth. But, as the CEA Report indicates, the rate of firm entry in the U.S. is in an almost 40-year free fall.[32] The relationship between high profits and market entry is thus the opposite of what we would expect to see in a well-functioning economy. This disconnect shines light on increasing concentration as a root concern.[33]

C. The Third Problem: Widening Inequality Gaps

There is growing agreement that income and wealth inequality are major problems in the U.S.[34] Inequality is increasing, with adverse effects on economic growth, incentives for entrepreneurship and innovation, individual opportunity and quality of life, and the political system.[35] But is there a connection to be drawn between high levels of concentration and inequality? The short answer is yes.

One explanation is that large purchasers of labor have increased their market power relative to sellers of labor. This tilts the balance of bargaining power toward powerful buyers in key industries such as food and manufacturing, resulting in higher returns and lower wage rates. Economic evidence backs this up. A recent study shows, for example, that the "prime driver of wage inequality

[32] Council of Economic Advisers, *supra* note 5, at 5.

[33] *See* Jonathan D. Ostry, Andrew Berg & Charalambos G. Tsangarides, *Redistribution, Inequality, and Growth*, INTERNATIONAL MONETARY FUND (Feb. 2014), http://www.imf.org/external/pubs/ft/sdn/2014/sdn1402.pdf.

[34] *See, e.g.*, THOMAS PIKETTY, CAPITAL IN THE TWENTY-FIRST CENTURY (2014); JOSEPH E. STIGLITZ, THE PRICE OF INEQUALITY: HOW TODAY'S DIVIDED SOCIETY ENDANGERS OUR FUTURE (2012). *See also* JACOB S. HACKER & PAUL PIERSON, WINNER-TAKE-ALL POLITICS: HOW WASHINGTON MADE THE RICH RICHER—AND TURNED ITS BACK ON THE MIDDLE CLASS (2012); Lawrence H. Summers, *The Inequality Puzzle*, 2014 DEMOCRACY J. 91; Bill Gates, *Why Inequality Matters*, GATESNOTES (Oct. 13, 2014), http://www.gatesnotes.com/Books/Why-Inequality-Matters-Capital-in-21st-Century-Review.

[35] Economists are taking up the question in force. The 2016 American Economic Association meetings, for example, featured at least four panels on inequality. *See* Preliminary Program of the Allied Social Science Associations, AMERICAN ECONOMIC ASSOCIATION (Jan. 3-5, 2016), https://www.aeaweb.org/conference/2016/preliminary.php.

is the growing gap between the most- and least-profitable companies."[36] Those most profitable firms have market power in labor markets. As "wage setters," they drive wages down, shifting wealth from labor to capital.[37] In high technology labor markets, understandings among employers not to "poach" each other's workers may also act to drive down wages.[38]

Another explanation is that the exercise of market power raises prices to consumers, which reduces the purchasing power of their wages. The larger proportion of spending on necessities and lower individual savings and investment widens the inequality gap. We know that prices have gone up as a result of past merger activity. Leading economist John Kwoka's meta-analysis of 50 studies encompassing more than 3,000 mergers over the last 25 years indicates that post-merger prices increased, on average, by 7.2%.[39]

There is a growing consensus that inadequate antitrust policy has contributed to the concentration problem and associated inequality effects. Leading law and economics experts Steven Salop and Jonathan Baker offer that the "adoption of more permissive antitrust rules during the past quarter century" likely increased the prevalence of market power, with the returns from it flowing disproportionately to the wealthy.[40] Another expert, Einer Elhauge, notes, "merger policy has the potential to be a major driver of economic inequality."[41]

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what are the highest priority reforms that would improve U.S. antitrust enforcement policy;

We ask the Commission to consider AAI's views as reflected in A National Competition Policy: Unpacking the Problem of Declining Competition and Setting Priorities Moving Forward, AM. ANTITRUST INST. (Jan. 4, 2017). The excerpt below from the appendix of AAI's

[36] Greg Ip, *Behind Rising Inequality: More Unequal Companies*, WALL STREET J. (Nov. 4, 2015) (citing Furman and Orszag, *supra* note 31), http://www.wsj.com/articles/behind-rising-inequality-more-unequal-companies-1446665769.

[37] Einer Elhauge, *Horizontal Shareholding*, 129 HARV. L. REV. 1267 (Mar. 2016), http://harvardlawreview.org/2016/03/horizontal-shareholding/.

[38] *See, e.g.*, Michael Liedtke, *Apple, Google, Other Tech Firms to Pay $415M in Wage Case*, SEATTLE TIMES (Jan. 15, 2015), http://www.seattletimes.com/business/apple-google-other-tech-firms-to-pay-415m-in-wage-case. *See also* Elhauge, *supra* note 28, at 23.

[39] *See generally*, John E. Kwoka, Jr., MERGERS, MERGER CONTROL, AND REMEDIES: A RETROSPECTIVE ANALYSIS OF U.S. POLICY (2014). The studied mergers include some that were challenged but allowed to proceed with some form of remedy.

[40] *See* Jonathan Baker and Steve Salop, *Antitrust, Competition Policy, and Inequality*, 104 GEO. L. J. ONLINE 1 (2015). *See also* William Comanor and Robert Smiley, *Monopoly and Distribution of Wealth*, 89 Q. J. ECON. 177, 189 (1975).

[41] Elhauge, *supra* note 28.

National Competition Policy statement identifies 7 key areas of reform and specific recommendations in each area:

1. Facilitating More Aggressive and Consistent Enforcement

• **The antitrust agencies should give greater credence to the structural presumption and to stopping anticompetitive mergers in their incipiency.** This means the agencies should not wait until markets become highly concentrated before acting, but should stop mergers in moderately concentrated markets that, if approved, threaten to invite widespread industry restructuring, as we saw in the airline industry. They should also focus on stopping mergers that enhance buyer market power and expose smaller or independent sellers to discriminatory practices, and deals that are justified by the claim that it is necessary to become larger to bargain more effectively against more powerful sellers. The agencies should implement these changes both through enforcement actions and advocacy.

• **Enforcers should adopt an appropriately critical view of claimed efficiencies, rely more on evidence from past mergers, and challenge consummated mergers that have harmed consumers.** Efficiencies claims often do not pan out, especially when they center on opening new markets or product lines, or promoting innovation. This calls into question enforcement decisions that cleared mergers on the basis that predicted efficiencies outweighed anticompetitive effects. The agencies should also rely more on evidence from past or similar mergers of sellers or buyers in proving the likelihood that a merger will have anticompetitive effects. They should challenge anticompetitive consummated mergers to the extent effective relief can be obtained.

• **Agencies and courts should presume that exclusionary conduct by monopolists that helps preserve, extend, or exploit monopoly power is anticompetitive.** Such conduct raises prices and stifles market entry and innovation. Exclusive dealing, tying, and conditional pricing practices such as loyalty and bundled discounts can be perfectly lawful. But when undertaken by dominant firms, such conduct should be presumed illegal unless the firms can show that it is unlikely to have anticompetitive effects or has countervailing procompetitive benefits to consumers. The agencies and courts should also flag competitive concerns surrounding access to monopolized essential infrastructure or networks that are important to realizing public benefits in transportation, telecommunications, and information technology.

• **The agencies should expand their efforts to increase the transparency of their decision-making in order to promote enforcement.** It is critical to inform citizens, businesses, lawmakers, and judges of the intent of the antitrust laws and the importance of their enforcement, and particularly the antitrust laws' connection to the broader goals of protecting markets and consumers. Increased transparency would aid in heading off at the pass deals that "should never have

gotten out of the boardroom."[42] The agencies should issue more frequent and detailed closing statements, encourage the courts to adopt their approach to merger analysis, and disseminate information through speeches and briefs. Merger retrospectives, which have proven value, should be performed routinely on deals that were cleared but were considered "close calls," that were challenged but settled, or that withstood a government challenge.

2. Ensuring that the Agencies Have Resources to Enforce the Laws

• **Political administrations should recruit antitrust agency leaders and sector regulators that are committed professionally and ideologically to enforcement.** The "revolving door" through which some agency leaders pass from government, to industry, to private practice, can create perverse incentives. Future administrations should work hard to install agency leaders that are not influenced by these incentives. For sector regulators, heads of agencies should focus on deepening technical industry expertise at the same time they recruit experts in competition law.

• **The agencies should pursue "litigation readiness," which will continue to aid in their preparedness for federal merger challenges and other enforcement actions.** The DOJ and FTC should periodically and systematically review whether sufficient resources are devoted to litigation preparation. They should also focus on attracting experienced litigators to the agency and training staff attorneys in litigation skills through actual experience.

• **The FTC should continue and even step up its competition advocacy work.** The agency's work consistently attracts bipartisan support and has been helpful in focusing attention on competition and nudging regulation in a pro-competition direction. For example, the FTC's advocacy against state "Certificate of Need" laws for hospitals that tend to exclude entry in an already highly concentrated sector has arguably prompted more states to re-examine or even relax those laws. The FTC has also effectively advocated in the area of occupational licensing and to liberalize the scope of practice for nurse practitioners and dental therapists. Even if the FTC's advice is not taken, it can be effective in the long-term by raising issues and arguments that often "move the needle."

• **Federal and state judges should have the tools and resources necessary to oversee complex antitrust litigation.** This includes understanding complex legal and economic concepts upon which theories of antitrust liability rest. Judicial education in antitrust law and economics has historically been dominated by private, well-funded, ideologically conservative organizations. The government should devote more resources to maintaining multidisciplinary

[42] Quote from then DOJ Assistant Attorney General Bill Baer, Nathan Bomey, *U.S. sues to block Halliburton-Baker Hughes merger deal*, USA TODAY (Apr. 6, 2016), http://www.usatoday.com/story/money/2016/04/06/us-justice-department-sues-halliburton-baker-hughes/82696494/.

judicial education programs that present balanced, objective views and give judges the tools to craft effective, informed antitrust opinions.

3. Preserving the Vital Role of Private Antitrust Enforcement

• **Educating the courts, the public, and lawmakers about the virtues of vigorous private antitrust enforcement should be a priority.** There are many prongs to the attacks on private rights of action. For example, standards have escalated to make it increasingly difficult to "certify" antitrust and other class actions. In many markets, antitrust offenders have effectively immunized themselves from meaningful antitrust damages by forcing consumers to accept class action or class arbitration waivers. Pleading requirements and summary judgment standards have also been made difficult for antitrust plaintiffs to satisfy. The next administration should continue and expand current governmental efforts to limit the use of forced arbitration clauses and class action waivers that undermine private antitrust enforcement.

• **The DOJ and FTC should use amicus briefs, competition advocacy, and speeches to help restore the vitality of private enforcement.** Opponents of effective antitrust enforcement have worked to try to sweep up private antitrust class actions into the ideologically driven "tort reform movement." They cast such actions as a frequent source of abusive litigation and have fought for measures that have had the practical effect of denying relief to many of the victims of antitrust violations and increasing complexity and cost. Government advocacy is needed to dispel these myths and restore balance.

• **A comprehensive and coherent approach is needed to ensure the ability to bring indirect purchasers suits.** Private enforcement plays a vital role in compensating victims for the damaging effects of various forms of collusion and exclusionary conduct. Victims include consumers and businesses that are deprived not only of competitive prices for final products, but also of competitive prices for intermediate goods. In 2013, for example, private enforcers obtained the largest price fixing verdict ever (approximately $1 billion) on behalf of the businesses that purchased chemicals to make polyurethane foam products for re-sale to customers.[43] Both "direct" and "indirect" purchasers should be eligible to recover their damages and help deter future violations. States that have not already done so should adopt statutes that permit consumers and businesses to recover overcharges as indirect purchasers.[44] But a comprehensive federal approach is also needed to protect the ability to bring indirect purchaser suits.

4. Revitalizing the Tools Available to Antitrust Enforcers

[43] The judgment was affirmed on appeal and the parties later settled for nearly $1 billion. *See In re Urethane Antitrust Litig*., 768 F.3d 1245 (10th Cir. 2014). *See also In re Urethane Antitrust Litig*., No. 04-1616-JWL, 2016 WL 4060156, at *7 (D. Kan. July 29, 2016).

[44] These are known as the "*Illinois Brick* repealer" statutes.

- **Section 5 of the Federal Trade Commission Act should be revitalized in order to address anticompetitive exclusionary and other conduct not reachable under the Sherman or Clayton Acts.** Section 5 prevents unfair methods of competition. But it is an underutilized tool in the statutory antitrust toolkit. The recent FTC Section 5 policy statement re-articulated long-established principles regarding "standalone" Section 5 cases, and it has always been clear that Congress gave the agency broad powers. A renewed commitment to bringing standalone Section 5 cases would signal the agency's willingness to take on important cases that address, among other things: a powerful buyer's abuse of its bargaining power; a dominant firm's use of market power in one market to restrain competition in another market, or to harm the competitive process; and an IP owner's abuse of its rights to monopolize a market or restrain competition.

- **The Robinson-Patman Act, which has fallen into disuse, should be rejuvenated.** The Act remains one of the major ways to bring enforcement actions against the harmful exercise of buyer market power and anticompetitive price discrimination. It should be reformed, however, in order to create a reliable statutory tool.

- **The agencies should revise their guidelines to provide more clarity and guidance on how they will assess various types of mergers.** The government's Horizontal Merger Guidelines apply to mergers that eliminate actual horizontal competitors. Other types of mergers may raise competitive problems, but the government's treatment of non-horizontal mergers is not transparent. The agencies should issue updated formal guidelines explaining their legal-economic framework for evaluating mergers involving potential competition or the vertical combination of a customer and supplier.[45] The agencies should also provide more guidance than is already in the Horizontal Guidelines on how they will examine mergers that impair competition in innovation markets and involve network effects or two-sided markets. This can be accomplished through comprehensive merger commentaries.

- **Antitrust and regulation should be vigorously promoted as complementary tools of competition enforcement and policy.** Sector regulators typically have the statutory authority to promote the "public interest," a standard that includes protecting competition and other objectives beyond the scope of the narrower "no harm" to competition standard applied in antitrust. Other differences set regulators and antitrust enforcers apart, including procedural approaches and the types of remedies applied.[46] Nonetheless, just as the antitrust agencies bring legal-economic expertise to the enforcement table, sector regulators add important

[45] The agencies have not updated the non-horizontal merger guidelines that guide analysis of vertical transactions since 1984.

[46] *See, e.g.*, Diana L. Moss, *Antitrust Versus Regulatory Merger Review: The Case of Electricity*, 32 REV. INDUS. ORG. 241 (2008).

perspective and technical expertise on the industries they oversee. This highlights the importance of cooperation between the antitrust and regulatory agencies, which should adopt standards for coordinating their reviews of mergers and other conduct affecting competition.

5. Recognizing New Sources and Abuses of Market Power

- **Information and Data.** Consumer data on buying patterns and preferences no longer raise issues exclusively about consumer protection, where the focus is on privacy and deceptive practices. The value of data as a tool for exercising market power is escalating and raises questions ranging from defining markets for "data" to strategic control of data. For example, access to large quantities of data may be necessary for effective competition in some markets and therefore act as a barrier to entry. Or firms may also engage in anticompetitive price discrimination based on proprietary access to data.

- **Multichannel Distribution.** Distribution through multiple channels, including the Internet, provides important options for competitors and consumers. But powerful players that are vertically integrated into distribution, including airlines and hotel chains, may have incentives to restrict distribution of their products and services to more innovative retailers. Agreements between manufacturers and retailers to impose minimum retail prices and prevent discounting ("resale price maintenance") have recently been employed in the contact lens industry and in other sectors, which limits the pricing discretion of more efficient retailers and stifles their growth.

- **Buying and Bargaining Power.** Major supply chains such as food and healthcare now feature large and powerful buyers that often exercise market power by lowering the prices they pay to vulnerable classes of smaller sellers, such as laborers, farmers, ranchers, or writers. Exclusionary conduct by powerful buyers is on the rise, including the practice of bidding above cost to drive rival buyers from the market. These developments are triggering "reactive" consolidation, or mergers that are intended to enhance the bargaining power of smaller suppliers that sell to powerful buyers. These reactive consolidation patterns are anathema to healthy competition.

- **Innovation and Intellectual Property.** Some mergers eliminate competition in innovation or R&D markets.[47] But preserving "parallel path" R&D is particularly important where the risks of commercializing new products are high. Other concerns involve "platforms," or groups of patented technologies that serve as a base for applying other technologies. Platforms are often controlled by dominant firms, some of which have the ability and incentive to stifle entry. IP holders can also abuse their rights in order to shape or control competition

[47] *See* Letter from Am. Antitrust Inst, Food & Water Watch, and National Farmers Union *supra* note **Error! Bookmark not defined.**, at 9-13.

through selective cross-licensing in agricultural biotechnology, "pay for delay" pharmaceutical patent settlements designed to shut out generic drug entrants, and the acquisition of patent portfolios for the purpose of asserting them to raise rivals' costs.

• **Colluding on "Rules."** Collusion is not limited to fixing prices and dividing up markets. Efforts by a handful of powerful firms to collectively impose standard market "rules" have the effect of favoring powerful incumbents and excluding rivals or new entrants. These strategies can be used to disadvantage online or brick-and-mortar distributors and by state occupational licensing boards made up of industry practitioners that impose requirements that make it harder for small firms and start-ups to enter.[48] Standard-setting organizations can also be subject to abuse by developing standards that prevent would-be rivals from ever reaching the market.

6. Ramping Up Antitrust Penalties and Remedies

• **The DOJ should encourage companies to create a "culture of compliance" in combatting cartels.** Effective antitrust compliance programs prevent or deter the formation of cartels and discourage repeat behavior, or "recidivism." The DOJ should advocate for changes that ensure maximum fines for corporations and individuals, jail time, and civil damage awards that are sufficient to achieve optimal deterrence. A variety of other instruments should be considered to monitor post-penalty behavior and reward good conduct, including bounties to whistleblowers and anti-retaliation protections.

• **The DOJ should use public availability of cartel enforcement information as a tool for enhancing the deterrence of illegal conduct.** This can be done through information-sharing with, among others, state attorneys general in consumer class-action cases. After a prosecution has run its course, the DOJ should provide details about how a cartel was able to reach and maintain an agreement and the harm that was caused. This can be done through a written communication similar to a competitive impact statement in a merger case**.**

• **The agencies should seek structural relief, as opposed to conduct remedies, in all but the most exceptional merger cases.** Structural approaches such as divestiture are more effective and administratively simpler than conduct remedies, and they should almost always be used instead of conduct remedies where practicable.[49] Structural relief may also be appropriate in certain Section 2 cases involving exclusionary conduct. The agencies should also continue to increase their use of equitable monetary remedies such as disgorgement and support legislation that would permit the agencies to assess civil penalties in Section 2 cases.

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[48] *North Carolina State Board of Dental Examiners v. Federal Trade Commission*,, 135 S. Ct. 1101 (2015).

[49] *See, e.g.*, John E. Kwoka and Diana L. Moss, *Behavioral Merger Remedies: Evaluation and Implications for Antitrust Enforcement*. 57 ANTITRUST BULL. 979 (2012).

7. Promoting International Coordination

- **In promoting international cooperation, U.S. agencies should be aware that other countries have different economic and political problems, and that what might be wrong for the U.S. might be necessary elsewhere.** Such considerations might include, for example, whether merger law should account for effects of consolidation on employment, trade, or economic development.

- **The agencies should continue to work with the International Competition Network, the Competition Committee of the OECD, and other international organizations to help promote effective cartel and merger remedies.** An important part of this process is U.S. openness to considering innovative enforcement approaches used by other countries, and to engage in fruitful two-way dialogues.

- **The U.S. should bootstrap smaller and younger competition authorities and encourage more integration through regional alliances of smaller agencies to improve their effectiveness**.

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whether there are material differences between antitrust/competition policy and law in the United States and the rest of the world, and the effects of such differences;

We ask the Commission to consider AAI's views as reflected in *Recent Trends in International Antitrust Enforcement, Hearing Before the House Comm. on the Judiciary, Subcomm. on Regulatory Reform, Commercial and Antitrust Law*, 115th Cong. (2017) (testimony of Randy M. Stutz, Associate General Counsel, American Antitrust Institute) and American Antitrust Institute, Report on AAI International Antitrust Roundtable, AM. ANTITRUST INST. (Feb. 17, 2017).

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whether U.S. antitrust agencies should be involved in curbing the application to U.S. firms of foreign competition laws that may be inconsistent with international norms, and whether antitrust agencies should seek the assistance of the U.S. trade and foreign policy agencies in preventing or rectifying such situations;

We ask the Commission to consider AAI's views as reflected in *Recent Trends in International Antitrust Enforcement, Hearing Before the House Comm. on the Judiciary, Subcomm. on Regulatory Reform, Commercial and Antitrust Law*, 115th Cong. (2017) (testimony of Randy M. Stutz, Associate General Counsel, American Antitrust Institute).

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whether, and how, mergers create buyer power; if so, whether and how this is distinct from monopsony power; and what harms buyer power or monopsony power may cause to sellers and/or consumers in downstream markets;

We ask the Commission to consider AAI's views as reflected in Diana L. Moss, Rolling Up Video Distribution in the U.S.: Why the Comcast-Time-Warner-Cable Merger Should be Blocked, Am. Antitrust Inst. (June 11, 2014).

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whether the antitrust agencies give sufficient recognition to the potential for buyer power acquired through a merger to enhance competition by enabling the parties to exercise countervailing power, or to the potential for existing buyer power to inhibit merging sellers from exercising market power.

We ask the Commission to consider AAI's views as reflected in Diana L. Moss & Thomas Greaney, Antitrust Review of the Aetna-Humana and Anthem-Cigna Mergers, Am. Antitrust Inst. (Jan. 11, 2016).

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Thank you for considering the views of AAI. Questions or reactions to any of these comments may be addressed to:

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