

COMMITTEE ON THE JUDICIARY
SUBCOMMITTEE ON ANTITRUST, COMMERCIAL AND ADMINISTRATIVE LAW
UNITED STATES HOUSE OF REPRESENTATIVES

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April 17, 2020

Chairman Cicilline, Ranking Member Sensenbrenner, members of the subcommittee, thank you for accepting this written statement for submission with regard to the subcommittee's investigation into the state of competition in digital markets. You have asked for my views on three specific questions concerning the contemporary adequacy of the antitrust laws. I will answer each in turn.

1. The adequacy of existing laws that prohibit monopolization and monopolistic conduct, including whether current statutes and case law are suitable to address any potentially anti-competitive conduct.

Before coming to the substantive adequacy of contemporary monopolization law, let me offer a word about judicial interpretation of the antitrust statutes that will inform my answer to both questions (1) and (2). As I detail in my forthcoming article *Antitrust Antitextualism*,¹ from the earliest cases interpreting the Sherman Act to the present, the courts have followed a pattern of declining to apply either the plain textual meaning or the apparent legislative purpose of the federal antitrust statutes, insisting that the federal antitrust statutes delegate to the courts broad discretion to formulate a dynamic common law of competition. With respect to all of the substantive antitrust statutes—the Sherman, Clayton, FTC, Robinson-Patman, and Celler-Kefauver Acts—either right away or over time, the courts have often ignored the text Congress enacted and the act's legislative history in order to formulate antitrust principles more favorable to big business. Thus, for example, the court read an a-textual “rule of reason” into Section 1 of the Sherman Act, ignored the plain import of the Clayton Act's labor exemption, excised the word “unfair” entirely from Section 5 of the FTC Act, shut down the Robinson-Patman Act's express concern with acts that harmed an individual competitor but not competition more generally, and began to ignore the Celler-Kefauver Act's concern with mergers that contributed to an “incipient” trend toward concentration.

I offer this as a purely positive observation about the legislative-judicial dynamic over the course of antitrust's 130-year history. There are many potential interpretations of this pattern of judicial a-textualism, most apparently that the courts have been ideologically at odds with Congress. In my article, I consider and reject ideological conflict as an overall explanation for this phenomenon, and offer a different interpretation instead. Whether or not my interpretation is correct, I offer this positive observation about judicial disregard of legislative text and purpose

¹ https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3561870.

for the following reason: If the historical pattern holds, substantive legislative reforms are unlikely to achieve durable changes in the way the courts apply the antitrust laws. This is not to say that new legislation would achieve nothing—in some cases, particularly with respect to the Robinson-Patman and Celler-Kefauver Acts, the courts initially followed the statute faithfully before retreating into “common law” interpretation that nullified much of what Congress enacted. However, the eventual trend has been, seemingly inevitably, away from distinctive legislative text and purpose and toward a homogenous common law of competition across all of the antitrust statutes.

Given this phenomenon, it perhaps would be naïve to assume that substantive legislative reforms in response to any perceived weaknesses of antitrust law with respect to digital platforms will make an enduring change to the de facto practice of antitrust law. On the other hands, as I will address more fully in response to Question 3 below, changes in the institutional structure of antitrust enforcement could make a significant difference.

Turning now to the substantive rules governing monopolistic behavior under Section 2 of the Sherman Act, in many quarters there is a perception that enforcement has been excessively lax in recent decades. The Bush Justice Department brought no monopolization cases, the Obama Justice Department brought one insignificant case, and the Trump Justice Department has, thus far, brought no monopolization cases. The Federal Trade Commission has brought a few monopolization cases over the last two decades, with its 2010 consent decree with Intel probably the most salient example.² In the meanwhile, over the same time period the European Commission has leveraged a succession of extravagant fines on American technology companies based on charges of abusing a dominant position in contravention of Article 102 of the Treaty on the Functioning of the European Union (“TFEU”).³ The contrast between Europe and the United States has created a perception that the U.S. has become passive in enforcing its anti-monopolization laws. Further to the point, the U.S. Supreme Court has not decided a monopolization case in favor of a plaintiff since its *Kodak* decision in 1992.⁴ Since *Kodak*, it has decided seven straight monopolization cases in favor of defendants, often employing language suggesting broad solicitude for dominant firms, furthering the impression that U.S. monopolization law has become one-sidedly pro-defendant.⁵

However, focusing just on enforcement actions by the federal antitrust agencies and the Supreme Court’s decisions gives an incomplete impression of monopolization law under Section 2 of the Sherman Act. Beginning with the D.C. Circuit’s landmark en banc decision in *Microsoft*, there have been a number of important federal court of appeals decision affirming judgments of Section 2 liability or allowing Section 2 claims to proceed. These include:

² *In the Matter of Intel Corp.*, <https://www.ftc.gov/enforcement/cases-proceedings/061-0247/intel-corporation-matter>.

³ The European Commission has fined Google alone more than \$9 billion in three abuse of dominance cases.

⁴ *Eastman Kodak, Inc. v. Image Tech. Servs., Inc.*, 504 U.S. 451 (1992).

⁵ The following list includes only substantive monopolization decisions, and excludes decisions on such trans-substantive matters as standing, class certification, and antitrust immunity: *Pacific Bell Tel. Co. v. linkLine Communcs., Inc.*, 555 U.S. 438 (2009); *Weyerhaeuser v. Ross-Simmons Hardwood Lumber Co.*, 549 U.S. 312 (2007); *Illinois Tool Works Inc. v. Independent Ink, Inc.*, 547 U.S. 28 (2006); *Verizon Communcs. v. Law Offices of Curtis V. Trinko*, 540 U.S. 398 (2004); *NYNEX Corp. v. Discon, Inc.*, 525 U.S. 128 (1998); *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209 (1993); *Spectrum Sports, Inc. v. McQuillen*, 506 U.S. 447 (1993).

- *U.S. v. Microsoft Corp.*, 253 F.3d 34 (D.C. Cir. 2001) (bundling, exclusive dealing, deception)
- *Conwood Co. v. U.S. Tobacco Co.*, 290 F.3d 768 (6th Cir. 2002) (exclusive dealing, tortious conduct)
- *Beech-Nut Nutrition Corp. v. Gerber Prods. Co.*, 69 Fed. Appx. 350 (9th Cir. 2003) (predatory pricing)
- *LePage's, Inc. v. 3M*, 324 F.3d 141 (3d Cir. 2003) (bundled discounts)
- *Geneva Pharm. Tech. Corp. v. Barr Labs Inc.*, 386 F.3d 485 (2d Cir. 2004) (deception)
- *Covad Communcs. v. Bell Atlantic Corp.*, 398 F.3d 666 (D.C. Cir. 2005) (refusal to deal)
- *U.S. v. Dentsply Int'l*, 399 F.3d 181 (3d Cir. 2005) (exclusive dealing)
- *Andrx Pharm. Inc. v. Elan Corp., PLC*, 421 F.3d 1227 (11th Cir. 2005) (exclusionary settlement agreement)
- *Spirit Airline, Inc. v. Northwest Airlines, Inc.*, 431 F.3d 917 (6th Cir. 2005) (predatory pricing)
- *Hydril Co. LP v. Grant Prideco LP*, 474 F.3d 1344 (Fed Cir. 2007) (patent fraud)
- *Broadcom Corp. v. Qualcomm Inc.*, 501 F.3d 297 (3d Cir. 2007) (reneging on FRAND commitment)
- *Newcal Indus., Inc. v. Ikon Office Solution*, 513 F.3d 1038 (9th Cir. 2008) (exclusive dealing, tying)
- *Kaiser Foundation Health Plan v. Abbott Labs. Inc.*, 552 F.3d 1033 (9th Cir. 2009) (patent fraud)
- *Massimo Corp. v. Tyco Health Care Group, L.P.*, 350 F. Appx. 95 (2009) (sole source and market share agreements)
- *In re DDAVP Direct Purchaser Antitrust Litig.*, 585 F.3d 677 (2d Cir. 2009) (patent fraud, abusive litigation)
- *West Penn Allegheny Health Sys., Inc. v. UPMC*, 627 F.3d 85 (3d Cir. 2010) (vertical conspiracy to restrain competition)
- *E.I. du Pont de Nemours v. Kolon Indus, Inc.*, 637 F.3d 435 (4th Cir. 2011) (exclusive dealing)
- *Z.F. Meritor v. Eaton Corp.*, 696 F.3d 254 (3d Cir. 2012) (market share discounts)
- *Lenox McLaren Surgical Corp. v. Medtronic, Inc.*, 762 F.3d 1114 (10th Cir. 2014) (deception)
- *New York v. Actavis PLC*, 787 F.3d 638 (2d Cir. 2015) (exclusionary product reformulation)
- *Collins Inkjet Corp. v. Eastman Kodak Co.*, 781 F.3d 264 (6th Cir. 2015) (tying)
- *McWane, Inc. v. FTC*, 783 F.3d 814 (11th Cir. 2015) (exclusive dealing)
- *TransWeb LLC v. 3M Innovative Properties, Inc.*, 812 F.3d 1295 (Fed. Cir. 2016) (patent fraud)
- *In re Actos End Payer Antitrust Litig.*, 848 F.3d 89 (2d Cir. 2017) (false FDA filing)
- *In re Lipitor Antitrust Litig.*, 868 F.3d 231 (3d Cir. 2017) (patent fraud)
- *Trendsettah USC Inc. v. Swisher Int'l, Inc.*, 761 F. Appx. 714 (9th Cir. 2019) (refusal to deal)

- *Wacker v. JP Morgan Chase & Co.*, 678 F. Appx. 27 (2d Cir. 2017) (market manipulation)
- *Curtin Maritime Corp. v. Santa Catalina Island Co.*, 786 F. Appx. 675 (9th Cir. 2019) (conspiracy to monopolize)
- *In re National Football League’s Sunday Ticket*, 933 F.3d 1136 (9th Cir. 2019) (conspiracy to monopolize)
- *Mountain Crest SRL v. Anheuser Busch Inbev SA*, 937 F.3d 1067 (7th Cir. 2019) (retail distribution restrictions)
- *In re Lantus Direct Purchaser Antitrust Litig.*, 950 F.3d 1 (1st Cir. 2020) (Orange Book manipulation)
- *ViaMedia v. Comcast Corp.*, 951 F.3d 429 (7th Cir. 2020) (refusal to deal, tying)

In addition to these 32 federal court of appeals decisions, there have been scores or hundreds of federal district court decisions similarly allowing monopolization cases to proceed or finding liability at trial.⁶ Successful monopolization claims, asserting many different types of exclusion, have been lodged against many of America’s largest and most powerful technology, banking, pharmaceutical, telecommunications, transportation, media, and manufacturing companies. Section 2 of the Sherman Act is far from a dead letter—it remains a vital check on unilateral anticompetitive conduct creating market power.

As there always will be, there remain unresolved questions about application of Section 2. In my view, the two most important general issues of Section 2 doctrine are:

- Whether section 2 claims should be corralled into discrete categories of challenged behavior such as predatory pricing, exclusive dealing, tying, or refusals to deal and required to meet the elements for challenging those forms of conduct, or whether Section 2 claims should instead be analyzed under general principles of monopolization law, such as the “five principles” articulated in *U.S. v. Microsoft*, 253 F.3d 34 (D.C. Cir. 2001).
- When a plaintiff demonstrates that defendant’s conduct reduces competition but the defendant demonstrates that the conduct advances an efficiency or procompetitive interest, should the procompetitive effect be weighed against the anticompetitive effect, or does the presence of a procompetitive justification for the conduct mean that the conduct is lawful per se? Compare *U.S. v. Microsoft*, 253 F.3d 34 (D.C. Cir. 2001) (requiring balancing) with *Allied Orthopedic Appliances, Inc. v. Tyco Health Care Group*, 592 F.3d 991 (9th Cir. 2010) (rejecting balancing).

These questions, and many others, are being worked out in the typical common law process characteristic of our antitrust system. Our judicial system has the capacity to work out iterative answers informed by experience and evolving understanding of competitive practices. I would not counsel any legislative amendment to Section 2 of the Sherman Act.

⁶ Many such cases settle are not reported in the Federal Supplement.

2. The adequacy of existing laws that prohibit anti-competitive transactions, including whether current statutes and case law are sufficient to address potentially anti-competitive vertical and conglomerate mergers, serial acquisitions, data acquisitions, or acquisitions of potential competitors.

I begin my answer to the second question by referring back to the beginning of my answer to the first question, observing that the courts have shown a pattern of deviating from the text and purpose of the antitrust statutes to lessen their reach. This is certainly true of the judicial interpretation of Section 7 of the Clayton Act, as amended by the Celler-Kefauver Act of 1950. In 1950, Congress perceived a “rising tide of concentration” in the post-War economy and feared that such a trend could threaten democracy by replicating the extreme concentration of economic power that contributed to the rise of Nazism or else pave the way for Stalinism.⁷ The Celler-Kefauver Amendments eliminated any doubt that Section 7 applied to non-horizontal (particularly vertical) mergers and created an incipency standard meant to catch mergers that might not yet create an overly concentrated market but could lead down that path. Following a period of aggressive anti-merger enforcement from roughly 1950 to 1976, merger policy began to swing in a considerably more merger-friendly direction. The agencies and courts largely abandoned the incipency standard and begin to require evidence that a merger would actually harm competition. And, since the 1990s, few vertical merger challenges have been brought.

But, perhaps even more than with respect to Section 2 of the Sherman Act, merger law is not a place in which new substantive legislation is likely to be helpful. The Supreme Court has not decided a substantive merger case since Congress enacted the Hart-Scott-Rodino Act in 1976, largely leaving in place a body of enforcement-friendly precedent from the 1950s, 60s, and early 70s. Since Hart-Scott, merger review has primarily taken place within the agencies as a matter of bureaucratic practice rather than through a formal legal process of litigation in the courts. The Federal Trade Commission and Antitrust Division’s merger guidelines, more than judicial precedent, frame the substance of merger review. Existing caselaw, including structural presumptions of anticompetitive effects,⁸ give the agencies wide latitude to challenge many more mergers than they do. If there is a need for more aggressive merger challenges, a change in agency attitude toward mergers would be more significant than new legislation.

I will now comment briefly on each of the categories of merger mentioned in question 2:

Vertical and conglomerate mergers: As mentioned above, there have been relatively few vertical merger challenges in recent decades. Significant challenges that were brought include the Obama Administration’s consent decrees in TicketMaster/Live Nation,⁹ Comcast/NBC Universal,¹⁰ and Google/ITA,¹¹ and the Trump Administration’s unsuccessful challenge to AT&T/Time Warner.¹² In my view, vertical mergers can harm competition in some circumstances, and it is appropriate for the agencies to continue to scrutinize them. That said, given the tremendous importance to merger enforcement of agency merger guidelines, it is

⁷ See Daniel A. Crane, *Fascism and Monopoly*, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3436231.

⁸ See *U.S. v. Philadelphia National Bank*, 374 U.S. 321 (1963).

⁹ <https://www.justice.gov/atr/case-document/proposed-final-judgment-248>.

¹⁰ <https://www.justice.gov/atr/case-document/file/492191/download>.

¹¹ <https://www.justice.gov/atr/case-document/file/497636/download>.

¹² *U.S. v. AT&T, Inc.*, 916 F.3d 1029 (D.C. Cir. 2019).

problematic that the vertical merger guidelines currently in place are those instituted in 1982. The progress of economic knowledge has rendered those guidelines largely obsolete.

Fortunately, the FTC and DOJ recently promulgated draft vertical merger guidelines.¹³ The public comment period on the draft has now closed, the agencies have held a workshop on the draft, and I trust the agencies will shortly issue revised guidelines bringing state-of-the-art economic understanding to vertical merger review. Until the new guidelines are finalized and we have some experience with their implementation, it would be premature to consider potential legislative reforms.

As to conglomerate mergers—meaning mergers among firms that have neither a competitive (horizontal) nor vertical relationship—it is difficult to see the case for competitive concern, except in circumstances where the firms are not yet competitors but could become competitors through technological or market changes. I would think of the latter cases as potential competition (discussed below) rather than conglomerate cases.

Serial acquisitions: Under current U.S. antitrust law, there is no obstacle to agency challenges to serial acquisitions that harm competition. If a firm buys up five small companies and none of the acquisitions itself would have harmed competition but the five acquisitions harm competition in combination, the mergers are actionable under Section 7 of the Clayton Act. Indeed, the legislative history of Celler-Kefauver Act makes clear that concern about serial, small acquisitions is partly what motivated Congress to amend Section 7 to catch mergers that would not be actionable under the Sherman Act:

The type of problem to which this bill is addressed was described by the Federal Trade Commission in these words: ‘Under the Sherman Act, an acquisition is unlawful if it creates a monopoly or constitutes an attempt to monopolize. 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 test against them.’¹⁴

Data acquisitions: Among other things, the Celler-Kefauver Amendments to Section 7 of the Clayton Act made clear that anticompetitive asset acquisitions (in addition to stock acquisitions) are unlawful. The antitrust agencies have long scrutinized acquisitions of intangible assets, such as patents, on the same terms as purchases of corporations or corporate shares.¹⁵ There is therefore no legal obstacle to antitrust enforcement against anticompetitive data acquisitions, should such cases arise.

Potential Competitors: In my view, potential competition cases raise the most difficult questions of merger policy. As a doctrinal matter, it is clear that a merger of potential

¹³ <https://www.ftc.gov/news-events/press-releases/2020/01/ftc-doj-announce-draft-vertical-merger-guidelines-public-comment>.

¹⁴ Sen. Rep. No. 1775, 81st Cong., 2d Sess. (1950)

¹⁵ See, e.g., <https://www.justice.gov/opa/pr/statement-department-justice-s-antitrust-division-its-decision-close-its-investigations>.

competitors could be actionable under Section 7 of the Clayton Act.¹⁶ But it is often challenging for a plaintiff to prove that the acquired firm likely would have become a competitor of the acquiring firm but-for the acquisition, particularly in circumstances of technological dynamism where the rapidly-changing technologies and markets could bring into direct competition firms that previously did not compete. To give one high-profile example, for many years Apple and Amazon coexisted in the market as firms that would not have been considered direct competitors. Apple made computer hardware and Amazon sold books (and then other products). Apple was hardware; Amazon was retail. Over time, however, the two firms morphed into bitter rivals as Amazon entered the hardware market with the Kindle and Apple entered the retail market for books, music, and more. Technological innovation had turned the companies into competitors.

Although technological change can turn firms into competitors, that effect is much more easily seen with hindsight than with foresight. Predictive uncertainty presents a challenge for merger enforcement. The party with the burden of proof—the government in merger cases—cannot win if it cannot prove by a preponderance of the evidence that absent the merger technological change is likely to turn the merging firms into competitors, and that is often difficult to prove. One could imagine inverting the burden of proof and requiring the merging parties to prove that they are *not* likely to become competitors because of technological change, but that is not a practicable solution. How could one go about identifying the set of mergers to which the inverted burden of proof should apply without first identifying which firms are likely to morph into horizontal competitors through technological change?

Since I do not have a comprehensive solution to propose, I will conclude by repeating the observation that current legal doctrine is capacious enough on potential competition to permit the agencies and courts to work incrementally toward enhanced understanding of this problem. I do not believe that legislative reforms would be desirable.

3. Whether the institutional structure of antitrust enforcement—including the current levels of appropriations to the antitrust agencies, existing agency authorities, congressional oversight of enforcement, and current statutes and case law—is adequate to promote the robust enforcement of the antitrust laws.

My book *The Institutional Structure of Antitrust Enforcement* (2011), now a bit out of date, presents my views on public and private enforcement, and the relationship between them. I take it, however, that your question is principally focused on public enforcement, so I will confine my answer to enforcement by the Justice Department and Federal Trade Commission.

Unlike with respect to the substantive reach of Section 2 of the Sherman Act and Section 7 of the Clayton Act, discussed above, institutional arrangements are a place where legislative reforms have been durably significant. In particular, the creation of a private right of action for treble damages, the formation of the Federal Trade Commission, and the Hart-Scott-Rodino Act's creation of a premerger notification system and expanded state enforcement have reshaped the enforcement of the antitrust laws. If this Congress is interested in making significant changes to antitrust enforcement, institutional rather than substantive reform is likely to be effective.

¹⁶ *U.S. v. Marine Bancorp., Inc.*, 418 U.S. 602 (1974); *U.S. v. Falstaff Brewing Corp.*, 410 U.S. 526 (1973).

Plausible institutional reforms could be large or small. The big question, which has been fruitlessly debated for decades, is whether it makes sense to continue lodging civil antitrust enforcement jurisdiction in two separate federal agencies, or whether it should instead be consolidated in either the FTC or DOJ. When Congress designed the FTC in 1914, it had in mind an institution very different than the FTC has become.¹⁷ The FTC was not supposed to be primarily a law enforcement agency but rather a non-partisan, “quasi-legislative, quasi-judicial” body of experts that would promulgate rules, try cases, provide technocratic advice to Congress, and assist the Justice Department in its enforcement activities, for example by sitting as a special master in equity on questions of remedy. Over time, however, the FTC has become a fairly traditional law enforcement agency. It has promulgated almost no antitrust rules, rarely sits as a trier of fact (preferring instead to litigate in federal district court as an ordinary plaintiff), and has never sat in equity on remedy in Justice Department cases. Rather than collaborating on enforcement with the DOJ, the FTC and DOJ divide up industries and investigations. While the FTC clearly has significant expertise, it is no more expert than the Antitrust Division. All in all, very few of the articulated reasons for creating the FTC have been realized in the Commission’s actual performance.

This is not to say that the FTC is doing a poor job as a law enforcement agency, but it does raise the question of why we need two law enforcement agencies tasked with doing the same job. Some supporters of maintaining the status quo have argued that having more cops on the beat is better than having fewer, but that analogy has a serious flaw. It is clearly better to have more cops on the beat to fight crime, but it is not clearly better to have two police departments operating in the same city—they might just get in each other’s way, conduct turf wars, and waste resources.

Having two law enforcement agencies doing the same job is not an optimal way to structure federal antitrust enforcement. Never having worked in either agency, I am not in a position to say whether there would be cost savings or efficiencies from combining antitrust enforcement functions, but there have been a number of high-profile and frankly embarrassing instances when the two agencies have gotten in each other’s way. The most recent (and ongoing) instance involves the FTC’s monopolization action against Qualcomm (now pending in the U.S. Court of Appeals for the Ninth Circuit), where the Justice Department has openly opposed the FTC’s case.¹⁸ Whichever agency has the better view on the merits, it cannot be healthy for federal antitrust enforcement as a whole to have two federal agencies publicly fighting each other in court. To be sure, robust dialogue and debate over antitrust enforcement is healthy and vital to our democracy, but it does not follow that deputizing two competing agencies to represent the federal interest optimizes antitrust enforcement. To the contrary, conspicuous agency squabbling tends to diminish the influence of public enforcement as a whole.

With some reluctance, I recommend consolidating antitrust enforcement in a single agency. My personal preference would be to lodge all antitrust enforcement in the Justice Department’s Antitrust Division, leaving the FTC to focus single-mindedly on consumer protection. Should Congress be interested in pursuing such a proposal, I could offer further

¹⁷ The claims in this paragraph are based on my article *Debunking Humphrey’s Executor*, 83 *Geo. Was. L. Rev.* 1835 (2015).

¹⁸ <https://www.justice.gov/atr/case/federal-trade-commission-v-qualcomm-incorporated>.

thoughts about how to accomplish it without losing the FTC's accumulated experience and expertise on antitrust matters.

Given that large-scale reorganizations of the agencies may not be likely in the current environment, there are also smaller legislative amendments that should be considered. Let me suggest two potential reforms. The first is relatively technical, but has a significant effect on the FTC's capacity to sit as an adjudicative body. The FTC Act's appellate review provision allows a defendant to lodge an appeal from an adverse FTC decision "within any circuit where the method of competition or the act or practice in question was used or where such person, partnership, or corporation resides or carries on business."¹⁹ Unlike the appellate provision applicable to almost any other federal agency, this provision effectively allows most defendants to pick any of the twelve federal circuits for their appeal and thereby to forum shop for the circuit whose precedents or ideological composition are most favorable to the defendant. In order to avoid facing a potentially hostile circuit chosen by the defendant, the FTC has sometimes decided to sue in federal district court rather than try a case administratively, thus frustrating Congress's design for agency adjudication. There is no good reason to allow such forum shopping by defendants. If the FTC is to retain its adjudicatory authority, Congress should consider amending the statute to provide either for an exclusive appellate forum for all FTC cases (for example, the D.C. Circuit, which generally hears appeals from FCC decisions) or designating a particular circuit dependent on the defendant's status (for example, that of the defendant's principal place of business).

The second reform I would suggest is to align the preliminary injunction standard for blocking mergers for the two agencies, as was proposed in the Standard Merger and Acquisition Reviews through Equal Rules Act of 2017.²⁰ There has been "some ambiguity" in the case law as to how the preliminary injunction standard in FTC Part III cases should be applied,²¹ and some suggestion that the FTC can prevail in obtaining a preliminary injunction with a lesser degree of proof of likely anticompetitive effects than the DOJ would have to show if it were the plaintiff.²² Here is what this means as a practical matter: The DOJ and FTC divide enforcement responsibility not based on case complexity, legislative mandate, or policy considerations, but rather based on industry experience. Thus, for example, the DOJ reviews mergers of firms that make computer software and the FTC of firms that make computer hardware. If Microsoft makes an acquisition, the DOJ reviews it; if Intel makes one, the FTC reviews it. Given that a preliminary injunction is often the death knell for a merger given its time sensitivity, this means that the difference in preliminary injunction standard gives Microsoft a better probability of closing its merger than Intel from the sheer happenstance of which agency claims ownership over an industry. This is an arbitrary way to run the system. The preliminary injunction standards for the two agencies should be aligned.

Thank you again for inviting me to present my views. I hope that this submission will be informative in your deliberate process.

¹⁹ 15 U.S.C. § 45(c).

²⁰ <https://www.congress.gov/115/crpt/hrpt412/CRPT-115hrpt412.pdf>.

²¹ *FTC v. Whole Foods Market, Inc.*, 548 F.3d 1028, 1034 (D.C. Cir. 2008).

²² *Id.* at 1035 ("[T]he FTC will usually be able to obtain a preliminary injunction blocking a merger by 'rais[ing] questions going to the merits so serious, substantial, difficult[,] and doubtful as to make them fair ground for thorough investigation.'") (citations omitted).