



**Comments of the
American Antitrust Institute**

**United States House of Representatives
Committee on the Judiciary
Subcommittee on Antitrust, Commercial and Administrative Law**

**Judiciary Committee Investigation into
Competition in Digital Markets**

**Washington, D.C.
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Chairman Cicilline, Ranking Member Sensenbrenner, and Members of the Subcommittee, thank you for the invitation to submit the views of the American Antitrust Institute (AAI) on the adequacy of existing antitrust laws, competition policies, and current enforcement levels as part of the Committee’s investigation into competition in the digital marketplace. 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.¹

Below we address each of the three issues raised in your letter dated March 13, 2020.

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

In the United States, anticompetitive conduct by dominant firms in digital markets can be redressed under the Sherman Act, the Clayton Act, the Federal Trade Commission Act, and state antitrust laws. Depending on the circumstances, such conduct may also come within the purview of federal, state, and local regulators, many of which have public interest mandates that include, but are not limited to, competition principles. The principal federal antitrust statute governing unilateral dominant firm behavior is Section 2 of the Sherman Act, which makes it a felony to “monopolize,

¹ AAI is managed by its Board of Directors, with the guidance of an Advisory Board that consists of over 130 prominent antitrust lawyers, law professors, economists, and business leaders. Individual views of Members of AAI’s Board of Directors or Advisory Board may differ from AAI’s positions. For more information about AAI, see <http://www.antitrustinstitute.org>.

or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several states, or with foreign nations.”²

Federal enforcement against unilateral, dominant-firm behavior has been so limited for so many years, Section 2 has often been described as a “dead letter.”³ According to its own statistics, the Antitrust Division of the U.S. Department of Justice (DOJ) undertook 50 investigations between 2000-2018 where monopolization was the “the primary type of conduct under investigation at the outset of the investigation.”⁴ But since the *Microsoft* case some 20 years ago and the handful of other cases litigated around the same time,⁵ the DOJ has brought only one comparatively insignificant Section 2 case. This was an Obama-era challenge to exclusive dealing by a dominant hospital in a small market in Texas.⁶ The DOJ’s approach to Section 2 enforcement therefore has been to look, but not to sue.

The Federal Trade Commission (FTC) has been more active in policing single-firm conduct, but its activity has been almost entirely focused in certain narrow areas involving health care and pharmaceutical markets. Among the rare exceptions are *McWane v. FTC*, involving exclusive contracts in iron pipe fittings, a settlement with Intel Corporation that ended exclusionary practices in computer chips, and the Commission’s 2019 case against Qualcomm, involving modem chips used in smartphones—arguably its most significant Section 2 case since *Microsoft*. But the *Qualcomm* case was initiated during the Obama administration and has been followed by bitter Republican criticism ever since. This includes a strongly worded dissent from the decision to sue,⁷ followed by an unprecedented opinion piece by a sitting FTC commissioner after the agency won at trial, urging that her own agency should lose on appeal,⁸ and continuing with equally unprecedented efforts by the DOJ to interfere with and upend the case.⁹ Moreover, the DOJ’s briefing in *Qualcomm* largely reprises the arguments and spirit of the controversial Section 2 Report of the Bush administration, which would have intentionally relegated many aspects of Section 2 to insignificance.¹⁰

² 15 U.S.C. § 2.

³ See, e.g., Robert Pitofsky, *Antitrust Policy in A Clinton Administration*, 62 Antitrust L.J. 217, 219 (1993).

⁴ U.S. Dep’t of Just., Antitrust Div., Historic Workload Statistics, <https://www.justice.gov/atr/division-operations> (last visited April 3, 2020).

⁵ *United States v. Microsoft Corp.*, 253 F.3d 34 (D.C. Cir. 2001); see also *United States v. Dentsply Intern., Inc.*, 399 F.3d 181 (3d Cir. 2005); *United States v. AMR Corp.*, 335 F.3d 1109 (10th Cir. 2003).

⁶ *United States v. United Regional Healthcare Sys.*, No. 7:11-cv-00030 (S.D. Tex. 2011).

⁷ Dissenting Statement of Commissioner Maureen K. Ohlhausen, *In re Qualcomm, Inc.*, File No. 141-0199 (Jan.17, 2017). Commissioner Ohlhausen continued to criticize the suit publicly during its pendency, even as she was named acting Chair. See, e.g., Claude Marx, Mike Swift & Joshua Sisco, *Ohlhausen Wants to Explore FTC Withdrawing Qualcomm Suit*, MLEX (Jan. 23, 2017), available at <https://mlexmarketinsight.com/insights-center/editors-picks/antitrust/north-america/ohlhausen-wants-to-explore-ftc-withdrawing-qualcomm-suit>.

⁸ Christine Wilson, *A Court’s Dangerous Antitrust Overreach*, WALL ST. J. (May 28, 2019).

⁹ See United States’ Statement of Interest Concerning Qualcomm’s Motion for Partial Stay of Injunction Pending Appeal, *FTC v. Qualcomm*, No. 19-16122 (9th Cir. filed July 16, 2019). The DOJ also has supported Qualcomm in private litigation under state antitrust law, filing an amicus brief in the 9th Circuit seeking to decertify a class on grounds that states which allow indirect purchaser suits have an irreconcilable policy conflict with states that follow the *Illinois Brick* indirect purchaser rule—an unexplained reversal of longstanding government policy dating back to *California v. Arc America*, 490 U.S. 93 (1989) (upholding state statutes allowing indirect purchaser recoveries with support of U.S. Solicitor General).

¹⁰ See, e.g., U.S. Dep’t of Just., Competition and Monopoly: Single-Firm Conduct Under Section 2 of the Sherman Act 127 (2008), <http://www.justice.gov/sites/default/files/atr/lega-cy/2009/05/11/236681.pdf> (unilateral, unconditional refusals to deal “should not play a meaningful part in Section 2 enforcement”); see also Press Release, *Antitrust Division Withdraws Report on Antitrust Monopoly Law*, Dep’t of Just., Antitrust Div. (May 11, 2009) (report “raised too many hurdles to government antitrust enforcement and favored extreme caution”).

The trend of weak or nonexistent Section 2 enforcement therefore continues. Although the federal antitrust agencies have undertaken investigations into unilateral abuses by the large digital technology firms,¹¹ there are strong indications from their track records that neither agency intends any serious action. Based on its briefing in *Qualcomm*, as well as an amicus brief it filed in an important private Section 2 case decided recently,¹² there is especially good reason to doubt that the DOJ, in particular, has any interest in Section 2 enforcement of any kind, whether in the technology sector or otherwise.

AAI believes current levels of Section 2 enforcement are woefully inadequate. Dominant firms have amassed substantial power in relevant antitrust markets in a variety of sectors and industries, including event ticketing, agricultural biotechnology, broadband infrastructure, and internet search, to name a few important examples.¹³ Dominant firms can employ business strategies that cause consumer harm through higher prices, reduced output, or diminished choice, quality, or service by thwarting competition from horizontal rivals or among their suppliers or distributors. They can acquire, enhance or maintain power by preventing interoperability, leveraging control over important assets (including intellectual property), discriminating against rivals, or otherwise raising rivals' costs or denying rivals' access to customers; by engaging in contracting practices that lock up key suppliers or distributors or distribution channels; or by engaging in predatory pricing practices.¹⁴ Yet, as the aforementioned statistics show, potential exclusionary conduct by dominant firms is rarely challenged and rarely punished by government enforcers.

The disconnect is attributable to a culture of excessive caution in agencies and courts. In our experience, enforcers confronted with potentially harmful dominant-firm behavior tend to be too deferential to theoretical efficiencies claims, too averse to the risk of "false positives," and too dismissive of the risk of "false negatives." Many of the most substantial roadblocks to a more effective anti-monopoly program would be overcome if agency enforcers adopted a more vigorous approach to monopolization enforcement, supported by significantly increased appropriations and the political support of Congress and the Executive Branch. However, legal reform also is necessary because excessively cautious attitudes have become ingrained not only in culture, but in certain areas

¹¹ See Brent Kendall, *Justice Department to Open Broad, New Antitrust Review of Big Tech Companies*, WALL ST. J. (July 23, 2019); Tony Romm, *Amazon Could Face Heightened Antitrust Scrutiny Under a New Agreement Between U.S. Regulators*, WASH. POST (June 1, 2019).

¹² Brief for the United States as Amicus Curiae in Support of Neither Party, *Viamedia Inc. v. Comcast Corp.*, No. 18-2852 (7th Cir. filed Nov. 8, 2018).

¹³ See Letter from Am. Antitrust Inst. to Makan Delrahim *re* Amended Final Judgment in United States v. Ticketmaster Entertainment, Inc., https://www.antitrustinstitute.org/wp-content/uploads/2020/02/AAI_Ltr-to-DOJ_LN-TM_F.pdf; Letter from Am. Antitrust Inst., Food & Water Watch, and Nat'l Farmers Union to Makan Delrahim *re* Competitive Concerns Surrounding Traits-Seeds-Chemicals Platforms, Digital Farming, and Farm Data (Oct. 3, 2017), https://www.antitrustinstitute.org/wp-content/uploads/2018/08/AAI-FWW-NFU_MON-BAY-addendum.pdf; Letter from Am. Antitrust Inst. to William J. Baer *re* Exclusionary Gatekeeping and the Emergent Access Problem After Proposed Comcast-Time Warner Cable Merger (Sept. 16, 2014), https://www.antitrustinstitute.org/wp-content/uploads/2014/09/Comcast-TWC_DOJ-Letter-re-Gatekeeping-and-Access_9-16.pdf; Randy M. Stutz, An Examination of the Antitrust Issues Posed by Google's Acquisition of ITA (AAI white paper, Feb. 11, 2011), <https://www.antitrustinstitute.org/wp-content/uploads/2018/08/Google-ITA-AAI-White-Paper2.18.11.pdf>.

¹⁴ Jonathan B. Baker, *Exclusion as a Core Competition Concern*, 78 Antitrust L.J. 527, 539–43 (2013).

of case law. Specifically, litigators, courts, and agencies, as well as Congress, should pursue the following changes to monopolization law and policy:¹⁵

- **Recognize that information deficiencies and other “consumer protection” market imperfections may give a firm market power; eliminate formalistic reliance on market-share benchmarks for purposes of establishing monopoly power, particularly in attempt cases and cases where there is direct evidence of harm.**
- **Overturn, or sharply limit, *Ohio v. American Express Co.*, and confirm that normal rules for defining relevant markets apply in Section 2 cases involving two-sided platforms, without requiring plaintiffs to establish harm to both sides of a two-sided platform to make out a prima facie case, and clarify that two-sided platforms can face competition from firms that are not two-sided platforms.**
- **Reject efforts to promote a single proxy for exclusionary conduct under Section 2, such as the profit-sacrifice test, the no-economic sense test, or the equally efficient competitor test. The default framework for assessing allegations of exclusionary conduct should be the consumer-welfare balancing test articulated by the D.C. Circuit in *Microsoft*.**
- **Treat a monopolist’s exclusive dealing that reasonably appears capable of making a significant contribution to maintaining its monopoly power as presumptively anticompetitive, subject to rebuttal that actual or potential anticompetitive effects are unlikely or are prevented by procompetitive benefits to consumers.**
- **Reject cost-based safe harbors for conditional pricing practices (loyalty and bundled “discounts”), and treat such practices as presumptively anticompetitive when they help preserve, extend, or exploit a monopolist’s market power, subject to rebuttal that anticompetitive effects are unlikely or are prevented by procompetitive benefits to consumers.**
- **Support liability for a monopolist’s refusal to deal with a rival when: (1) such refusal helps preserve or extend its monopoly power; (2) the monopolist discriminates between the competitor and other customers, has previously dealt voluntarily with the competitor, or otherwise demonstrates a predatory intent; and (3) the anticompetitive effects are not prevented by procompetitive benefits to consumers.**
- **Treat a “price squeeze” by a monopolist as a constructive refusal to deal when the monopolist could not have made a profit selling at its retail rates if it purchased inputs at its own wholesale rates.**
- **Revitalize the essential facilities doctrine as an independent theory of liability for purposes of injunctive relief.**

¹⁵ For a more detailed explanation of these recommendations, see American Antitrust Institute, Restoring Monopoly and Exclusion as Core Competition Concerns (AAI Presidential Transition Report, 2016), https://www.antitrustinstitute.org/wpcontent/uploads/2018/08/Monopolizationfinal_0-1.pdf.

- Treat a vertically integrated monopolist’s refusal to sell or license its intellectual property to a downstream competitor the same as a refusal to sell or provide access to physical property.
- Treat a drug manufacturer’s large cash or in-kind payment to delay generic entry as presumptively unlawful, subject to rebuttal that it is justified by avoided litigation costs or valuable collateral products and services; and treat a “product hop” as presumptively unlawful if it makes “no economic sense”¹⁶ on its face.
- Overturn the *Brooke Group* standard for predatory-pricing and apply instead a structured rule of reason that is more consistent with modern economic thinking about predatory pricing strategies, including above-cost strategies, than is current law.
- Use the Federal Trade Commission’s “unfair methods of competition” authority to address anticompetitive conduct by dominant firms that may not be reachable under the Sherman Act or Clayton Act.
- Seek to employ structural remedies in appropriate cases, continue the increased use of equitable monetary remedies, and support legislation to allow both agencies to obtain civil penalties in Section 2 cases.
- Oppose efforts to overturn *Jefferson Parrish*, and support a rule of presumptive illegality for tying by firms with market power.

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

Merger control remains one of the most important areas of antitrust law. Section 7 of the Clayton Act prohibits mergers and acquisitions the effect of which “may be substantially to lessen competition or to tend to create a monopoly.”¹⁷ As such, Section 7 embodies what is known as the “incipiency doctrine.” Antitrust scholars have aptly described the doctrine as a “Congressional directive that the courts should prevent mergers even when they do not rise to the level of Sherman Act violations whenever they could cause a reasonable probability of harm to competition.”¹⁸

Section 7 is the only area of antitrust law that is forward looking. Sections 1 and 2 of the Sherman Act address anticompetitive conduct only *after* violations have occurred. Conversely, Section 7 is designed to *prevent* anticompetitive mergers or acquisitions, including but not limited to: head-to-head rivals, customers and suppliers, and potential competitors. Economic evidence

¹⁶ See Michael A. Carrier & Steve D. Shadowen, *Product Hopping: A New Framework*, 92 Notre Dame L. Rev. 167 (2016).

¹⁷ 15 U.S.C. § 18.

¹⁸ Peter C. Carstensen & Robert H. Lande, *The Merger Incipiency Doctrine and the Importance of ‘Redundant’ Competitors*, 2018 Wisc. L. Rev. 783 (2018).

demonstrates that high levels of market concentration give rise to stronger incentives to exercise market power, either unilaterally by dominant firms, or through anticompetitive coordination among rivals in oligopolized markets.¹⁹

Merger enforcement remains a critical area of antitrust enforcement, at the same time it has been “under siege” as a result of an imbalance in burdens borne by plaintiffs and defendants, excessive deference to efficiencies claims, and analytical approaches that are out of sync with modern business models. Despite the intent and design of Section 7 of the Clayton Act, merger law in the U.S. has been under-enforced for at least the past 40 years. A significant part of AAI’s work has been focused on exposing this troubling trend through research and education, and advocating before Congress, the agencies, and the courts for stronger enforcement. In practice, under-enforcement of the merger law is indicated by a number of factors, including but not limited to the following.

1. Economic Evidence of Weaker Merger Enforcement Over Time

Evidence demonstrates that the agencies’ enforcement against moderately concentrative mergers has declined over time. For example, between 1993 and 2011, the enforcement rate for mergers involving five to eight remaining significant competitors has fallen to zero.²⁰ The cumulative effect of antitrust enforcement decisions to let through successive, moderately concentrative mergers in any particular relevant market, or even sector, is to allow higher and higher levels of concentration (i.e., “creeping concentration”). This step down in enforcement reveals the failure of the U.S. enforcement agencies and the courts to “hold the line” on the incipiency standard described above. As a result, merger control has now been largely reduced to flagging only the most egregiously anticompetitive mergers.²¹

2. Declining Rate of Second Requests

AAI analysis shows that from 1993 to 2018, the DOJ and FTC have issued fewer “Requests for Additional Information” (“Second Requests”) under the Hart Scott Rodino Act (HSR).²² The practical implication of this development is that the agencies are conducting fewer in-depth merger investigations. In addition to better illuminating the anticompetitive threats posed by a particular transaction, Second Requests serve importantly to build knowledge of markets and potential effects of horizontal, vertical, and “ecosystem” consolidation. The agencies are less, if at all, familiar with the last of these types of consolidation that we see in many sectors—not just digital technology. Ecosystem consolidation has occurred in agricultural biotechnology, healthcare, video content programming and distribution, and other sectors.

¹⁹ See U.S. Dep’t of Justice & Fed. Trade Comm’n, *Horizontal Merger Guidelines* (2010), <https://www.ftc.gov/sites/default/files/attachments/merger-review/100819hmg.pdf>. Section 5.3 explains, “Mergers resulting in moderately concentrated markets that involve an increase in the HHI of more than 100 points potentially raise significant competitive concerns and often warrant scrutiny,” and “[m]ergers resulting in highly concentrated markets that involve an increase in the HHI of more than 200 points will be *presumed to be likely* to enhance market power.” *Id.* (emphasis added).

²⁰ John Kwoka, *Controlling Mergers and Market Power: A Program for Reviving Antitrust in America* 37 (2020).

²¹ See American Antitrust Institute, *The State of Antitrust Enforcement and Competition Policy in the U.S.* (April 14, 2020) [hereinafter “AAI State of Enforcement Report”], <https://www.antitrustinstitute.org/work-product/antitrust-enforcement-report/>.

²² 15 U.S.C. § 18a; see AAI State of Enforcement Report. Despite the overall trend of declining second requests, data reveal that Democratic administrations tend to enforce merger law more vigorously than Republican administrations.

AAI analysis of acquisitions by the largest digital technology firms reveals that the rate at which the agencies issued Second Requests (as a percent of clearances) is higher than average across all sectors.²³ However, the rate of challenges of illegal deals is far lower than the average. Thus, while the agencies are “looking” in digital technology mergers, they appear not to be “finding” problematic transactions. This disparity is symptomatic of the misalignment of current merger enforcement with what is necessary to protect competition, consumers, and workers.

3. HSR Reporting Thresholds Miss Potentially Anticompetitive Transactions

HSR reporting thresholds are set too high to appropriately flag acquisitions that could have adverse competitive consequences. Serial acquisitions of smaller rivals that avoid antitrust scrutiny (by falling below the current reporting thresholds) is an effective expansion strategy for creating very large firms. AAI’s analysis of reportable transactions indicates that they constitute only a small portion of total M&A.²⁴ This is particularly concerning for the aforementioned sectors that feature market ecosystems, where small additions to a system of tightly connected markets can enhance the ability and incentive to leverage market power across markets.²⁵ The HSR thresholds should be adjusted to account for these concerns.

4. Inadequate Approaches to Antitrust Analysis

Current enforcement approaches are often inadequate to identify the types of competitive issues raised in modern models of business organization, such as the market ecosystem. Ecosystems feature business assets that are not necessarily arranged in horizontal or vertical relationships, but in interconnected markets that expand the scale and scope of functionality. Data plays a key role in providing this interconnectivity. Longstanding enforcement norms are being challenged by these developments. For example, enforcers have long focused their lens on narrow markets in mergers that create horizontal overlaps, or in vertical mergers that pair up suppliers and customers. This approach often misses the “forest for the trees.” Serial acquisitions of small firms in large market ecosystems can help dominant firms leverage their market power or create incentives for system exclusivity.²⁶

As noted above, this problem is not limited to digital technology markets or to ecosystem mergers. It is also apparent in other sectors. The government’s loss in AT&T-Time Warner was largely a result of the court’s failure to appreciate the merger’s likely adverse effects, and its excessive focus on claimed merger-related efficiencies. This loss arguably undermined the agencies’ incentives

²³ Diana L. Moss, *The Record of Weak U.S. Merger Enforcement in Big Tech*, Am. Antitrust Inst. (Jul. 8, 2019), available at https://www.antitrustinstitute.org/wpcontent/uploads/2019/07/Merger-Enforcement_Big-Tech_7.8.19.pdf. AAI analyzed acquisition activity for Amazon, Apple, Facebook, Google, and Microsoft, and also for the digital technology sector, as reported by NAICS code in the agencies’ annual reports to Congress under the Hart Scott Rodino Act.

²⁴ *Id.*; see also Diana L. Moss, *Can Competition Save Lives? The Intersection of COVID-19, Ventilators, and Antitrust Enforcement*, Am. Antitrust Inst. (Mar. 31, 2020), <https://www.antitrustinstitute.org/can-competition-save-lives-the-intersection-of-covid-19-ventilators-and-antitrust-enforcement/>; Crunchbase, <https://www.crunchbase.com> (last visited April 2, 2020) (queries of acquisitions indicate numerous transactions valued below the HSR reporting thresholds).

²⁵ See Letter from Am. Antitrust Inst. to Makan Delrahim, AAG, U.S. Dep’t. Justice, Antitrust Div., Antitrust Review of Google’s Acquisition of Data Analytics and Business Intelligence Startup Looker 5 (Jul. 8, 2019), available at https://www.antitrustinstitute.org/wp-content/uploads/2019/07/AAI-Ltr-to-DOJ_Google-Looker_7.8.19.pdf.

²⁶ See, e.g., Aaron Pressman, *Should Apple be allowed to kill one of Android’s best weather apps?*, Fortune (Apr. 1, 2020), <https://fortune.com/2020/04/01/apple-buys-dark-sky-weather-android/>.

to challenge future vertical mergers, such as CVS Caremark-Aetna, where the government ignored vertical issues altogether. Similarly, the states' lawsuit to block the horizontal merger of Sprint and T-Mobile resulted in an unfavorable outcome, as revealed in an opinion that appeared to misunderstand basic economic incentives surrounding market power and the factors that legitimately inform an analysis of anticompetitive effects.²⁷ These cases create damaging precedent not only because of the results they reached, but also because of the misguided analytical approaches used in achieving those results.

5. *The Growing Number of Failed Merger Remedies*

Another major takeaway from enforcement activity over the last decade is that merger remedy policy is failing. This is true of both structural and conduct (i.e. behavioral) remedies. For example, the FTC has experienced problems with some structural remedies involving divestitures of targeted assets. In the merger of retail grocers Safeway and Albertsons, the FTC-approved sale of almost 150 stores to a regional west-coast grocer (Haggen) led to the failure and shuttering of the divested stores only a few months later.²⁸ In Hertz-Dollar Thrifty, the buyer of the divested assets (Advantage Rent-a-Car) filed for bankruptcy soon after the sale.²⁹ And despite divestitures in the UnitedHealth-Sierra and the Aetna-Prudential mergers, analysts have documented post-merger premium increases.³⁰

The FTC has performed two major studies of its divestiture remedies—one in 1999 and an update in 2017—which identify merger remedies as an area in need of improvement.³¹ The latter study revealed important observations, including that targeted asset divestitures are much less effective than line of business divestitures. The report noted “all of the divestitures involving an ongoing business succeeded. Divestitures of limited packages of assets in horizontal, non-consummated mergers fared less well”³² It remains unclear whether the agencies are incorporating the results of these findings in their enforcement actions.

²⁷ *New York v. Deutsche Telekom AG*, No. 19-civ-5434, 2020 WL 635499 (S.D.N.Y. Feb. 11, 2020). See also Tony Romm, *State Attorneys General Sue to Block Merger Between Sprint and T-Mobile*, WASH. POST (Jun. 11, 2019); Letitia James, Attorney General, New York, *T-Mobile/Sprint Megamerger Remains a Bad Deal for Consumers, Innovation, and Workers* (Jul. 26, 2019), available at <https://ag.ny.gov/press-release/ag-james-t-mobilesprint-megamerger-remains-bad-deal-consumers-innovation-and-workers>.

²⁸ Press Release, Fed. Trade Comm'n, *FTC Requires Albertsons and Safeway to Sell 168 Stores as a Condition of Merger* (Jan. 27, 2015), <https://www.ftc.gov/news-events/press-releases/2015/01/ftc-requires-albertsons-safeway-sell-168-stores-condition-merger>; Brent Kendall, *Haggen Struggles After Trying to Digest Albertsons Stores*, WALL ST. J. (Oct. 9, 2015), <http://www.wsj.com/articles/haggen-struggles-after-trying-to-digest-albertsons-stores-1444410394>.

²⁹ Press Release, FSNA, *Franchise Services of North America Inc. Announces Bankruptcy Filing by Simply Wheelz LLC* (Nov. 4, 2013), <http://www.fsna-inc.com/newspdfs/115201391920.PDF>.

³⁰ See, e.g., Jose R. Guardado, David W. Emmons & Carol K. Kane, *The Price Effects of a Large Merger of Health Insurers: A Case Study of UnitedHealth-Sierra*, 1 HEALTH MGMT POL'Y 16 (2013); Leemore Dafny, Mark Duggan & Subramaniam Ramanarayanan, *Paying a Premium on your Premium? Consolidation in the US Health Insurance Industry*, 102 AM. ECON. REV. 1161 (2012); see also Ted Johnson, *Senator Asks DOJ to Take Another Look at Comcast-NBCUniversal Merger*, VARIETY (Dec. 13, 2017), www.heritage.org/technology/commentary/time-repeal-the-ftcs-common-carrier-jurisdictional-exemption-among-other.

³¹ FED. TRADE COMM'N, *THE FTC'S MERGER REMEDIES 2006-2012, A REPORT OF THE BUREAU OF COMPETITION AND ECONOMICS* (Jan. 2017) [hereinafter “FTC's Merger Remedies 2006-2012”], https://www.ftc.gov/system/files/documents/reports/ftcs-merger-remedies-2006-2012-report-bureau-competition-economics/p143100_ftc_merger_remedies_2006-2012.pdf; FED. TRADE COMM'N, *A STUDY OF THE COMMISSION'S DIVESTITURE PROCESS*, BUREAU OF COMPETITION (Aug. 1999), <https://www.ftc.gov/sites/default/files/attachments/merger-review/divestiture.pdf>.

³² FTC's Merger Remedies 2006-2012, *supra* note 30, at 1.

The ineffectiveness of conduct remedies is particularly well known,³³ yet the agencies continue to deploy them. Recently, for example, the DOJ amended the 2010 consent decree in the merger of Live Nation and Ticketmaster. Despite evidence that the parties repeatedly violated the conduct remedies in the original decree, the DOJ simply re-instituted a modified set of conduct remedies and explicitly asked the reviewing court to forego a public comment process to consider its effectiveness.³⁴

The key question for lawmakers is what reforms are necessary to make the needed corrections? Antitrust is a generalist form of law enforcement, and special antitrust rules for any sector (digital technology or otherwise) would eliminate this important feature, creating conflicts across sectors, confusion in the courts, and potentially weakening antitrust law even further.³⁵ Antitrust reforms should thus address issues like those identified above, but in ways that apply across sectors and markets and that retain antitrust’s generalist law enforcement approach.

The practical implication of the foregoing is that legislative initiatives geared toward the digital technology sector, if they are proposed, should address the need for a sector-level *regulatory* framework. This would include, for example, social regulation to address system privacy issues, or economic regulation to promote non-discriminatory access or interoperability. The need for a statute to govern the digital technology sector, including formation of a sector regulator, would be complementary to antitrust enforcement, as we see in other sectors such as electricity and telecommunications.

On the antitrust front, comprehensive legislative proposals that “clarify and strengthen” the antitrust laws are important. Such proposals should also mandate certain forms of agency guidance, encourage more federal funding of judicial education programs, and ramp up appropriations for the antitrust agencies to address the deficiencies and problems identified above. Antitrust reforms that clarify and strengthen should contain a number of elements, including but not limited to the following:

- **Institute stronger presumptions of illegality for all types of mergers – horizontal, vertical, ecosystem, and potential competition.**
- **Shift the burden of proof to defendants to show offsetting pro-competitive effects in mergers that are likely to have anticompetitive effects.**
- **Reduce the burden of production for plaintiffs, particularly for acquisitions of potential rivals.**
- **Require that merger review consider both price and non-price effects, including quality and innovation.**

³³ John E. Kwoka & Diana L. Moss, *Behavioral merger remedies: Evaluation and implications for antitrust enforcement*, 57 Antitrust Bull. 979, 990-92 (2012).

³⁴ Letter to Makan Delrahim Re: Amended Final Judgment: U.S v. Ticketmaster Entertainment, Inc., and Live Nation Entertainment, Inc., Am. Antitrust Inst. (Feb. 4, 2020), *available at* https://www.antitrustinstitute.org/wp-content/uploads/2020/02/AAI_Ltr-to-DOJ_LN-TM_F.pdf.

³⁵ *AAI State of Enforcement Report*, *supra* note 5, at S.4.

- Require that merger review ensure “symmetry” between competitive effects analysis and efficiencies analysis and prevent attempts to limit competitive effects analysis to short-term price effects while considering both short-term cost savings and longer-term (i.e., dynamic) consumer benefits in efficiencies analysis.
- Require that merger remedies seek optimal deterrence, including the remedy of blocking a merger outright.
- Consider the success or failure of past remedies in crafting prospective remedies, including in past mergers involving the same or similar markets and competitive concerns, and whether prospective buyers of assets have committed past antitrust violations.
- Require that defendants collect and report (to an appropriately determined authority) post-merger data to facilitate merger retrospectives for both competitive effects and claimed efficiencies.
- Appropriately lower filing thresholds under the HSR reporting requirements to ensure that small acquisitions, particularly those that expand the scale and scope of market ecosystems, do not fly under the antitrust “radar.”

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

The current institutional structure of U.S. antitrust enforcement is a product of evolution rather than a top-down design process. A variety of enforcers at the federal, state, and private level play critical, complementary roles, all of which must be operating at full strength for U.S. antitrust enforcement to function effectively and serve its intended purpose.

About nine out of ten antitrust conduct cases in federal court are brought by private enforcers, who wield the Clayton Act’s treble damages provisions to ensure compensation of victims and deterrence of anticompetitive behavior by dominant firms and colluding conspirators. The DOJ also plays a central role in the deterrence mission through both its civil authority and criminal authority to prosecute hard core violations, including market allocation, price and wage fixing, and bid rigging. State enforcers also add critically to the deterrence mission by prosecuting local anticompetitive conduct that escapes federal attention, supplementing federal enforcement when federal matters have unique local dimensions, and working collectively to serve as a substitute for federal enforcement in instances where federal enforcers fail to protect the public.

The FTC was created to “exercise the trained judgment of a body of experts” when dealing with “special questions concerning industry.”³⁶ It was conceived as an antitrust prosecutor, adjudicator, and “analytical ‘think tank’” that would “facilitate the development of antitrust policy

³⁶ *Humphrey’s Ex’r v. United States*, 295 U.S. 602, 624 (1935) (quoting S. Rep. No. 63-597, at 10-11 (1914)).

while simultaneously enhancing certainty and accuracy in the decision of specific antitrust cases.”³⁷ The FTC relies heavily on administrative exercises of cease-and-desist authority to stop and prevent future anticompetitive practices.

For the system as a whole to function effectively, FTC investigatory authority and administrative cease-and-desist authority must be complemented by strong private and state enforcement and DOJ civil and criminal enforcement, so that the threat of treble damages, fines, and jail sentences, respectively, create “general deterrence.”³⁸ If treble damages, fines, and prison time provide realistic threats of severe sanctions to deter future wrongdoing by other putative defendants who may be considering strategic anticompetitive conduct, the FTC is free to “facilitate the development of antitrust policy,” address the “special questions concerning industry,” and exercise its cease-and-desist authority to provide specific deterrence.³⁹ The aspect of the FTC’s mission which commits the agency to exploring nascent, novel, and analytically challenging competition issues is especially important in an era of platform business models and ecosystems of interrelated digital technology products and services.

Like any complex machine with interconnected parts, one failing component can throw the whole U.S. enforcement system out of whack. Without adequate private enforcement, for example, it becomes increasingly important for federal enforcers to seek monetary equitable remedies. Without a strong criminal program, fines and private treble damages must be increased to ensure that antitrust penalties do not become a tolerable cost of doing business.⁴⁰ And collectively, federal, state and private enforcers must support a strong merger control system to prevent the creation of oligopolistic and monopolistic market structures in their incipiency, before anticompetitive conduct in such markets becomes difficult or impossible to police.

After decades of lax merger control and monopolization enforcement in particular, many sectors of the U.S. economy are already besieged by high levels of concentration. Although it remains critically important that antitrust enforcers punish anticompetitive conduct when violations occur in these sectors, the mere exploitation of legally sanctioned monopoly power does not violate U.S. antitrust law, notwithstanding that it is enormously harmful to consumers. In these circumstances, where the incipiency goal of the antitrust laws has not been realized, the potential need for sectoral regulation and other governmental policy tools increases exponentially. And the enormous societal value of antitrust enforcement—promoting an open, competitive, market-based economy—is diminished or lost.

Some commentators and policymakers have proposed to change course by radically altering, and even consolidating, the structure of antitrust institutions. But this cure does not fit the disease. For all of the reasons discussed above, it is an absence of robust antitrust enforcement, rather than

³⁷ D. Bruce Hoffman & M. Sean Royall, *Administrative Litigation at the FTC: Past, Present, and Future*, 71 Antitrust L.J. 319, 319 (2003).

³⁸ “Specific deterrence refers to how an *actual* wrongdoer responds to an *actual* lawsuit against it: does the wrongdoer stop the misbehavior after it gets caught? General deterrence, by contrast, refers to how potential wrongdoers respond to a potential lawsuit: do potential wrongdoers decide not to commit misconduct to begin with because they are afraid of lawsuits against them?” Brian T. Fitzpatrick, *Do Class Actions Deter Misconduct?*, in *THE CLASS ACTION EFFECT: FROM THE LEGISLATOR’S IMAGINATION TO TODAY’S USES AND PRACTICES* 181, 184 (Catherine Piché, ed., Éditions Yvon Blais, Montreal 2018).

³⁹ *See id.*

⁴⁰ *See* John M. Connor & Robert H. Lande, *Does Crime Pay? Cartel Penalties and Profits*, 33 Antitrust 29 (2019).

institutional design flaws, that contributes to the declining state of competition in many U.S. markets. Indeed, AAI believes that prudence warrants caution in modifying the structure of a system that evolved over 130 years after experiencing a single-agency system that proved too lax.⁴¹

The superficial logic of consolidating government institutions with overlapping mandates should yield to the fundamental question of whether institutional reform will make antitrust enforcement a stronger and more effective tool for promoting level competitive playing fields and a robust free market economy, in a time when market competition in the United States is badly in need of a boost. There is no evidence-based argument for believing that agency consolidation will inject anything other than uncertainty and retrenchment. Such an approach also introduces unwarranted risks of further diluting the agencies' unique missions.

AAI believes the three branches of U.S. government, and the so-called "fourth branch," should be collectively focused on strengthening existing institutions by eliminating legal, financial and ideological roadblocks to robust public and private antitrust enforcement against anticompetitive mergers, cartels and monopolies. If all of the various aspects of U.S. antitrust enforcement can operate as an integrated system, at full strength, the antitrust laws can serve as a powerful tool in the arsenal of governmental policy responses to restoring and maintaining the health of U.S. markets. Strong enforcement, coupled with appropriate social and economic regulation in structurally broken and otherwise underperforming markets, offers a tractable way forward.

Thank you for considering the views of the American Antitrust Institute. Questions or comments regarding this submission may be addressed to:

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⁴¹ See Am. Antitrust Inst., AAI Issues Letter Opposing the SMARTER Act (May 2, 2018), *available at* <https://www.antitrustinstitute.org/work-product/aai-issues-letter-opposing-the-smarter-act/>.