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The Honorable David N. Cicilline
Chairman
Subcommittee on Antitrust, Commercial, and Administrative Law
Committee on the Judiciary
United States House of Representatives
Washington, D.C. 20515

The Honorable F. James Sensenbrenner, Jr.
Ranking Member
Subcommittee on Antitrust, Commercial, and Administrative Law
Committee on the Judiciary
United States House of Representatives
Washington, D.C. 20515

Dear Chairman Cicilline and Ranking Member Sensenbrenner:

Thank you for affording me the opportunity to offer my views on the following topics in connection with competition in the digital marketplace:

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 anticompetitive conduct;
2. The adequacy of existing laws that prohibit anticompetitive transactions, including whether current statutes and case law are sufficient to address potentially anticompetitive vertical and conglomerate mergers, serial acquisitions, data acquisitions, or acquisitions of potential competitors; and
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 support the robust enforcement of the antitrust laws.

As former Acting Chairman and Commissioner of the Federal Trade Commission and a longtime antitrust practitioner, I hope to offer some helpful perspective that will assist the Committee with this important effort. This letter builds on my testimony before the Subcommittee

on Antitrust, Commercial, and Administrative Law at its July 16, 2019, hearing on "Online Platforms and Market Power, Part 2: Innovation and Entrepreneurship."[1]

Concerns over a perceived lack of competition in some sectors have led to calls for sweeping new legislation, which would, among other things, focus on size of entities rather than the competitive impacts of transactions or market behavior, introduce restrictions on companies' ability to adjust to market changes, and impose broad obligations to provide access to infrastructure and services to rivals. It would also impose extensive new duties on antitrust enforcement agencies and introduce ongoing uncertainty in previously-approved transactions. Because current antitrust law already prohibits anticompetitive mergers and conduct, when considering changes to the law, it is crucial to consider what other types of behavior new laws will prohibit, how these prohibitions may impact current market behavior that is beneficial to competition and consumers, and how they may affect our economy overall, as well as enforcement resources.

First, I will discuss the purpose of antitrust law and then I will address each of the above questions in turn.

I. <u>The purpose of antitrust law.</u>

Competition is a critical driver of economic growth and thus it is important to understand what current antitrust law can achieve. Although we may sometimes think of an antitrust offense in terms of anticompetitive effects, an antitrust offense is better understood in terms of the alleged conduct's impact on the "competitive process" through which a firm makes its decisions on price, quality, and the need to innovate, among other terms. Antitrust law is not designed for, nor intended to, correct a "problem" in the market wholly divorced from its impact on the competitive process. In other words, concerns over fairness, consumer privacy, or the protection of small business should be addressed by regulatory actions or consumer protection laws, not antitrust.[2] Using antitrust law to address non-competition factors, which may reduce competition or conflict with each other, reduces certainty and increases the risk of antitrust being used for industrial policy or political purposes.

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[1] *Online Platforms and Market Power, Part 2: Innovation and Entrepreneurship: Hearing Before the Subcomm. on Antitrust, Commercial, and Admin. Law of H. Comm. on the Judiciary*, 116th Cong. (2019) (statement of Maureen K. Ohlhausen, Partner, Baker Botts L.L.P.), *available at* https://docs.house.gov/meetings/JU/JU05/20190716/109793/HHRG-116-JU05-Wstate-OhlhausenM-20190716.pdf.

[2] *See* Maureen K. Ohlhausen & Alexander P. Okuliar, *Competition, Consumer Protection, and the Right [Approach] to Privacy*, 80 Antitrust L.J. 121, 152-53 (2015) ([T]he application of competition law is appropriate only where the potential harm is grounded in the actual or potential diminution of economic efficiency. If there is likely no efficiency loss because of the conduct or transaction, another legal avenue for enforcement is more appropriate and efficient. Second, the scope of the potential harm also should aid in the choice of law. Antitrust laws are focused on broader, macroeconomic harms, mainly the maintenance of efficient price discovery in the markets, whereas the consumer protection laws are preoccupied with ensuring the integrity of each specific contractual bargain. These are complementary, but discrete, enforcement goals. Third, and finally, the available remedies must be able to address effectively the potential harm. Enjoining a merger may do little to prevent a privacy violation if the parties can simply share the same consumer information under a contractual arrangement.").

This definition of antitrust closely aligns with the core premise of the Sherman Act, which is the belief that a market economy, free of private restraints and unnecessarily burdensome regulations, produces superior outcomes over time. This interpretation comports with the Supreme Court's long-espoused view.[3]

Antitrust is intended to protect the market process, not ensure a particular market outcome at a particular time. Our free market system rests on the conclusion that markets in which firms must endure competitive pressures will produce favorable outcomes in terms of price, output, quality, and innovation in the long run. Enforcers should only intervene when there is evidence that firms are corrupting or are likely to corrupt the competitive process through means other than competition on the merits. We should proceed cautiously and reflect very carefully before asking enforcers to go beyond this well-established mission of antitrust.

The Council of Economic Advisors' recently released annual report largely echoes that sentiment. The Report, which offers a detailed examination of the state of competition and current antitrust law's ability to promote and safeguard it, states that "major policy initiatives to completely rewrite antitrust rules . . . are premature."[4] In reaching this conclusion, the Report finds that such proposals are "likely to impose significant costs" and are based on flawed research.[5]

The Report analyzes several recent studies, including an influential 2016 policy brief issued by the Council of Economic Advisers in the previous administration. It concludes that many of these studies rest on the flawed assumption that "if undesirable outcomes—such as higher prices, profits, and markups—are correlated with concentration, then the cause of these outcomes" must be weaker competition.[6] That assumption fails to take into consideration other explanations that may nonetheless be consistent with "procompetitive behavior by firms."[7]

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[3] *See, e.g., Nat'l Soc'y of Prof'l Eng'rs v. United States*, 435 U.S. 679, 695 (1978) (embracing the "assumption that competition is the best method of allocating resources in a free market").

[4] Economic Report of the President: Together with The Annual Report of the Council of Economic Advisors, at 202 (2020), *available at* https://www.whitehouse.gov/wp-content/uploads/2020/02/2020-Economic-Report-of-the-President-WHCEA.pdf [hereinafter the "Report"].

[5] *Id.*

[6] *Id.* at 211. Starting in 2016, some journalists and others observed industry census data; noted that concentration across certain broad industry classifications like retail, transportation, finance, and utilities had risen; and saw that firms' returns on invested capital had increased. From this information, they inferred that monopoly power was rising and called for stricter antitrust enforcement. However, industry classifications identified by the Census Bureau are not antitrust markets and shifting trends in concentration do not necessarily reflect lost competition. Some markets have diminishing long-run average-cost curves, while others produce dominant firms or oligopolies due to superior efficiency or innovation. The arguments about increased concentration overlooked those critical nuances, as well as other key factors. *See* Maureen K. Ohlhausen, *Does the U.S. Economy Lack Competition*?, 1 Criterion J. on Innovation 47 (2016). Other scholars also observed these shortcomings. *See* Carl Shapiro, *Antitrust in a Time of Populism*, 61 Int'l J. Indus. Org. 714-48 (2018); Gregory Werden & Luke Froeb, *Don't Panic: A Guide to Claims of Increasing Concentration* (2018), *available at* SSRN: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3156912##.

[7] Report, *supra* note 4, at 211-12 (alternative procompetitive explanations include fixed costs, scale economies, and globalization).

The Report concludes that though competition plays a vital role in economic growth and needs to be safeguarded, the best available evidence simply does not support the current push for antitrust reform. If the antitrust rules are to be rewritten in the future, those efforts "should be based on studies of properly defined markets, together with conceptual and empirical methods and data that are sufficient to distinguish between alternative explanations for rising concentration and markups."[8]

By focusing on the competitive process, current antitrust law can still address many of the concerns raised by today's commentators. As long as there is sufficient factual and economic evidence of a cognizable competitive harm, antitrust law can prevent and remediate price effects, reductions in quality, impacts on innovation, and so-called "killer acquisitions" of nascent competitors.

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

Over its century-long history, commentators have from time-to-time questioned whether antitrust could prevent and remediate harms posed by new types of industries and markets. Despite these doubts, antitrust has proven to be flexible enough to adapt to and handle new and challenging issues.

For instance, antitrust can and should address monopolistic, anticompetitive behavior by any company, including innovative technology companies, as recognized in the thoughtful D.C. Circuit opinion in the *Microsoft* matter.[9] Among other things, that case teaches that under current antitrust law a dominant provider must maintain its position through legitimate competition on the merits, rather than through exclusionary conduct that has little or no purpose beyond disadvantaging rivals.[10]

The *Microsoft* decision stands for the proposition that monopolists can improve their products to better serve their customers just like any other market participant. But enforcers will not tolerate the use of market position to short-circuit competition on the merits. In essence, monopolists need to fend off their rivals the same way other firms do, by doing things better than their competitors. This standard leaves enforcers plenty of room to attack the kind of exclusionary conduct the antitrust laws are meant to address.

Recent enforcement efforts bear this out as the agencies target firms using a dominant position to exclude competition, such as the FTC's action against McWane for exclusionary conduct against rival manufacturers,[11] as well as the DOJ's continual efforts in the criminal sphere

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[8] *Id.* at 215.
[9] *See United States v. Microsoft Corp.*, 253 F.3d 34 (D.C. Cir. 2001).
[10] *Id.* at 58.
[11] *McWane, Inc. v. FTC,* 783 F.3d 814 (11th Cir. 2015).

to uproot and squelch price-fixing and other antitrust conspiracies that deprive consumers of the benefit of competition.[12] In the latter category, the FTC and DOJ's joint efforts to crack down on no-poach agreements that stifle wages and other employee benefits, including a new criminal enforcement policy, have built on the DOJ's enforcement actions against numerous tech companies with anticompetitive "no cold call" agreements.

Nonetheless, some have suggested that the scope of monopolization liability needs to be extended. One manner of extending liability would be to expand significantly the breadth of each element of a Sherman Act Section 2 violation. For example, one proposal would prohibit large companies (those with revenues over $40 billion) from refusing to deal with rivals. This would restrict companies' choice of with whom to deal, regardless of legitimate business reasons or impact on competition. For example, this would create a risk of liability for a retailer that wants to stock only products meeting certain ecological or quality standards if it also sells a house brand of those products. For example, Giant Food—owned by Ahold with annual revenues over $40 billion—offers private label organic products. Under some reform proposals, a rival producer of an organic product would theoretically be able to force Giant to stock its products that do not meet Giant's standards.

This effect would not be limited to retail, of course. Forcing large platforms to provide access to all third parties who are arguably rivals under threat of liability would hamstring their ability to police their own platforms and keep out harmful content and services, which would not serve consumer or broader societal interests well.

Another proposed expansion of Section 2 liability includes prohibiting a platform from also serving as a competing merchant on its own platform. This may force retailers with revenues over $40 billion who also sell their own products over their websites to choose between offering house brand products (often popular with lower-income consumers) and offering products made by third parties, such as national brand manufacturers. Were this prohibition interpreted this way, it would greatly reduce consumer choice on a large number of well-known retailer websites and possibly lead to a reduction in low-cost house brands—an extremely common retailing practice that long predated online sales.[13]

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[12] *See* U.S. Dep't of Justice, Antitrust Division, Criminal Enforcement Trends Charts Through Fiscal Year 2018, *available at* https://www.justice.gov/atr/criminal-enforcement-fine-and-jail-charts.

[13] "The heart of this dynamic isn't new. Sears started its catalogue business in 1888 and then started using the Craftsman and Kenmore brands as in-house brands in 1927. Sears was acquiring inventory from third parties and obviously knew exactly which ones were selling well and presumably made decisions about which markets to enter and which to stay out of based on that information. Walmart, the nation's largest retailer, has a number of well-known private brands and firms negotiating with Walmart know full well that Walmart can enter their markets, subject of course to otherwise applicable restraints on entry such as intellectual property laws." Randal C. Picker, *Breaking up Amazon? Platforms, Private Labels, and Entry*, TRUTH ON THE MARKET (July 17, 2019), *available at* https://truthonthemarket.com/2019/07/17/breaking-up-amazon-platforms-private-labels-and-entry/.

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

Current antitrust law can prevent and remediate anticompetitive transactions of all types, including vertical mergers, acquisitions of competitively significant assets, or acquisitions of potential competitors.

Antitrust enforcers generally agree that mergers creating durable market power do not serve consumers well. For example, during my time as Acting Chairman, the FTC identified a total of 32 proposed mergers with significant competition concerns. Of these, the agency accepted a consent agreement to protect consumers in 19 cases, with the balance of these deals either abandoned in the face of our challenge or contested in litigation.[14] At one point, the FTC had ten competition matters in active litigation at the same time, with three more on appeal, which approached historic levels of activity.

Recent FTC enforcement actions demonstrate the continued willingness and ability of the agencies to protect consumers from anticompetitive transactions, including acquisitions of nascent competitors, such as the 2018 FTC challenge to the merger between CDK and Auto/Mate, highlighted in my earlier testimony. More recently, the FTC successfully challenged the merger between Illumina and PacBio where a monopolist with 90% share of the market attempted to "extinguish [PacBio] as a competitive threat" upon discovering that PacBio was on the verge of offering better, more cost-effective products.[15] Finally, in February, the FTC challenged the merger between Harry's and Schick. There, Harry's—a disruptive newcomer—successfully changed the market from a "comfortable duopoly to a competitive battleground."[16] By challenging the merger, the FTC prevented a longstanding duopolist from buying its way out of future competition.[17] These enforcement actions demonstrate that the agencies can and will use antitrust

[14] *See* FTC & U.S. Dep't of Justice, Hart-Scott-Rodino Annual Report, Fiscal Year 2017 at 15-22, *available at* https://www.ftc.gov/system/files/documents/reports/federal-trade-commission-bureau-competition-department-justice-antitrust-division-hart-scott-rodino/p110014_fy_2017_hsr_report_c.pdf; FTC Annual Highlights 2018, *available at* https://www.ftc.gov/reports/annual-highlights-2018.

[15] *In the Matter of Illumina, Incorporated a corporation and Pacific Biosciences of California, Incorporated (PacBio) a corporation,* Docket No. 9387, Public Administrative Complaint ¶ 8 (Dec. 17, 2019), *available at* https://www.ftc.gov/system/files/documents/cases/d9387_illumina_pacbio_administrative_part_3_complaint_public.pdf.

[16] *In the Matter of Edgewell Personal Care Company, a corporation and Harry's, Inc., a corporation*, Docket No. 9390, Public Administrative Complaint ¶ 10 (Feb. 2, 2020), *available at* https://www.ftc.gov/system/files/documents/cases/public_p3_complaint_-_edgewell-harrys.pdf.

[17] The parties abandoned the merger approximately one week after the FTC filed the administrative complaint. *See* Press Release, FTC, Statement of Daniel Francis, Deputy Director of FTC Bureau of Competition, Regarding Announcement that Edgewell Personal Care Company has Abandoned Its Proposed Acquisition of Harry's, Inc., (Feb. 10, 2020), *available at* https://www.ftc.gov/news-events/press-releases/2020/02/statement-daniel-francis-deputy-director-ftc-bureau-competition.

law to preserve competition between rivals, thereby allowing benefits of that competition to flow to consumers.

Although the antitrust agencies should be alert to the risk of anticompetitive acquisitions of nascent competitors, it is important to avoid a categorical prohibition on acquisitions of small entities by larger entities. Experienced companies have frequently helped bring new products to market by providing expertise and resources to startups that were struggling to scale before acquisition. And economic research demonstrates a strong link between the potential for acquisition of small entities, their access to investment, and innovation.[18]

Vertical mergers, a hot topic in the antitrust world of late, are also subject to antitrust oversight and enforcement.[19] The vast majority of vertical arrangements, however, are pro-competitive.[20] FTC Commissioner Christine Wilson has convincingly laid out the reasons why: vertical deals eliminate no head-to-head competition in any market; they may create cost-saving benefits such as the elimination of double-marginalization and incentivize investment by aligning upstream and downstream incentives; and they are confirmed to be typically procompetitive by retrospective analyses, such as those collected by DOJ and FTC economists and expanded upon by the Global Antitrust Institute.[21] Vertical mergers can still raise antitrust concerns when the

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[18] *See, e.g.*, Gordon M. Phillips & Alexei Zhdanov, *Venture Capital Investments, Mergers and Competition Laws around the World*, at 5 (2019), *available at* SSRN: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3072665 ("As many start-ups rely on VC funding and venture capitalists rely more on exits through acquisitions versus IPOs, our results suggest that active M&A markets have important ex ante incentive effects for generating entrepreneurship and growth."); Igor Letina, et al., *Start-up Acquisitions and Innovation Strategies*, at 3 (2020), *available at* http://www.vwl.unibe.ch/wp-content/uploads/papers/dp/dp2003.pdf ("Our analysis concludes that prohibiting start-up acquisitions reduces the variety of innovation projects and, on a closely related note, the probability of innovation."); Gordon M. Phillips & Alexei Zhdanov, *R&D and the Incentives from Merger and Acquisition Activity*, at 34 (2012), *available at* http://www.nber.org/papers/w18346 ("Our results show that the possibility of an acquisition amplifies the potential gains from innovation - particularly so for smaller firms.").

[19] A "vertical" merger is one in which the parties do not directly compete, instead operating on different levels of the supply chain. A classic example would be a manufacturer merging with its distributor or retailers selling its products, and there are many recent examples in the tech sector as well, including Apple's purchase of music-recognition app Shazam, and Google's acquisition of ITA Software and its flight-search engine.

[20] *See, e.g.*, Francine Lafontaine & Margaret Slade, *Exclusive Contracts and Vertical Restraints: Empirical Evidence and Public Policy*, Handbook of Antitrust Econ. 391–414, 409 (Paolo Buccirossi ed., 2008) (concluding from an empirical analysis that, "when manufacturers choose to impose [vertical] restraints, not only do they make themselves better off, but they also typically allow consumers to benefit from higher quality products and better service provision. . . . The evidence thus supports the conclusion that in these markets, manufacturer and consumer interests are apt to be aligned, while [government] interference in the market is accomplished at the expense of consumers (and of course manufacturers)") (alteration in original); James C. Cooper et al., *Vertical Antitrust Policy as a Problem of Inference*, 23 Int'l J. Indus. Org. 639, 662 (2005) ("Our review of the empirical evidence—which informs our priors—suggests that vertical restraints are likely to be benign or welfare enhancing."). The Supreme Court has adopted the prevailing economic learning. *Leegin Creative Leather Prods. v. PSKS, Inc.*, 551 U.S. 877, 889-92 (2007) (discussing and embracing key insights from the economic literature).

[21] Christine Wilson, Commissioner, FTC, Keynote address at the GCR Live 8th Annual Antitrust Law Leaders Forum: Vertical Merger Policy: What Do We Know and Where Do We Go?, at 3-5 (Feb. 1, 2019) (citing FTC, DOJ, and GAI studies), *available at* https://www.ftc.gov/system/files/d ocuments/public_statements/1455670/wilson_-_vertical_merger_speech_at_gcr_2-1-19.pdf; *see also* D. Bruce Hoffman, Acting Director, Bureau of Competition,

parties gain an ability and incentive to foreclose their rivals from a significant portion of the market. Thus, as with horizontal mergers, vertical deals should be evaluated case-by-case based on all the available evidence and not pre-judged based on the size of the parties or concerns outside of preserving market competition.

While the enforcement agencies are adept at taking prophylactic measures to prevent anticompetitive transactions, they undoubtedly cannot be right every single time. Competitive conditions may change in unforeseen ways, in either direction, due to technological innovation, new entry, regulatory changes, and broader economic factors. Though the agencies may seek post-merger divestiture in limited circumstances, as I stated in my earlier testimony, that is a "drastic step that carries serious risk of doing more harm than good for competition and consumers." These concerns are amplified in the case of a breakup remedy for anticompetitive conduct unrelated to a merger. The dissolution of an already-unified company presents logistical difficulties and should be "imposed only with great caution, in part because its long-term efficacy is rarely certain." In fact, divestiture may actually reduce consumer welfare if the breakup leaves the company unable to innovate or with higher costs.

Despite appeals to wait for more data or allow the agencies more time to adapt to current events, it appears some wish proceed rapidly to alter fundamentally the primary mission of antitrust. Based on the assumption that "big is bad," these proposals seek to curtail mergers severely and impose sweeping restrictions on "anticompetitive conduct." Although undoubtedly well intentioned, such plans may result in numerous unintended, negative consequences for competition and consumers.

For example, the suggestion that all "mega mergers" should be banned, regardless of the actual effect on competition, is problematic. This category would include any transaction where both parties have annual revenues of over $15 billion or either party has annual revenue of over $40 billion. Crucially, the antitrust laws already prohibit *anticompetitive* mergers of large companies. What this ban would actually add to the current law is a prohibition on large mergers that would spur competition, such as where large, successful companies in one market add capabilities to challenge other large competitors in a different industry.[22]

Another proposal regarding mega mergers and mergers in general would require the FTC to establish a retroactive review process for consummated mergers and to review—within two years—*all* past "mega mergers" since January 1, 2000, as well as all "large mergers" one year post-approval. The FTC would then be required to "unwind" any merger that caused material harm

FTC, Address at Credit Suisse 2018 Washington Perspectives Conference, Vertical Merger Enforcement at the FTC, at 2-3 (Jan. 10, 2018), *available at* https://www.ftc.gov/system/files/documents/public_statements/1304213/hoffman_vertical_merger_speech_final.pdf

[22] For example, if the mega merger ban was in place in 2016, Walmart, Inc. (annual revenue $486 billion) would have been prohibited from purchasing Jet.com, thereby frustrating its ability to compete with Amazon's online marketplace. *See* Jennifer Saba, *Walmart's Bid for Jet.com Could Help It Compete Against Amazon,* N.Y. TIMES (Aug. 4, 2016), *available at* https://www.nytimes.com/2016/08/05/business/dealbook/walmarts-bid-for-jet-could-help-it-compete-against-amazon.html.

or failed to meet its stated justification or benefits. Besides wading into uncertain divesture territory, which I have already discussed, this would negatively impact the FTC's ability to carry out effectively its enforcement responsibilities. Additionally, the review would burden companies with little regard to competitive effects and unsettle markets for investment, particularly in startups.[23]

IV. 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 support the robust enforcement of the antitrust laws.

As a former enforcer, I know the agencies work hard to enforce the antitrust laws and police the market for anticompetitive conduct. With much needed additional resources, the enforcement agencies will be able to accomplish even more.

For example, the FTC's recent enforcement efforts have forced the agency to work "at or near the limits of [its] resources."[24] During his congressional testimony last year, former FTC Bureau of Competition Director Bruce Hoffman explained that the FTC, during a two-year time period, conducted nine trials comprising over 132 days of trial time, thereby causing the agency attorneys to spend 1 out of every 5 business days in trial.[25] In addition to the taxing demands of litigation and trial, the agency must also devote precious resources to its other enforcement responsibilities. Additional personnel would certainly help ease this burden.

Besides personnel, the agencies are also increasingly in need of additional expert resources. FTC Chairman Joseph Simmons specifically highlighted this request to Congress last year, explaining that economic experts "are a critical resource in every FTC competition case where litigation appears likely" and the cost has tripled in a five-year span causing the agency to come close to the point where it "will be unable" to hire experts "without compromising [its] ability to fulfill other aspects of the mission."[26]

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[23] *Competition in Digital Technology Markets: Examining Acquisitions of Nascent or Potential Competitors by Digital Platforms: Hearing before the Subcomm. on Antitrust, Competition Policy, and Consumer Rights before the S. Comm. on the Judiciary*, 116th Cong. 5 (2019) (statement of Patricia Nakache, General Partner, Trinity Ventures) ("In undertaking examination of this policy area, I encourage policymakers to recognize that the public markets are not nearly as welcoming to small companies as they once were, and indeed that many young companies cannot realistically achieve the scale necessary to become standalone public companies, which means that often M&A is the most viable pathway for startup."), *available at* https://www.judiciary.senate.gov/imo/media/doc/Nakache%20Testimony.pdf.

[24] Responses to questions for the record from Sen. Richard Blumenthal, prepared by Bruce Hoffman, Director, FTC Bureau of Competition) at 6, *available at* https://www.judiciary.senate.gov/imo/media/doc/Hoffman%20Responses%20to%20QFRs1.pdf.

[25] Oral testimony of Bruce Hoffman, (1:05:35 mark), *available at* https://www.judiciary.senate.gov/meetings/competition-in-digital-technology-markets-examining-acquisitions-of-nascent-or-potential-competitors-by-digital-platforms.

[26] *Oversight of the Enforcement of the Antitrust Laws: Hearing before the Subcomm. on Antitrust, Competition Policy, and Consumer Rights before the S. Comm. on the Judiciary*, 116th Cong. 5 (2019) (prepared statement of the

DOJ's Antitrust Division similarly is making the most of its limited resources.[27] However, it too needs additional resources to meet its responsibilities. DOJ's proposed budget for the next fiscal year requests $53 million in appropriations for the Antitrust Division, which represents a seventy-one percent increase in appropriations from the prior year.[28]

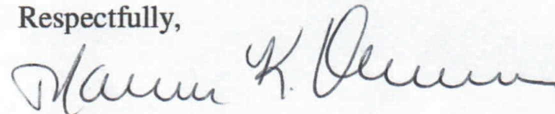
Greater funding will not only allow the agencies to continue to meet their current responsibilities but also enable them to expand their capabilities. For instance, because investigations can be quite resource intensive, additional funding provides the agencies with the ability to review a wider scope of transactions and market behavior and to undertake important research on competitive issues.

Therefore, Congress should help ensure the proper functioning of the market by providing the agencies with additional resources.

V. Conclusion

Our antitrust laws are designed to combat anticompetitive mergers and practices in the marketplace, but their application must be tied to the facts and evidence specific to each case. Calls to broaden the scope of antitrust law likewise must be based on reliable evidence that such changes are necessary to promote competition and will make consumers better off. Changing the goal of antitrust from protecting the competitive process to focus instead on company size or other issues, such as consumer privacy, may ultimately result in less competition and fewer benefits for consumers. Enforcing our antitrust laws is a resource-intensive endeavor, however, and our enforcers need more support.

Respectfully,



Maureen K. Ohlhausen
Partner

Federal Trade Commission), *available at*
https://www.judiciary.senate.gov/imo/media/doc/Simons%20Testimony.pdf.

[27] *Id.* at 20 (statement of Makan Delrahim, Assistant Att'y Gen., U.S. Dep't of Justice) ("We will continue to *leverage our limited resources to the fullest in order to meet the coming challenges,* knowing the importance of our work in every American's life." (emphasis added)), *available at*
https://www.judiciary.senate.gov/imo/media/doc/Delrahim%20Testimony.pdf.

[28] U.S. Dep't of Justice, Requested Budget of the Antitrust Division (ATR), Fiscal Year 2021 ("The Department is requesting additional resources to address the increase in workload for ATR in its civil and criminal merger enforcement, monopolization enforcement, criminal cartel enforcement programs, and for the Division's ongoing and comprehensive conduct review of market leading online platforms."), *available at*
https://www.justice.gov/doj/page/file/1246781/download. The proposed budget assumes collection of $136 million in HSR filing fees with the remaining $53 million constituting congressional appropriations.